

The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority

Ayelet Shachar*

Introduction

Proponents of multicultural accommodation policies¹ have been concerned primarily with the relationship among different cultures and between a given minority community and the state.² Yet, they often overlook an equally important multicultural dilemma concerning the potential injurious effects of intergroup accommodation upon intragroup power

* Assistant Professor, Faculty of Law, University of Toronto. B.A., LL.B., Tel Aviv University, 1993; LL.M., Yale Law School, 1995; J.S.D., Yale Law School, 1997. I am grateful for the helpful comments that I received on earlier versions, particularly from Rosalie Abella, Jack Balkin, Seyla Benhabib, Bruce Chapman, Chandran Kukathas, Ed Morgan, Carol Rose, Ian Shapiro, the editors at the *Harvard Civil Rights-Civil Liberties Law Review*, the multidisciplinary audiences at the Multiculturalism and Struggles for Recognition in Comparative Perspective conference at Harvard University (Mar. 5–6, 1999), and the Nationalism, Identity and Minority Rights conference at the University of Bristol, U.K. (Sept. 14–19, 1999), as well as the participants at the Legal Theory Workshop at the University of Toronto, the Queen's Forum for Philosophy and Public Policy, and the Conference for the Study of Political Thought, Toronto Chapter. Special thanks to Melissa Williams for her insightful commentary at the Conference for the Study of Political Thought and to Maya Johnson for her dedicated editorial assistance. As always, my greatest intellectual debt is to Ran Hirschl. His constructive criticism created the impetus for developing the ideas expressed in this article. I gratefully acknowledge the support of the Wright Committee, Faculty of Law, University of Toronto, for funding for this project and the assistance of the Social Science and Humanities Research Council of Canada General Research Grant.

¹ *Multicultural accommodation policies* refer to a wide range of state measures designed to facilitate identity groups' practices and norms. For example, a state may exempt group members from certain laws or award the group's leadership a degree of autonomous jurisdiction over the group's members.

² See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); see also JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (1995); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990); Rainer Bauböck, *Why Stay Together? A Pluralist Approach to Secession and Federation*, in *CITIZENSHIP IN DIVERSE SOCIETIES* 366 (Will Kymlicka & Wayne Norman eds., 2000); William A. Galston, *Two Concepts of Liberalism*, 105 *ETHICS* 516 (1995); Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 *STAN. L. REV.* 1311 (1996); Martha Minow, *The Constitution and the Subgroup Question*, 71 *IND. L.J.* 1 (1995); Bhikhu Parekh, *Cultural Pluralism and the Limits of Diversity*, 20 *ALTERNATIVES* 431 (1995); Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25 (Amy Gutmann, ed., 1994); Vernon Van Dyke, *The Individual, the State, and Ethnic Communities in Political Theory*, 29 *WORLD POL.* 343 (1977); Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 *ETHICS* 250 (1989).

relations.³ Well-meaning accommodation policies by the state, aimed at leveling the playing field between minority communities and the wider society, may unwittingly allow systematic maltreatment of individuals within the accommodated minority group⁴—an impact, in certain cases, so severe that it nullifies these individuals' rights as citizens.⁵

I term this phenomenon the paradox of multicultural vulnerability. Disproportionate allocation of accommodation costs within the group produces intragroup power asymmetries, which differentiate membership for individual group members. The paradox of multicultural vulnerability identifies the negative effects of well-meaning multicultural accommodations on group members bearing disproportionate burdens within their own cultural tradition's comprehensive world view, or *nomos*.⁶ This tension between accommodating differences and protecting the interests of historically vulnerable group members within these communities has been brought to the forefront of various countries' public policies, thanks

³ See Leslie Green, *Internal Minorities and their Rights*, in GROUP RIGHTS 101 (Judith Baker, ed., 1994).

⁴ See Ayelet Shachar, *Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation*, 6 J. POL. PHIL. 285 (1998) [hereinafter Shachar, *Multicultural Accommodation*]; see also Ayelet Shachar, *On Citizenship and Multicultural Vulnerability*, 28 POL. THEORY 64 (2000) [hereinafter Shachar, *Citizenship*].

⁵ My use of *individual rights* or *citizenship rights* is not meant to convey a dyadic conception of rights. Nor do I view rights bearers as separate and distanced from each other. Rather, I tend more towards the understanding of rights that has been articulated by feminist scholars in recent years. Such an understanding emphasizes the relationships that rights construct and enforce, but also the value inherent in the boundary-marking feature of rights. As Martha Minow explains, the whole concept of boundary depends on relationships: the relationship between the two sides drawn by the boundary and the relationships among the people that recognize and affirm the boundary. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (1990); see generally Elizabeth Kiss, *Alchemy or Fool's Gold? Assessing Feminist Doubts About Rights*, in RECONSTRUCTING POLITICAL THEORY: FEMINIST PERSPECTIVES 1 (Mary Lyndon Shanley & Uma Narayan eds., 1997); Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1 (1993).

