

Miller's Minarets: Religion, Culture, Domination

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Liberal political philosophers have recently come to a new appreciation of the complexities of debates attendant to the place of religion in the liberal polity.¹ There is noticeable dissatisfaction with the explanatory and normative force of standard liberal paradigms—state secularism and liberal neutrality, freedom of religion, multicultural equality—in providing guidance in controversies such as the limits of free speech, the content of education curricula, or the place of religious symbols in the public sphere. In part, such dissatisfaction denotes some uncertainty about the category of religion itself. Is religion a stable, *sui generis* term of legal and political discourse? Or should it be analogized—at least in legal and political discourse—with proximate categories? Whether religion appears primarily as propositional statement, obligatory practice, expression of identity, dimension of nationality, marker of social divisions, and so forth, will affect our normative judgements regarding controversies about religion.

In a recent article, David Miller has brought his considerable analytical skills, ingenuity, and wisdom to bear on a case where all these complexities come into play.² In 2009, a Swiss popular initiative voted for a constitutional nationwide ban on the building of Muslim minarets. Miller provides a sympathetic reconstruction of the arguments justifying the minaret ban. He rightly sees that minarets can be interpreted either as a key component of Islamic practice or as a symbol of cultural presence, and he plausibly introduces different normative considerations in response to both dimensions. Miller argues that the minaret ban does not violate

¹ A draft of this chapter was presented at the European Institute in Florence on 5 May 2015 and in Oxford on 9 May 2015 at a symposium in honour of David Miller. I have greatly benefited from discussions with Rainer Baubock, Richard Bellamy, Clare Chambers, Lucas Leemann, Geoff Levey, Tariq Modood, Alan Patten, Andrea Sangiovanni and Jeremy Waldron. For useful written comments, I am grateful to Aurélie Bardon, Bouke de Vries, Gina Gustavsson, Ronan McCrea, Simon Thompson, and two editors of this volume, Sarah Fine and Zofia Stemplowska.

² David Miller, 'Majorities and Minarets: Religious Freedom and Public Space', *British Journal of Political Science* 46 (2014): 437–456.

any human right to freedom of religion, and that Muslim symbols in shared public spaces can, in principle, be limited by (what Miller calls) a majority's right of religious precedence. This is a right to give special public status to the majority religion, because its symbols and structures have played a constitutive part in national identity. Miller concludes, however, that an outright constitutional ban is not proportionate to the aim of religious precedence, and that it unjustly infringes on the equal status of Muslims.

I agree with Miller that the minaret ban is unjustifiable. My objection to the minaret ban is, however, more straightforward than his, because I am more sceptical about majority religious precedence in the public sphere. In my view, the Swiss minaret ban is a clear case of arbitrary majority domination. We can see this, I suggest, if we take seriously the third dimension of religion that was in play during the minaret ban debates. This concerns, not religion as *obligatory practice* (1) or as *cultural expression* (2) but religion as *assigned identity* (3)—one that is almost exclusively defined by the majority, in ways that both stigmatize and silence the target minority, and exclude it from the national community. The Swiss minaret ban illustrates the way in which the category of religion is implicated in the politics of ethnonational domination. Religion, at times, functions exactly like race—an assigned identity serving to affirm and consolidate boundaries between dominant and dominated groups. I argue that the chief problem with the minaret ban is not that it infringes Muslims' interest in free religious practice or right of equal cultural presence. Rather, it is that it dominates them, by denying them minimum civic standing and excluding them from the imaginary community of citizens. I reach this conclusion by analysing the three dimensions of religion at play in the minaret controversy (religious practice, cultural expression, assigned identity) in turn.

9.1 Minarets as Conditions of Religious Practice

The Swiss minaret controversy began in a small municipality in the northern part of Switzerland in 2005. The Turkish cultural association in Wangen bei Olten had applied for a construction permit to erect a six-metre-high minaret on the roof of its Islamic community centre. Local residents mobilized against the application, which was examined in turn by various planning commissions and administrative courts, before being finally approved by the Federal Supreme Court. In response, representatives of small right-wing parties decided to launch a federal ballot initiative 'Against the building of minarets', which was supported by the majority conservative Swiss People's Party. The committee collected enough signatures (over 114,000) for the proposed amendment to the Constitution to be put to a vote in a nationwide referendum. The campaign was for the most part one-sided, as the general assumption was that the initiative would be easily defeated on 29 November 2009. To the stupefaction of commentators at home and abroad, the initiative

passed the 'double majority' test: both a majority of cantons (22 out of 26) and a majority of voters (57.5 per cent) supported the ban. The Swiss Constitution now has a clause specifying 'The construction of minarets is prohibited.'

Miller frames the controversy as involving the right of democratic majorities to control the character of public space, and notably to maintain the latter's predominantly Christian character. He recognizes that the minaret campaign was largely motivated by anti-Muslim prejudice, but he seeks to extract from the Swiss debates a more respectable, and more plausible, argument for the ban. By taking Swiss political debates seriously, Miller provides a useful counterpoint to existing Anglo-American political philosophy literature about multiculturalism and religion in Europe. Much of this literature is North America-centred, and often takes the US tradition of non-establishment and religious freedom as a universally valid normative paradigm. At best, British or French or Swiss controversies are discussed as 'local' or 'parochial' cases, and often used to illustrate Europeans' defective grasp of freedom of religion.³ As a result, much of the existing political theory literature misses out the distinctiveness of what Sune Laegaard has called 'Euro-multiculturalism'.⁴ Euro-multiculturalist debates concern the fair terms of integration of immigrants, many of whom are increasingly defined through their *religious* identity, typically as Muslims. Finding fair terms of integration for Muslims poses particular challenges in West European societies that are socially and politically secularized but culturally Christian, and where Christian churches still enjoy an established, if mostly symbolic, 'precedence' (to use Miller's ingenious phrase). Is *any* instance of religious establishment or precedence, however, always illegitimate? Is any special recognition of the majority's religion an infringement of the religious freedom of minorities?

Miller's answer is that religious establishment or precedence does not necessarily infringe a *basic human right* to religious freedom. He construes human rights in a minimalist way; and argues that the human right to religious freedom only extends to what is objectively essential to ritual and observance. Access to a mosque, like access to a church, is essential for religious practice. By contrast, minarets, like stained glass windows or church spires, are not so essential because they are mostly aesthetic ornaments. The basic human right to freedom of religion, therefore, should not be understood to include the right to build minarets. Miller argues that minarets would have to be a *necessary* element of Muslim religious manifestation to benefit from human rights protection, and that this necessity must be established objectively: by reference to the accepted requirements of an authoritative

³ See, for example, Martha Nussbaum, *Liberty of Conscience* (Basic Books, 2008); Ronald Dworkin, *Religion without God* (Harvard University Press, 2011). For an attempt to identify the relevant normative principle at work in the French hijab controversy, see Cécile Laborde, *Critical Republicanism. The Hijab Controversy and Political Philosophy* (Oxford University Press, 2008).

⁴ Sune Laegaard, 'Euro-Multiculturalism and Toleration', *Journal of East-West Thought* 4 (2014): 37–52.

doctrine, rather than by deferring to the subjective claims of applicants.⁵ (Authoritative sources and history show that minarets play only a marginal role in Islamic practice).⁶ Miller's construal of the human right to religious freedom is here aligned to the European Court of Human Rights' decision of 28 June 2011. The Court dismissed the applicants' case, on the ground that no violation of Article 9 of the Convention had occurred.⁷

Miller concurs with the ECtHR, then, in declining to apply a human rights standard to the minaret ban. Yet, crucially, Miller also suggests that human rights standards are not the only relevant standards in the normative assessment of controversies such as the minaret ban.⁸ The ban does not violate basic religious freedom, but it might violate another key interest of citizens—equal treatment of all by the state. Miller's move here is fundamental, in two ways. First, it allows him to reject the tendency—visible both in US constitutional law and to international law—to deploy one unique value, that of religious freedom, in assessing a wide range of controversies about politics and religion. Miller's approach tallies with recent work that has developed a two-pronged normative test—a stringent but minimalist test of human rights or basic state legitimacy on one level; and a

⁵ Miller claims that deference to an 'authoritative body of doctrine' is the only way to separate out the morally significant claims made on behalf of religion from trivial 'life-style' claims ('Majorities and Minarets', p. 444). But there is no reason to believe that a subjective construal of freedom of religion—which would protect what applicants take as central to the integrity of their *moral* life—would not also successfully rule out trivial life style claims. See my 'Religion in the Law: The Disaggregation Approach', *Law and Philosophy* 34 (2015): 581–600. However, one could argue that the demand to build minarets is rooted in the collective right of freedom of (religious) association. In the case of groups, I agree that a sincerity test is not sufficient and that associational leaders must show that their claim is rooted in objectively ascertainable associational purposes. If the association in question considers itself Islamic, it is not illegitimate for judges to take account of what the requirements of the Islamic religion are. For more detailed examination of the difference between individual and collective claims, see Cécile Laborde, *Liberalism's Religion* (Harvard University Press, 2017), Chapters 5 and 6.

⁶ One could argue that minarets are necessary for the call of the muezzin (*adhan*), which is part of religious practice. If the ringing of church bells is covered by Article 9(1), so might the steeples that come with the bells—and by analogy, their Muslim equivalents. See Lorenz Langer, 'Panacea or Pathetic Fallacy? The Swiss Ban on Minarets', *Vanderbilt Journal of Transnational Law* 43 (2010): 1–62 at p. 8. This line of argument was not available to the Swiss applicants, however, because the minarets in question were specifically not intended to be used for the *adhan*.

⁷ *Ouardiri v. Switzerland* (28 June 2011), *Ligue des Musulmans de Suisse and Others v. Switzerland* (no. 66274/09). For examination of the legal issues, see Langer, 'Panacea or Pathetic Fallacy?' at pp. 17–30. See also Daniel Moeckli, 'Of Minarets and Foreign Criminals: Swiss Direct Democracy and Human Rights', *Human Rights Law Review* 11 (2011): 1–22; and Marcel Stüssi, 'Banning of Minarets: Addressing the Validity of a Controversial Swiss Popular Initiative', *Religion and Human Rights* 3 (2008): 135–153. Note however that the ECtHR has recently moved towards a more subjective test that defers to individuals' assessment of the demands of their faith. See, notably, *SAS v. France*, 2014, where the Court refused to decide the issue of whether wearing the *niqab* was a genuine religious obligation.