⁶ Many associate Robert Cover with the use of the Greek term *nomos* in referring to minority communities that create comprehensive alternative world views where law and cultural narrative are inseparable. Such communities may generate sets of group-sanctioned norms of behavior that differ from those encoded in state law. See Robert M. Cover, *The Supreme Court 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). I use the terms *nomoi communities* and *identity groups* in a related manner, to refer primarily to religiously defined groups of people that "share a comprehensive world view that extends to creating law for the community." Abner S. Greene, *Kiryas Joel and Two Mistakes about Equality*, 96 COLUM. L. REV. 1, 4 (1996). This definition can also apply to other types of minority groups, such as those organized primarily along ethnic, racial, tribal, or national origin lines, as long as their members share a comprehensive and distinguishable world view that extends to creating a law for the community. However, all of these definitions of identity groups remain fraught with controversy. For the purposes of this discussion, such groups will be said to share a unique history and collective memory, a distinct culture, a set of social norms, customs and traditions, or perhaps an experience of maltreatment by mainstream society, all of which may give rise to a set of group-specific rules or practices. My analysis will focus only on identity groups bent on maintaining their *nomos* as an alternative to full assimilation.

to the recent global sociopolitical movement towards a multicultural, as opposed to a universalist, conception of citizenship.

According to this new multicultural (or *differentiated*) citizenship model, the basic building blocks of a just social order may well continue to rely on the protection of basic citizenship rights and the nourishment of individuals' capacities.⁷ However, justice may also require the recognition of traditions and unique ways of life for members of nondominant cultural minorities.⁸

Differentiated citizenship is currently adopted in a variety of different forms in diverse societies, ranging from Canada, England, and the United States to Israel, India, and Kenya. Such a model entitles traditionally marginalized cultural communities to seek group-based protections, including the acquisition of jurisdictional autonomy over controversial legal domains, primarily in education and family law.⁹

While these multicultural schemes ensure the decentralization of state power and potentially greater diversity in the public sphere, they do not necessarily promote the interests of all group members. Thus, the same policy that seems attractive when evaluated in an intergroup perspective can systematically work to the disadvantage of certain group members in an intragroup perspective. To capture these different levels of power disparities, it is necessary to acknowledge the highly dynamic set of interactions that can take place between the group, the state, and the individual. Indeed, one cannot comprehend (let alone redress) the plight of the individual in the multiculturalism paradox if one does not understand the complex and overlapping affiliations existing between the state,

⁷ See, e.g., Amartya K. Sen, *Capability and Well-Being*, in *THE QUALITY OF LIFE* 30 (Martha C. Nussbaum & Amartya K. Sen eds., 1993).

⁸ See *infra* notes 14–29 and accompanying text. However, several scholars do not agree with the view that formal recognition contributes significantly to the promotion of human well-being or a just social order. See, e.g., Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, in *GLOBAL JUSTICE* 12 (Ian Shapiro & Lea Brilmayer eds., 1999).

⁹ In the arena of education, for example, a *nomoi* group may wish to withdraw its younger members from the public school system, as in the highly publicized case, *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, the U.S. Supreme Court approved an accommodation measure to exempt children at the age of 14 from two more years of mandatory schooling, as requested by the Old Amish Order community. *Yoder* is one of the relatively few cases in the American constitutional tradition in which a court granted a request for religious exemption from a valid law. See Austin Sarat and Roger Berkowitz, *Disorderly Differences: Recognition, Accommodation, and American Law*, 6 *YALE J.L. & HUMAN.* 285, 298 (1994).

Another type of challenge in the education arena is a demand by group members to exempt their children from exposure to material that challenges the parents' world view. Unlike in *Yoder*, the U.S. Supreme Court rejected this type of accommodation claim in *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987) (holding that public schools requiring students to read a basic reader did not violate the students' right to freedom of religion). For comprehensive commentary on this case, see Nomi Stolzenberg, *'He Drew a Circle that Shut Me Out': Assimilation, Indoctrination and the Paradox of Religious Education*, 106 *HARV. L. REV.* 581 (1993).