⁸ The applicants in the minaret case also appealed to Article 14 of the Convention—the right not to be discriminated in relation to the right of religion protected under Article 9. The burden of proof here is lower, as applicants do not need to show that religious freedom itself has been substantively breached, only that the facts 'fall within the ambit' of Article 9. In the event, the Court rejected that claim on the grounds that the applicants themselves had not actually sought to build a minaret, so there was no 'cognizable victim' of a breach. Thanks to Ronan McCrea for discussion.

more thickly textured but looser test of state neutrality or equal citizenship on the other.⁹

Second, Miller rightly sees that the two standards—religious freedom and equal citizenship—capture two different dimensions of (what we ordinarily call) 'religion'. The human right to freedom of religion protects one dimension of religion that has a particular normative salience, because it points to a set of practices and rituals that are key to individuals' ethical life. For Miller, the fact that a practice is objectively and compulsorily required by an authoritative religious doctrine qualifies it as protected by a human right. By contrast, non-central religious practices and symbols do not fall under the protection of freedom of religion. This is not to say that they merit no protection at all. They too have normative salience, albeit of a different kind: as expression of a valued cultural or historical tradition. Let me turn, then, to Miller's assessment of minarets as symbols of cultural expression.

9.2 Minarets as Symbols of Cultural Expression

Miller's argument can be reconstructed as follows.

1. The state should generally apply a principle of neutrality as equal treatment of all cultures.
2. Equal treatment, however, does not require equal symbolic presence.
 - 2.1 Equal treatment is impossible in the case of non-divisible goods such as the architectural make-up of public spaces.
 - 2.2 There is value in the preservation of national identity, and it is permissible for majorities to give their culture and religion symbolic precedence in the public space.
 - 2.3 Symbolic precedence does not infringe on equal respect due to all citizens just because its content is religious.
3. However, the Swiss ban violates two further democratic requirements:
 - 3.1 The *subsidiarity* requirement: the nationwide scope of the ban prevents each town or village to shape its own local landscape according to local needs.
 - 3.2 The *revisability* requirement: the constitutional nature of the ban prevents minorities from contesting the decision in the future.

Therefore:

⁹ See also Cécile Laborde, 'Political Liberalism and Religion: On Separation and Establishment', *Journal of Political Philosophy* 21 (2013): 67–86; S. Cabulea May, 'Democratic Legitimacy, Legal Expressivism, and Religious Establishment', *Critical Review of International Social and Political Philosophy* 15 (2012): 219–238; Saladin Meckled-Gardia, 'The Ethics of Establishment: Fairness and Human Rights as Different Standards of Neutrality', in *Negotiating Religion*, edited by Lois Lee, Francois Guesnet, and Cécile Laborde (Ashgate, 2016).

4. A nationwide constitutional ban is not the fairest political mechanism for preserving the cultural character of the Swiss landscape.

The general lesson Miller draws from the minaret controversy is that it is not on principle impermissible for majorities to shape the public space around their cultural and religious symbols (provided they do not infringe any basic right of religious freedom). Yet Miller is moved by two features of the Swiss decision—the fact that it is a *nationwide* and a *constitutional* ban—both of which lead him to condemn the ban. I shall not discuss arguments (1), (3), and (4) at any length. In what follows, I raise sceptical considerations about the steps of Miller's core, and most controversial, argument (2). I examine the three steps of that argument in turn.

9.2.1 The Divisibility of Public Space

Miller is committed to a general principle of state neutrality, understood as equality of treatment of the different commitments and projects held by citizens.¹⁰ The demand of neutrality, he argues, is a requirement of equal citizenship, and it applies paradigmatically to divisible public goods. Schematically: if a state funds hockey pitches, it must also fund baseball grounds; if a state grants charitable status to a religion, it must extend this status to all religions, and so forth. However, Miller argues, public architecture is not a divisible good and, for this reason, equality cannot apply to it. Either the public architecture will reflect the 'predominantly Christian heritage' of the local area; or it will 'make a statement about the increasing public prominence of Islam, a good presumably for local Muslims'.¹¹

There is an obvious problem with this line of argument. It is implausible to think of public architecture as a space of zero-sum competition between rival groups with exclusive interests in the presence of *their* culture or religion. One could argue that citizens also have an interest in a religiously diverse public space, one that reflects the pluralist make-up of the citizenry itself. On this view, the architectural presence of *others'* religions may itself be a good for all, not only a good for those whose religion it is. (In the multicultural neighbourhood where I live in London, for example, the only aesthetically pleasing monument turns out to be a mosque adorned with an elegant shining minaret.) Furthermore, even if we grant to Miller that cultural presence is of value primarily to the members of that culture or religion, it does not follow that it is a non-divisible good. Muslims who want to build minarets do not want Islam to be 'prominent' or to dominate the

¹⁰ Here Miller follows Alan Patten, 'Liberal Neutrality: A Reinterpretation and Defense', *Journal of Political Philosophy* 20 (2012): 249–272.

¹¹ Miller, 'Majorities and Minarets', p. 446.

public space: they simply want their culture and religion to take its place in the architectural background of the society in which they live. It is not clear why the majority's interest in cultural presence can only be satisfied if public space remains 'predominantly Christian'. When possible, should not the demands of (at least pro rata) equality apply to public space? The question arises for Miller in an acute form because of his commitment to neutrality as equal treatment of all cultures. We need to know why, as majorities are barred from claiming more than their fair share of public *funds*, they are still entitled to claim more than their fair share of public *presence*.

9.2.2 The Value of National Identity

Miller's answer is that the value of national identity permits majorities to grant their culture and religion precedence in the public space, *and* that such symbolic precedence (by contrast to use of public funds) does not infringe on equal citizenship. Therefore, we need to say more about how Miller understands the relationship between national identity and citizenship. Miller has defended the right of what he calls historic nations to preserve their culture over time. The main justification for this right is that the shared public culture provided by national identity fosters the political and social solidarity that is essential to the successful functioning of liberal democratic states. In modern nation states, national identity 'serves important political aims, helping to stabilize democracy and to promote social justice'.¹² Call this is an *instrumental* argument for nationality: nationality is only valuable if it promotes liberal democratic aims. One of those aims, Miller argues, is equal citizenship.

Now a question arises. How can we reconcile equal citizenship and the preservation of national identity in societies that—partly because of immigration—are increasingly multicultural and multi-ethnic? Miller defends an open and inclusive theory of national integration, one that sees all settled immigrants as potential equal citizens. The latter should (in time) endorse the national identity, which takes the form of a public culture allowing a diversity of private cultures. The private cultures of immigrants can be publicly supported in various ways, as demanded by principles of equal opportunity and fair allocation of public resources.¹³ But the state must also promote a shared *public culture*, which is essential for social solidarity. Miller rejects narrowly political accounts of civic integration, and suggests that national identity should have a more thickly cultural content. The problem, as he rightly notes, is that 'the cultural components of national identity

¹² Miller, 'Majorities and Minarets', p. 448.

¹³ David Miller, 'Immigrants, Nations and Citizenship', *Journal of Political Philosophy* 16 (2008): 371–390 at p. 381; David Miller, 'Liberalism, Equal Opportunities and Cultural Commitments', in *Multiculturalism Reconsidered. 'Culture and Equality' and its Critics*, edited by Paul Kelly (Polity, 2002).

will naturally reflect the historic culture of the majority of native-born citizens, and this may pose an obstacle to integration.¹⁴ There will inevitably be a tension between the cultural content of national identity and the rightful claims to equal citizenship of minorities.

This tension is immediately apparent in the case of the minaret ban. As the ban openly encourages the public presence of Christianity over Islam, is it not an impermissible infringement of equal citizenship? In 'Majorities and Minarets', Miller suggests two possible answers to this worry, neither of which—I shall show—is convincing. The first is that the promotion of national identity sometimes *trumps* equal citizenship. This is suggested by Miller's additional argument for the value of national identity. On this more *intrinsic* argument, national identity has value over and above its *instrumental* support for equal citizenship. Miller notes that majorities value their cultures intrinsically and have a 'subjective interest' in retaining them.¹⁵ The claim here would be that even if the minaret ban infringed on the equal citizenship of Muslims, it would be a reasonable cost to bear, because of the particularly valuable good of national identity. Whereas on the instrumental defence of nationality, national identity and liberal democratic values are mutually supportive, on the intrinsic defence of nationality, they can come apart. Should such a scenario arise, however, it is doubtful that Miller would side with nationalism against liberal democracy. Miller's attempt at reconciliation of liberal democracy and nationalism may be wrong or misguided, but one cannot doubt the sincerity of his liberal democratic commitments. I doubt he would want to say, therefore, that majorities can promote their culture even in a way that infringes on the equal citizenship of minorities.

Miller has another answer available to him, however. This is that liberal democratic values of equal citizenship are *not affected* by benignly symbolic assertions of national identity. On this view, the architectural character of the public culture has little bearing on equal citizenship. The minaret ban infringes no right essential to equal citizenship: as we saw, no basic right of religious freedom has been violated, and no right of fair access to a (divisible) public good and to a fair share of public resources has been denied. So the ban is a permissible way for the majority to give its culture precedence in the public space, because it does not jeopardize equal citizenship.

In what follows, I take issue with this latter claim. I argue that majorities cannot permissibly affirm their culture in the public sphere in any way they choose. In particular, they must not affirm their culture in ways that undermine Miller's main (instrumental) argument for nationality—that it must (at least potentially) be inclusive enough to serve as the foundation of equal citizenship. Insofar as the

¹⁴ David Miller, *Strangers in our Midst. The Political Philosophy of Immigration* (Harvard University Press, 2016), p. 145.

¹⁵ Miller, 'Majorities and Minarets', p. 449.

minaret ban implies both the explicit promotion of a Christian heritage and the explicit rejection of Islamic culture, I argue that it undermines Miller's own defence of citizenship and nationality.¹⁶ To see this, I now look at Miller's defence of the religious content of national culture.

9.2.3 Symbolic Religious Precedence

Miller argues that religious precedence need not infringe on the equal respect due to all citizens. He rejects the view, popular among many liberals, that there is a contradiction between what is sometimes called 'symbolic religious establishment' and equal citizenship. Martha Nussbaum, for example, has suggested that state endorsement of a religion marginalizes those who do not belong to the established religion: it amounts to a public declaration that they are second-class citizens.¹⁷ Miller rejects this claim. He points out that it relies on a dubious semiotic interpretation of the meaning of religious symbols. How can we tell that symbols are alienating without inquiring into the actual intentions and perceptions of the relevant actors? Miller illustrates the point with the *Lautsi* case of a crucifix display in an Italian school: is this an 'endorsement of Roman Catholicism or ... simply a traditional part of school architecture'?¹⁸ State support for a country's Christian heritage may not be dissimilar to state policies promoting national cinema or national literature.¹⁹ Furthermore, symbolic establishment, as a matter of empirical fact, does not necessarily marginalize and alienate religious minorities.