In the family law arena, see Minow, *supra* note 2; Shachar, *Multicultural Accommodation*, *supra* note 4. See also notes 35–48, *infra* and accompanying text.

the group, and the individual. Recognizing this wider network of forces and influences, one can begin to account for the reality in which well-meaning attempts to empower traditionally marginalized minority communities ultimately may reinforce power hierarchies within the accommodated community.

Given the complexity of this problem, the real challenge facing both the proponents of multicultural schemes and the defenders of the interests of at-risk group members is to find a way of accommodating cultural differences, while also protecting at-risk group members from sanctioned violations of their state-guaranteed citizenship rights. In other words, it is crucial to resolve the rarely discussed yet omnipresent paradox of multicultural vulnerability.¹⁰

Resolution of this problem requires acknowledgement that power itself is never static and does not map neatly onto a division between intergroup and intragroup categories. Rather, it is a relational, dynamic concept. Similarly, it is necessary to reject the tendency artificially to compartmentalize individual identity into narrow, single-axis categorizations. Instead, one should adopt a richer intersectional perspective that permits a wider and more respectful understanding of individuals in their multiple, complex, and potentially conflicting facets of identity.¹¹ This more nuanced understanding of power and identity enables a certain amount of distance from the prevailing yet misleading culture/rights dichotomy. While there are no magic formulae that can resolve neatly the paradox as a whole, one can attempt, at least, to rethink some legal and institutional designs that strive for the reduction of injustice between groups, together with the enhancement of justice within them. Addressing these complex challenges in critical perspective is the primary task of this Article.

The discussion proceeds in three stages. In Part I, I briefly describe the critique of traditional or universal citizenship models elaborated by such theorists as Will Kymlicka, Charles Taylor, and Iris Young; in addition, I explain the paradox of multicultural vulnerability in the context of the current global trend towards a differentiated citizenship model. In Part II, I distinguish and challenge two theoretical solutions to the para-

¹⁰ I am confining my remarks to *citizens*, since they are the prime beneficiaries of the rights and protections of the modern state. I include in this category all persons that permanently reside in a given country.

¹¹ On the concept of intersectionality, see Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Gender: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 39 (1989); see also Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L.J. 581 (1990). For further critiques of the use of a single-axis framework that fails to account for interlocking power hierarchies, see Tina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16 (1995); Sherene H. Razack, *Beyond Universal Women: Reflections on Theorizing Differences Among Women*, 45 U. NEW BRUNSWICK L.J. 209 (1996); Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1581-83 (1996).

dox of multicultural vulnerability. These two approaches, which I call the *reuniversalized citizenship* response and the *unavoidable cost* response, appear to be diametrically opposed. I argue, however, that these two competing approaches function as mirror images of one another, since both partake of the same basic logic.

In Part III, I suggest that a new and more viable approach to respecting cultural differences must reject such simplistic models. A truly comprehensive multicultural citizenship model must identify and defend only those group-based accommodations that coherently coalesce with the improvement of the status of traditionally subordinated classes of individuals within minority group cultures. In this section, I describe the two traditional legal paradigms to the challenge of accommodating difference. I also outline and assess four alternative schemes for accommodation, evaluating their capacities to overcome major difficulties embedded in the two prevalent theoretical responses to the paradox of multicultural vulnerability.

Alternative accommodation schemes proceed from the assumption that one needs to acknowledge how different players are differently bound and affected by the move from a universal towards a differentiated citizenship model.¹² They also rest on the recognition that intergroup and intragroup power hierarchies are not independent of one another. Indeed, these power systems often interlock.¹³ In light of this interdependence, it is imperative that one strives to ensure a more level playing field—not only for nondominant minority cultures and society at large, but also for different groups of individuals within accommodated communities as well—by seeking creative new ways to divide and share jurisdictional authority in our increasingly diverse societies.

I. Justifying Differentiated Citizenship Models

The first wave of writings on multiculturalism generally assesses the justice claims of minority groups.¹⁴ In these early multicultural writings,

¹² Interestingly, the research conducted in the last three decades on the roles of women in economic development also shows that, as with the move towards multiculturalism, other far reaching schemes of social change, such as industrialization, have had very different effects on men and women and among different groups of women. See IRENE TINKER, *PERSISTENT INEQUALITIES: WOMEN AND WORLD DEVELOPMENT* 3 (1990); Laura Ho et al., *(Dis)Assembling Rights of Women Workers along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383 (1996).

¹³ For a discussion of interlocking power systems in the context of race and gender (drawing on the insights of feminist and critical race scholarship), see ADRIEN KATHERINE WING, *CRITICAL RACE FEMINISM: A READER* 4 (1997); see also PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (1990); SHERENE H. RAZACK, *LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTSROOMS AND CLASSROOMS* (1998).

¹⁴ See, e.g., Will Kymlicka, *Comments on Shachar and Spinner-Halev: An Update from the Multiculturalism Wars*, in *MULTICULTURAL QUESTIONS* 112 (Christian Joppke & Ste-

theorists like Will Kymlicka, Iris Young, and Charles Taylor all argue in favor of respecting group-based cultural differences, by drawing on a shared view of the shortcomings of universal citizenship models.¹⁵ This critique makes three major claims.

First, blindness-to-differences policies, whose aim is to treat all individuals equally regardless of group identity, do not in themselves ensure state neutrality. Rather, such policies are often implicitly tilted towards the needs, interests, and inherited particularities of the majority, thus creating a range of burdens, barriers, and exclusions applying to members of nondominant cultural communities. Part of the problem is that "the state cannot help but give at least partial establishment to a culture"¹⁶ and, often, that culture reflects the norms, identities, and preferences of the majority community.¹⁷ Second, when universal citizenship regimes encompass certain aspects of an *a priori* unjust social order, extending citizenship rights may prove a necessary but not sufficient means for ensuring that excluded minority cultures will acquire full and equal opportunities to participate in the public life of the polity and to gain access to its established decision-making centers.¹⁸ Third, at the heart of many contemporary justifications for differentiated citizenship lies a deep concern about power, particularly about the power of the state to erode the traditions and unique ways of life of minority cultures. In an attempt to pay what Charles Taylor calls "equal respect to all cultures,"¹⁹ a move beyond the limiting and homogenizing conception of universal citizenship is advocated by proponents of multiculturalism.²⁰

Two main interpretations have emerged in response to such a move beyond universal citizenship. These two interpretations classify best as the strong and weak versions of multiculturalism.²¹ The strong version of multiculturalism calls for a fundamental shift in the understanding of

ven Lukes eds., 1999).

¹⁵ See, e.g., WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1989); YOUNG, *supra* note 2; Taylor, *supra* note 2.

¹⁶ KYMLICKA, *supra* note 2, at 27.

¹⁷ For a comprehensive critique of blindness-to-differences policies, see T. Alexander Aleinikoff, *Re-Reading Justice Harlan's Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961 (1992); Neil Gotanda, *A Critique of 'Our Constitution is Color-Blind'*, 44 STAN. L. REV. 1 (1991); Alexandra Natapoff, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059 (1995).

¹⁸ See Young, *supra* note 2; see also MELISSA S. WILLIAMS, *VOICE, TRUST AND MEMORY: MARGINALIZED GROUPS AND THE FAILURE OF LIBERAL REPRESENTATION* (1998).

¹⁹ Taylor, *supra* note 2, at 26.

²⁰ See *id.* at 64-73 ("[T]he further demand . . . is that we all recognize the equal value of different cultures, that we not only let them survive, but acknowledge their worth."). *Id.* at 64. Notably, Taylor treats the claim "that all human cultures that have animated whole societies over some considerable stretch of time have something important to say to all human beings" as a *presumption*, in other words, as a starting hypothesis that has to be demonstrated concretely in the actual study of any particular culture. *Id.* at 66-67.

²¹ See generally, Shachar, *Citizenship*, *supra* note 4.

citizenship. Cultural communities are to be granted strong formal, legal, and constitutional standing that will permit them to govern their members in accordance with their customs and views. The central unit of the strong multicultural citizenship model is the minority group, not the individual nor the state. In order to free minority communities from the tyrannical imposition of centralized state law (the "imperial yoke, galling the necks of the culturally diverse citizenry"),²² the strong version calls for a new intercultural deliberative legislative process, which is based on a more genuine interplay between different constituent cultural groups. Through such intercultural dialogue, traditionally marginalized communities can ensure that their voices and perspectives will be heard and legally protected in the public domain.²³ However, this approach offers little consideration of the various problems with group agency (such as the criteria determining who can speak for a group). Nor does this approach deal with the political effects of intercultural arrangements upon the ossification of identity in minority communities.