Here again, it is useful to distinguish between two possible interpretations of Miller's argument. First, Miller could be claiming that symbolic establishment, qua symbolic, has no bearing on equal citizenship. A state could endorse the religious symbols of the majority, give symbolic precedence to its religion, without infringing on anyone's basic rights, provided the benefits of establishment are purely symbolic and do not involve any unfair use of public resources. Miller seems to veer towards this view when he writes that what constitutes citizenship is an equal 'bundle of liberties, rights and opportunities' (i.e., not symbolic or status recognition). This view of citizenship is, to my mind, too minimalist. Miller himself has argued elsewhere that a richer, social ideal of equality underpins citizenship: 'a form of life in which people in a very important sense treat one another as equals, one that is 'not marked by status divisions such that one can place different people in hierarchically ranked categories.'²⁰ In the view that I favour, political institutions

¹⁶ See also Alexa Zellentin, 'Freedom, Equality, Minarets', *Res Publica* 20 (2014): 45–63 at p. 54.

¹⁷ Nussbaum, *Liberty of Conscience*, p. 225.

¹⁸ Miller, 'Majorities and Minarets', p. 452.

¹⁹ There is a question here as to how Miller would square his strong commitment to equality in the distribution of public funds and special promotion of national cinema or national literature.

²⁰ David Miller, *Citizenship and National Identity* (Polity Press, 2000), pp. 23, 32.

have a crucial role to play in securing the equal status of citizens. Equal civic status requires, not simply a legal guarantee of equal rights and distributive fairness, but also appropriate *expressive* treatment as civic equals by state institutions. On this expressive, republican conception of citizenship, a state that closely associates itself with one religion risks infringing the equal civic status of religious minorities, just as a state that would closely associate itself with an ethnic or racial identity would.²¹ The view that state symbolism has no bearing on equal citizenship is not plausible, and nor does it fit with Miller's broader theory of citizenship and status-based social equality.

Secondly, however, Miller could be making a more modest claim, as suggested by his observations about the *Lautsi* case. The claim could be that religious symbolism causes no expressive disrespect *if (and only if)* it draws on features of religion that have become patrimonialized and culturalized, and therefore do not signify inequalities of status. We may argue that religious symbolism is only problematic under certain circumstances: paradigmatically, when it entrenches and perpetuates socially salient divisions. To illustrate: the government of Northern Ireland could not give religious precedence to Protestant symbols and rituals without gravely jeopardizing the equal civic status of Catholics. By contrast, when religious symbolism has been absorbed into widely accepted, mainstream symbols of national identity, or when it has been de-sacralized, vestigial, ecumenical, 'grandfathered', it does not infringe on equal status.

I agree with Miller that the wrong of establishment hinges on a contextual assessment of the features of what is being 'established'. Religious symbols qua religious are not objectively more alienating than political, ethnic, or gendered symbols. If they are, it is not because of some general sociological feature of religion as such but, rather, because of often profound, yet historically and geographically contingent, connections between religion and social and political conflict. Whether displays of Christian crucifixes in Italian state schools are compatible with equal citizenship hinges on an assessment of that kind. What is clear is that it will not do, as the ECtHR did in *Lautsi*, to neutralize the expressive force of crucifixes by redescribing them as 'cultural' instead of 'religious' symbols. Culture and tradition can be just as divisive as religion, and it should not be so quickly assumed, with Miller, that crucifixes are simply 'a traditional part of school architecture',²² without further assessment of the role of Christianity in shoring up an (often exclusive) European sense of identity.

This takes us right back to the Swiss minaret ban. How plausible is it to describe it as the benign symbolic protection of a valued cultural tradition, with no implication for the equal status of Muslims? Not very. First, most obviously, the ban directly and negatively targets an Islamic symbol, as opposed to positively

²¹ Laborde, 'Political Liberalism and Religion'.

²² Miller, 'Majorities and Minarets', p. 452.

protecting features of the Christian landscape. As Miller concedes, the threshold of justification for an outright prohibition is high.²³ If the intentions behind the ban were the preservation of the traditional Swiss landscape, existing regulations on zoning laws and conservation areas would be amply sufficient. The claims of majority precedence cannot justify the outright prohibition of a minority's cultural symbol. Second, Miller comes to the view that the *constitutional* nature of the ban, because it prevents Muslims from easily contesting the decision in the future, is a grave infringement of their (potential) equal status as citizens. The minaret ban can rightly be criticized for not meeting conditions of subsidiarity and revisability.

This, however, does not quite get to the heart of the issue. The picture that Miller draws is that of a historic nation benignly affirming its culture in the public space, and in the process assessing the weight of competing minority religious and cultural interests. Yet, I shall argue, in the minaret case, there is no strong minority interest alongside the majority's. Instead, the majority is defining itself through its construal of minority identity. National identity is imagined as a *spontaneously exclusive* identity, in the sense that it defines itself through what it is not, and automatically excludes Muslims from the national imaginary. It is, therefore, straightforwardly incompatible with equal citizenship. To see this, I now turn to the third dimension of religion that was in play in the Swiss minaret controversy.

9.3 Religion as Assigned Identity

So far, I have considered religion as a first-person interest. In line with mainstream liberal writings about religion, I have interpreted religion either from the perspective of compulsory rituals and practices, or from the perspective of cultural expression and presence. First-person perspectives analyse controversies such as the minaret ban as questions about which weight to give to minority interests within a broader theory of justice or equal citizenship. Let me now introduce a different perspective on religion. Imagine that there is no (significant) minority demand, and that the interests and perspectives of a minority are nearly exclusively framed and construed by the majority. This is not a first-person but a *third-party* perspective on minority religion. A person or a group's assigned identity, on this view, may diverge from their first-person beliefs or culture, in the sense that it is principally a matter of how others classify and relate to them.