The weak version of multiculturalism offers a more complex vision of differentiated citizenship. According to the weak version, the most pressing challenge for multiculturalism is the establishment of a theoretically sound and institutionally plausible balance between the needs and interests of three entities: the minority group, the state, and the individual. Clearly, proponents of the weak version of multiculturalism seek to preserve the value or primacy of the individual while also recognizing the legitimacy of group-based demands for accommodation. Will Kymlicka, the most well-known proponent of this theory, grounds his argument for a differentiated citizenship model on the elements that constitute an individual's own sense of identity, security, and freedom.²⁴ Indeed, Kymlicka asserts that "[a] comprehensive theory of justice in the multicultural state will include both universal rights, assigned to individuals regardless of group membership, and certain group-differentiated rights or 'special status' for minority cultures."²⁵ In the same vein, Iris Young and Charles

²² TULLY, *supra* note 2, at 5. See also James Tully, *Cultural Demands for Constitutional Recognition*, 3 J. POL. PHIL. 111 (1995).

²³ See TULLY, *supra* note 2, at 54–57.

²⁴ See KYMLICKA, *supra* note 15, at 162–205.

²⁵ *Id.* at 6. Kymlicka does not argue that all minority groups share the same entitlement to state accommodation. Instead, he distinguishes three major degrees or levels of accommodation that should be granted to different types of nondominant communities: "self-government" rights, which involve the delegation of legal powers to national minorities; "polyethnic rights," which include financial support and legal protection for certain practices associated with particular ethnic or religious groups; and "special representation rights," which are typically associated with institutional attempts to respond to concerns that the political process is underrepresentative in failing to reflect the diversity of the population. *Id.* at 6–7, 26–33. Surprisingly, Kymlicka pays relatively little attention to religiously defined minority communities. These groups do not occupy a special category in his tripartite typology. Instead, they are lumped together with ethnic and immigrant groups, even though their concerns and historical incorporations into the body politic do not necessarily correspond to the voluntary criteria for immigration stressed by Kymlicka.

Taylor argue that multicultural accommodation policies are not only compatible with, but are the extension and expression of, individuals' fundamental rights and identities as citizens in diverse societies.²⁶

Although I accept most of the preceding arguments, I find the weak version's world view overly optimistic, since it pays too little heed to the potentially injurious intragroup effects of public recognition and accommodation of the authority of minority cultures over their members.²⁷

Although apparent in a variety of areas, the potential threat of multiculturalism is most flagrant within those legal arenas that are significant for the group's demarcation of its membership boundaries, such as family and education law.²⁸ In the education arena, problems arise when respecting minority communities' quest to preserve their unique way of life (by passing it on to their children) may lead, *inter alia*, to the restriction of their children's social mobility. Such accommodations in education may result in several inadvertent limitations, including a lack of exposure to more pluralist and diverse aspects of the curriculum, mandatory high school education, or participation in a learning environment that treats all persons as equals, regardless of their race, gender, culture, religion, etc. These issues have arisen in some of the most controversial religious accommodation cases brought before the U.S. Supreme Court in recent years.²⁹

²⁶ Taylor, for example, claims that the

demand for recognition is . . . given urgency by the supposed links between recognition and identity, where this latter term designates something like a person's understanding of who they are, of their fundamental defining characteristics as a human being In the case of the politics of difference, we might also say that a *universal* potential is at its basis, namely, the potential for forming and defining one's own identity, as an individual, and also as a culture.

Taylor, *supra* note 2, at 42 (emphasis added). Young suggests that, since, in practice, individuals' "needs and interests, and their perception of the needs and interests of others . . . are structured partly through group-based experience and identity," a full and free expression of individuals' identity requires that their groups "have a specific voice in deliberation and decision making." Young, *supra* note 2, at 263.

²⁷ A related problem is the weak version's overly narrow focus on identity as singular. This single-axis perception fails to capture the multiplicity of group members' affiliations and experiences.

²⁸ On education, see *supra* note 9 and accompanying text. On family law, see, for example, Shachar, *Multicultural Accommodation*, *supra* note 4; *infra* notes 35–48, 83, 89–115, 118–125 and accompanying text. The demarcation of a group's membership boundaries may also find expression through specific patterns of land ownership or may be closely associated with the preservation of a shared language. I focus my analysis on the domains of family law and education, where religiously defined *nomoi* communities have raised some of the most pressing challenges for multicultural accommodation in recent years. See, e.g., Peter W. Edge, *The European Court of Human Rights and Religious Rights*, 47 INT'L & COMP. L.Q. 680 (1998); Marie-Claire S.F.G. Foblets, *Family Disputes Involving Muslim Women in Contemporary Europe: Immigrant Women Caught between Islamic Family Law and Women's Rights*, in RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN 167 (Courtney W. Howland ed., 1999).

²⁹ See, e.g., Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687

However, not every act of accommodation necessarily leads to the paradox of multicultural vulnerability. Problems attending the paradox tend to arise only when the group upholds certain practices that disproportionately expose the citizenship rights of some members to risk. Of course, one could argue that no state accommodation measure ever will affect all group members perfectly equally, but this misses the crux of the problem. The multiculturalism paradox does not refer to incidental rights violations. Rather, it is concerned with systemic intragroup practices that adversely affect a particular category of group members.³⁰ Under such circumstances, respect for difference can become a license for subordination.³¹

The potential for multicultural policies negatively to effect certain groups of citizens living within minority cultures is available through the lens of an old legal controversy: the struggle to decide which entity, the state or the group, may control the terms and procedures validating marriage and divorce.³² Arguments over who is allowed to control the rules

(1994); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). Religiously defined minority communities historically have been considered the prime candidates for such accommodation, and this notion is prominent in classic liberal theory, as well as in the contemporary constitutional codes of most democratic countries in the world. The treatment of nondominant religious minorities, thus, offers a rich body of legal experience with different measures of accommodation. See AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* (forthcoming 2001) (manuscript ch.4, on file with author). This Article does not attempt to provide a doctrinal analysis of church/state relations in the United States or in Canada, nor an examination of "the state of freedom of conscience, religion and belief in the world." For such a comprehensive study, see, for example, *FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT 1* (Kevin Boyle & Juliet Sheen eds., 1997) [hereinafter *FREEDOM OF RELIGION*].

³⁰ The distinction between incidental and systemic intragroup rights violations is developed further in Shachar, *Citizenship*, *supra* note 4, at 71–72. Legal scholars have also called attention to systemic patterns of inequality by elaborating a distinction between the antidiscrimination principle and the antisubordination principle, a distinction which has played a central role in the development of different visions of the constitutional guarantee of equality in American law.

³¹ Third world women, in particular, have contested uncritical understandings of culture, tradition, and the role of the state in promoting specific manifestations of communal identity over others, processes that significantly affect women's positioning with respect to both the group and the state. In this rapidly growing field of study, see, for example, *APPROPRIATING GENDER: WOMEN'S ACTIVISM AND POLITICIZED RELIGION IN SOUTH ASIA* (Patricia Jeffery & Amrita Basu eds., 1998); *FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES* (M. Jacqui Alexander & Chandra Talpade Mohanty eds., 1997); *UMA NARAYAN, DISLOCATING CULTURE: IDENTITIES, TRADITIONS, AND THIRD WORLD WOMEN* (1997); Amrita Chhachhi, *Forced Identities: The State, Communalism, Fundamentalism and Women in India*, in *WOMEN, ISLAM AND THE STATE* (Deniz Kandiyoti, 1991).

³² This controversy, in turn, determines the rights and obligations that individuals accrue upon entering and leaving families. For a concise overview of the historical aspects of such accommodation in the context of family law in the United States, see, for example, Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority* 26 J. FAM. L. 741 (1987–88). In the United Kingdom and Europe, see generally CAROLYN HAMILTON, *FAMILY, LAW AND RELIGION* (1995).

surrounding marriage ceremonies and divorce proceedings continue to complicate family law today, both in countries that already possess relatively pluralistic personal law systems and in countries that have only very recently begun to revise their family law policies to accommodate cultural differences.

The arena of family law has long proven volatile, even under traditional universalist citizenship models, as it brings to the surface underlying philosophical questions. These include concerns about the degree to which the state may define the family, as well as public policy issues, such as population control, reproductive freedom, and the proper limits of parents' control over their children. However, these and other questions related to the terms and procedures defining the legal relationships within families have become particularly pressing in the context of multicultural or differentiated citizenship models in which minority communities increasingly demand legal recognition of family law traditions as necessary to preserve the group's collective identities.³³

Traditionally, various religious (and national) communities have used marriage and divorce regulation in the same way that modern states have used citizenship law: to delineate clearly who is inside and who is outside of the collective.³⁴ Family law fulfils this demarcating function by legally defining only certain kinds of marriage and sexual reproduction as legitimate, while labeling all others as illegitimate. By punishing individuals who engage in "illegitimate" marriage and childbirth, certain minority groups (as well various states) use marriage and divorce regulations as a sociopolitical tool for policing a given collective's membership boundaries.³⁵