There is little doubt that profound mechanisms of *identity assignment* are at work in multicultural controversies in Europe, and that they were activated, in paradigmatic form, in the Swiss minaret ban. (This is not to say that Switzerland

²³ Miller, 'Majorities and Minarets', p. 451.

is unique. Polls have shown that a growing number of citizens in many European countries—with a clear majority in Belgium—would also ban the building of minarets by referendum.²⁴ The constitutional ban passed in Switzerland because of the system of the ‘initiative’, which allows constitutional reform by referendum with no possibility of judicial review, and because opponents of the ban—political parties, business federations, churches—did not think it opportune, or necessary, to mobilize against it. It is a lack of mobilization and debate, therefore, that allowed unfiltered majority prejudice to rule.) The combination of majority rule, identity assignation, and minority political marginalization, I argue, makes the minaret ban a case of arbitrary domination. Consider the following features of the controversy:

1. *Minarets are a low-salience issue for Muslims in Switzerland.* Out of the two hundred Muslim centres in Switzerland, only four mosques had a minaret, and there were only a handful of pending building applications.²⁵ Among the 310,000 Muslims (4.3 per cent of the population) who live in Switzerland, only a small minority (10–15 per cent) are observant.²⁶ Fifty-six per cent of Muslims in Switzerland are from the former Yugoslavia, and another 21 per cent from Turkey. Islam in these regions is mostly a cultural way of life: conservative and patriarchal, but not overly attached to explicitly religious markers.²⁷ Muslims are well integrated into Swiss society and for the most part secular in outlook and practice; they display a very heterogeneous profile and highly individualized attitudes towards politics, religion, and society. As a result, ‘the erection of a minaret at their local mosque is ... not an issue; minarets are not seen by most Swiss Muslims as a ‘must-have’ feature of their place of prayer.’²⁸ It is not the case, therefore, that the problem with the minaret ban is, as Miller claims, that ‘a form of religious expression *that many Muslims would value* has been prohibited.’²⁹ To this extent, the 2009 Swiss minaret ban is very similar to the 2010 French *niqab* ban. Only a minuscule proportion of women want to wear the *niqab* in France; just as only a handful of small Muslim communities in Switzerland want minarets. Both prohibitions shed light on a practice or demand that has very low salience within the targeted minority, but that acquires high salience for

²⁴ See Todd H. Green, ‘The Resistance to Minarets in Europe’, *Journal of Church and State* 52 (2010): 619–643 at p. 642.

²⁵ Lorenz Langer, ‘Panacea or Pathetic Fallacy?’, pp. 5–6.

²⁶ Marco Antonsich, ‘Mapping the Swiss Referendum on the Minaret Ban’, *Political Geography* 29 (2010): 57–62 at p. 57.

²⁷ Patrick Haenni and Samir Amghar, ‘Leur conquête de l’Ouest n’aura pas lieu’, in *Les minarets de la discorde: éclairage sur un débat suisse et européen*, edited by Patrick Haenni and Stéphane Lathion (Infolio, 2009).

²⁸ Douglas Pratt, ‘Swiss Shock: Minaret Rejection, European Values, and the Challenge of Tolerant Neutrality’, *Politics, Religion and Ideology* 14 (2013): 193–207 at pp. 195–196.

²⁹ Miller, ‘Majorities and Minarets’, p. 441, emphasis added.

the majority, because they become connected—by imputation—to a series of negative features or practices associated with the minority.³⁰

2. *The anti-minaret campaign gave shape to inchoate fears about Islam and Muslims.* Anti-Islamic prejudice was not a regrettable side effect of a worthy campaign of architectural protection: it provided the very fuel of the controversy. Tellingly, the party at the origin of the initiative first intended to launch a campaign against the import of *halal* (and *kosher*) meat, but was afraid of testing the sensitivity of Swiss Jews, and therefore deliberately picked minarets as the convenient symbol of the creeping 'Islamization' of Switzerland.³¹ Opposition to minarets was based on a preconceived idea of Islam rather than on actual exposure to Muslims, mosques, and minarets: the share of the 'yes' vote was highest in rural areas.³² Islam was associated with gender oppression, sharia law, and political violence. So successful were those 'politics of fear'³³ that the minaret ban effectively worked as a panacea for the ills of Islamization.³⁴ This is all the more ironic because radical Islamists—Wahhabi and Salafi fundamentalists notably—are scornful of local community mosques and deem minarets to be a late innovation and deviation from original practice (*bida'a*).³⁵
3. *Muslims in Switzerland had no control over how their religion was portrayed.* Of those Muslims living in Switzerland, 88.3 per cent do not have Swiss citizenship, and therefore do not vote in popular initiatives.³⁶ As Douglas Pratt notes, 'most Muslims felt themselves silenced by the fact that they are not Swiss but aliens in Switzerland, therefore their voices were largely absent. They were present, but talked about in the third person.'³⁷ As a result, what got lost in the controversy is how Muslim communities in Switzerland interpret their own religious structure.³⁸ Even when Muslim representatives were heard (as in the flagship TV news programme 19:30), they were shown up as 'alien', in a striking parallel with the first such popular initiative in

³⁰ Of course, once the minarets are banned, they acquire a high salience for Muslims too. Swiss Muslims were right to think that a liberty right they previously enjoyed had been denied to them out of sheer animus—this is presumably what motivated them to challenge the ban in court. I do not wish to deny that Swiss Muslims value the opportunity of building minarets. I wish merely to isolate the distinctive wrong of the removal of this opportunity, whether or not it was valued before it was removed.