³³ One of the lingering effects of colonialism upon aboriginal communities in North America has been the establishment of a connection between a woman's marriage status and her entitlement to tribal membership (where a non-Indian woman marries an Indian man) or her exclusion and loss of status (where an Indian woman marries a nontribal or a non-Indian husband). See, for example, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), in which an Indian woman that married a nontribal man challenged her own tribe's gender-discriminatory membership rules. The U.S. Supreme Court rejected her claim, in deference to the tribe's autonomy and entitlement to define who is inside or outside of its boundaries. The Canadian federal government has historically been directly involved in defining and upholding (gender-discriminatory) tribal membership rules. See *The Indian Act*, R.S.C., ch.I-5 (1985) (Can.); *Canada (Attorney General) v. Lavell* [1974] S.C.R. 1349; U.N. GAOR Hum. Rts. Comm., 36th Sess., Supp. No. 17, U.N. Doc. A/36/40 (1981) (critiquing this policy). However, it is not clear that the solution chosen by the Canadian government, which externally enforces gender-neutral norms and reinstitutes persons as Indians for the purposes of the Act, see *An Act to Amend the Indian Act*, R.S.C., ch. 32 (Supp. I 1985) (Can.), is necessarily the best means for striking a balance between respecting cultural differences and accommodating women's interests. See, e.g., *Barry v. Garden River Ojibway Nation* #14 [1997] 4 C.N.L.R. 147. I discuss this tension and briefly sketch the contours of a new resolution in Shachar, *Multicultural Accommodation*, *supra* note 4, at 299-304.

³⁴ On this use of citizenship law by modern states, see generally ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* (1992).

³⁵ For a related example of self-regulation on the national scale, see Nancy F. Cott,

Additionally, many minority communities operating within a larger political entity possess traditions pertaining specifically to the family that historically have served as important manifestations of distinct cultural identity.³⁶ These traditions allow the community autonomously to demarcate its membership boundaries, making family law a central pillar in the cultural edifice for ensuring the group's continuity and coherence over time. It is not surprising that, in the current age of diversity,³⁷ the state is relatively receptive to minority cultures' requests for greater degrees of legal control over their own family affairs.³⁸

Such recognition strengthens the autonomy of *nomoi* groups; for, without the ability to define its own membership boundaries, no community can survive. However, it may also disproportionately injure women.³⁹

Marriage and Women's Citizenship in the United States, 1840-1934, 103 AM. HIST. REV. 1440 (1998); see also *Miller v. Albright*, 523 U.S. 420 (1998) (upholding the legality of different procedures for the acquisition of citizenship based on the gender of an American parent where a child is born out of wedlock and outside of the United States). Even today, most states do not recognize same-sex couples as married and, thus, do not extend to same-sex partners the same immigration and naturalization benefits that are granted to married couples. See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982).

³⁶ Traditions pertaining to the family can become emblems of a group's authentic identity. In the context of Muslim communities that have been ruled by Western colonial regimes, this assertion of identity often bears a specific, anti-imperialist tone. For further discussion, see Marie-Aimée Hélie-Lucas, *The Preferential Symbol for Islamic Identity: Women in Muslim Personal Laws*, in IDENTITY POLITICS AND WOMEN: CULTURAL REASSERTIONS AND FEMINISMS IN INTERNATIONAL PERSPECTIVE 391 (Valentine M. Moghadam ed., 1994).

³⁷ See generally TULLY, *supra* note 2.

³⁸ While this trend is still controversial, it nevertheless looms large on the public policy agendas of many multicultural societies. For example, Canada, Australia, New Zealand, England, and the United States have all been revisiting their family law policies in recent years, exploring different ways in which state law can be pluralistic enough to allow different communities to govern themselves. For a concise overview of recent changes in the family law policies of Australia, New Zealand, Canada, England, and Wales, see SEBASTIAN POULTER, *ETHNICITY, LAW AND HUMAN RIGHTS: THE ENGLISH EXPERIENCE* 195-236 (1998); JOHN T. SYRTASH, *RELIGION AND CULTURE IN CANADIAN FAMILY LAW* (1992); Bill Atkin & Graeme Austin, *Cross-Cultural Challenges to Family Law in Aotearoa/New Zealand*, in *FAMILIES ACROSS FRONTIERS* 327 (Nigel Lowe & Gillian Douglas eds., 1996); Andrew Bainham, *Family Law in a Pluralistic Society: A View From England and Wales*, in *FAMILIES ACROSS FRONTIERS* 295 (Nigel Lowe & Gillian Douglas eds., 1996); Patrick Parkinson, *Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities*, 16 SYDNEY L.R. 473 (1994); David Pearl, *The Application of Islamic Law in the English Courts*, 2 Y.B. ISLAMIC AND MIDDLE EASTERN L. 3 (1995). In the American context, see, for example, the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1982); see also *In Re Adoption of Holloway*, 732 P. 2d 962 (Utah 1986); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). A policy of deference to tribal marriage, divorce, and gender-biased lineage rules was also adopted in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

³⁹ See Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271 (1997). It is necessary to differentiate between random impositions on particular group members, and those that routinely burden only a certain category of group members. Certain violations, for example, most of those against women in the family law arena, are systemic rather than random.