³¹ Tariq Ramadan, 'My Compatriots' Vote to Ban Minarets is Fuelled by Fear', <http://www.theguardian.com/commentisfree/belief/2009/nov/29/swiss-vote-ban-minarets-fear>

³² Langer, 'Panacea or Pathetic Fallacy?', p. 58.

³³ Martha Nussbaum, *The New Religious Intolerance* (Harvard University Press, 2012).

³⁴ Langer, 'Panacea or Pathetic Fallacy?'.

³⁵ Husam Tammam, 'Les minarets en Suisse vus du monde arabo-musulman', in Haenni and Lathion, *Les minarets de la discorde*, p. 103.

³⁶ Langer, 'Panacea or Pathetic Fallacy?', p. 47.

³⁷ Pratt, 'Swiss Shock', p. 196.

³⁸ Green, 'Resistance to Minarets', pp. 639–640.

Switzerland in 1893, where a democratic debate about Jewish slaughtering practices quickly degenerated into irrational anti-Semitic fury.³⁹

4. *Minarets have come to symbolize the outer border of the imagined national community.* Not only were Muslims disparaged and silenced. Just like Jews in the nineteenth century, they were construed as outsiders, alien to the national community. Miller's theory of national identity overlooks the ways in which, anthropologically, collective identity is defined, not by its core, but by its borders. As Foucauldians and post-structuralists would put it, collective identity needs an Other to define itself. This is true of Western Europe in the post-war era. Western European identity—a particularly elusive construal—was imagined, first in opposition to Eastern communism and later, after the end of the Cold War, in opposition to Islam.⁴⁰ Islam is construed as the 'alien religiosity': either because it conflicts with secular republicanism (France), or with 'Christian–Occidental' values (Germany), or with gender equality and the *vivre-ensemble* (Belgium).⁴¹ During the minaret controversy, Swiss values were counterposed to presumed Muslim values, with the clear implication that they were incompatible.⁴² Christianity was redefined as compatible with, even supportive of, secular democratic values such as tolerance, the separation of church and state, and gender equality. The presence of church buildings, towers, or steeples, was not deemed to be a threat to European secular identity but was, instead, 'an expression of our Western Christian heritage.'⁴³ Muslim minarets are symbolically placed at the outer border of the imagined national community: they constitute the national community by showing up what the national community is not. It is hard to see how such a binary construal of national identity can ever be compatible with equal citizenship for Muslims. Miller argues (plausibly) that

³⁹ Philippe Gonzalez, 'Banning the Minarets in Switzerland: The Limits of the Liberal Public Sphere and the Dark Side of Monstration', *Public Seminar* 1 (2014): <http://www.publicseminar.org/2014/05/banning-the-minarets-in-switzerland/#.Vk9Fu7-6TS0>

⁴⁰ See, e.g., Benoit Challand, 'From Hammer and Sickle to Star and Crescent: The Question of Religion for European Identity and a Political Europe', *Religion, State and Society* 37 (2009): 65–80. Challand shows how Turkey was seen to be 'in' Europe during the Cold War (as a NATO member) but is now widely perceived to be 'outside' Europe, as a Muslim nation. The religious dimension of Turkey's European-ness only came to the fore in the post-1989 period and was barely a factor before.

⁴¹ Robert Gould, "Alien Religiosity" in Three Liberal European States', *Politics, Religion and Ideology* 4 (2013): 173–192.

⁴² Pratt, 'Swiss Shock', p. 201.

⁴³ Green, 'Resistance to Minarets', p. 636. During the *Lautsi* controversy, the Italian government argued that the crucifix 'was both the symbol of Italian history and culture, and consequently of Italian identity, and the symbol of the principles of equality, liberty and tolerance, as well as of the State's secularism'. Cited in Langer, 'Panacea or Pathetic Fallacy?', p. 59. See generally Christian Joppke, 'Pluralism vs. Pluralism: Islam and Christianity in the European Court of Human Rights', in *Religion, Secularism and Constitutional Democracy*, edited by Jean Cohen and Cécile Laborde (Columbia University Press, 2014); Jitte Klausen, 'Europe's Uneasy Marriage of Secularism and Christianity since the 1960s and the Challenges of Religious Pluralism', in *Religion and the Political Imagination*, edited by Gareth Stedman Jones and Ira Katznelson (Cambridge University Press, 2010).

immigrants cannot hope to change national identity overnight, and that majority identities 'will over time adjust in ways that recognise their presence'⁴⁴ so they can evolve into genuinely shared national identities. But he gravely underestimates how the construal of majority culture as an exclusive national identity makes equal citizenship radically impossible. To put it crudely, if Swiss national identity is imagined as a European-secular-Christian identity whose content is defined through its external boundaries, in opposition to Islam, then this effectively *prevents* Muslims from joining the imagined Swiss national community.

By considering religion as an assigned identity, therefore, we can see how Muslims were dominated through a process that is structurally similar to racialization: their identity was externally assigned, negatively connoted, and served to delimitate the symbolic boundary of the national community. The minaret ban is wrong not primarily because it violates significant minority religious or cultural interests but, rather, because it denies a more basic interest in non-domination: in minimal political standing. This minimal political standing includes minimum discursive control over how one's identity is construed by others. Muslims were unfairly treated by the minaret ban, not *qua* Muslims, but *qua* (at least potential) citizens. As in many other similar controversies, they suffered, not from lack of recognition, but from an excess of misrecognition (as those who do not belong because they are radically, essentially different).⁴⁵ Religious assignation, in this case, functions in exactly the same way as racial assignation, and is wrong for the same reason.

A possible objection to this line of argument would run as follows. Religion is not like race—the objection would go—because it is not an unchosen dimension of one's identity. Criticizing a religion is importantly different from criticizing a race. Anti-Muslim views—what some call Islamophobia—might be ignorant and bigoted, but they target ideas and practices, not persons. They may be challenged and criticized but—by contrast to incitement to racial hatred, say—they fall under protected speech in liberal democracies. Furthermore, what was rejected in the minaret ban was not Muslims or Islam but Islamism—a radical, anti-democratic, and anti-liberal ideology repudiated by most Muslims. If most Muslims themselves reject Islamism, and do not care much about minarets, it is not clear where the harm of misrecognition should be located.

There is something to the objection. It is a salutary warning against approaches that equate criticism of Muslim beliefs and practices with racism, and that reduce the sometimes difficult integration of minorities into the European public sphere to a simple framework of postcolonial domination. Clearly, many controversies concerning Islam and Muslims involve the accommodation of

⁴⁴ Miller, 'Majorities and Minarets', p. 449.

⁴⁵ For similar thoughts about the French hijab controversy, see Laborde, *Critical Republicanism*.

genuine minority demands, some of which pose real dilemmas for liberal justice and equal citizenship. This is the case, for example, of demands concerning the content of education curricula, family religious law, gender-specific social roles, and exemptions from workplace requirements.⁴⁶ But, I submit, no such dilemma of accommodation was at stake in the Swiss minaret ban, because there was no high-salience minority claim. To be sure, there were a couple of local demands for minarets, but those could perfectly well have been handled through the enforcement (or refinement) of existing planning regulations. Those demands only served as pretexts for the construal of Islam as an alien threat to national identity, with little concern for the actual perspectives of Muslims.

Nor is the argument that race is essentially different from religion compelling. It is true that there is a tendency among liberals to treat religion as a first-person interest, one connected to individuals' conceptions of the good (e.g., following the obligatory precepts of their faith, expressing their cultural identity). The chief difference between a religion and a race, on this view, is that religion is positively endorsed by individuals. Regardless of how people have come to acquire the religious beliefs and commitments that they happen to have, the normative significance of first-person religion lies in the fact that people have an interest in affirming and pursuing it. This moral power generates non-trivial interests of the kind that must be accommodated in liberal theories of justice or citizenship. Yet religious identity is not always a first-person identification—it can also take the form of a third-party assignation and function exactly like race: as a negatively connoted, externally assigned identity that is used as the basis for wrongful treatment. Let me take three familiar examples from the law. First, in international asylum law, one can claim to have been persecuted on religious grounds even if one does not actually belong to the religion in question.⁴⁷ Third-party assignation is particularly salient in contexts where ethnonational groups are defined in religious terms (Muslims in Bosnia, or Catholics in Northern Ireland). Second, in UK discrimination law, Sikhs and Jews are defined as racial groups for the purposes of the Race Equality Act. Third, in freedom of speech law, incitement to religious hatred stands alongside incitement to racial hatred as possible grounds for speech regulation. Liberal secular law is well equipped to handle cases where anti-religious speech racializes and essentializes persons in ways that are exactly similar to hate speech on racial or sexual grounds.⁴⁸

Admittedly, these are easy cases insofar as what is targeted are not ideas or practices but, indeed, persons. Liberals have no problem handling cases of prejudicial treatment on what Rawls called morally arbitrary grounds, and they

⁴⁶ Laegaard, 'Euro-Multiculturalism and Toleration.'

⁴⁷ T. Jeremy Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law', *Harvard Human Rights Journal* 16 (2002): 189–215.

⁴⁸ Andrew March, 'Speech and the Sacred. Does the Defense of Free Speech Rest on a Mistake about Religion?', *Political Theory* 40 (2012): 19–346.

can readily concede that prejudices about religion, no less than prejudices about race or sexual orientation, can motivate wrongful treatment of individuals. More difficult are cases, such as the minaret ban, where it is not obvious who exactly is wronged, especially if, as I have suggested, Muslims themselves do not have a salient (prior) interest in building minarets. What is attacked by the minaret ban is a religion—Islam—with no unfair or wrongful treatment of its practitioners. And in a democracy, it is perfectly legitimate freely to criticize religious ideas and practices, even in a prejudiced, ignorant, and disrespectful manner. This is all true enough. The chief problem with the minaret ban, I suggest, is that because Muslims lacked political voice, they had no discursive control over what was said about them and their religion. They could be disparaged by association—as minaret-builders, Islamists, and oppressors of women—without being able to counteract speech with speech. It is this political disempowerment, coupled with the anti-Muslim rhetoric of campaigners, that excluded them from the imaginary community of Swiss citizenship.

9.4 Conclusion

Even if (*pro arguendo*) we grant Miller that it is legitimate for the Swiss to promote the majority culture in the symbolic public space, in order to shore up their sense of national identity and continuing support for democratic institutions, it is impermissible for them to do so in ways that undermine prospects of equal citizenship for minorities. The minaret ban, I have argued, does exactly that. It defines the content of national identity by expelling Islam to its outer boundary, and turning Muslims into permanent and irreducible aliens. The key objection to the minaret ban, therefore, is not that it violates a religious or cultural interest of Muslims qua Muslims but, rather, that it denies them minimum civic standing qua citizens.