A growing body of research shows that accommodation in the family law arena (involving, for example, the allocation of certain jurisdictional powers over marriage and divorce from the state to minority communities) may impose upon women a systemic, sanctioned, and disproportionate burden (particularly in their traditional gender roles as wives and mothers).⁴⁰ The reasons for this phenomenon are many, but I will offer only two conjectures here.

⁴⁰ Family law accommodation can also, under certain circumstances, impose disproportionate costs upon children. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49; see also C.A. 3077/90, *Ploni v. Ploni*, 49(2) P.D. 578. In this Israeli case, a girl was born out of wedlock to a Muslim mother. The mother turned to a district *Shari'a* (Muslim) court to seek declaration that *Ploni* (pseudonym) was the father of the child and was, therefore, obliged to support the child. The religious court rejected the child support claim, refusing to hear the case on the merits. The court stated that, since there was no marriage relationship, and the father refused to declare paternity, the child could not be declared his daughter according to Muslim family law. Hence, he had no legal obligation to support her. The decision was appealed to the *Shari'a* Court of Appeals, which reversed the initial district *Shari'a* court decision.

The district court was ordered to hear the case on the merits and to allow the mother to bring evidence that she had had an intimate relationship with the alleged father, and that that relationship was based on a marriage promise that never materialized. The district *Shari'a* court reheard the case. This time it held that it had no authority to impose child support obligations on the father, because no marriage relationship between the parties was proved according to Muslim family law. The religious court recommended, however, that the mother turn to a civil district court to try and establish her legal claim there (according to secular rather than religious norms).

The civil court found that it had no jurisdiction over the case, since the case involved a matter of personal status law. Matters of Muslim personal status law are, under Israel's accommodationist family law system, subject to the exclusive jurisdiction of the *Shari'a* court. The civil district court held that the *Shari'a* court alone was authorized to determine any paternity matters concerning Muslims. As a result, the child (represented by her mother) had no venue in which to prove the father's paternity *ex lege*.

The mother turned to the Israeli Supreme Court, constitutionally challenging the civil court's decision. The mother claimed that the court's decision violated her daughter's human dignity because no legal venue would hear the paternity claim (for the purposes of child support payments). The Israeli Supreme Court convened to hear the case in a special forum (with seven justices on the bench, instead of the usual three justices). The Supreme Court affirmed the *Shari'a* court's conclusion, holding that, according to Muslim personal law, as interpreted by that authorized court, the mother and the child had no legal claim against *Ploni*, the alleged father, because the child was born out of wedlock. The Supreme Court also affirmed that the civil district court could not establish jurisdiction over the case as long as the case was defined as a matter of paternity declaration, since no court but the *Shari'a* court had jurisdiction over these matters of personal status concerning Muslim Israeli citizens.

However, the Supreme Court held that leaving the child without legal ability ever to claim support against her alleged father was an unjust result that violated her basic human dignity as protected by the Basic Law. That dignity required that she, like any other person, have a legal venue open to her to claim support payments. Israeli maintenance law (a state secular law) orders that, irrespective of their religious affiliation, parents have an obligation to support their children, even if the children were born out of wedlock. The case was, thus, returned to the civil district court to rule on the merits of the support claim (based on the assumption that the father's biological, not legal, relationship to the child could be proven, for example, through DNA testing) without challenging the decision of the *Shari'a* court that, for religious purposes, *Ploni* could not be the child's father.

This complex path illustrates how accommodation of a religious tradition may leave certain categories of individuals vulnerable (in this case, children born out of wedlock). In

First, religious traditions often encode within their legal traditions various formal and informal mechanisms for controlling the personal status and sexuality of women, primarily because women play a central and potentially powerful role in symbolically reproducing the collective.⁴¹ Today, almost all such explicit distinctions of gender have been removed from the law books of democratic countries around the globe. However, they may remain present, and, in certain cases, they have even gained new meanings within the group (e.g., as a means to highlight the difference between the *nomoi* community and the wider society).⁴² Under such circumstances, women's indispensable and often valued role as both biological and symbolic bearers of the collective can put them in an ironic double bind. Their crucial female role has traditionally been expressed in the realm of the family, which still adheres to gender-biased norms and practices working to women's disadvantage.⁴³ Thus, when a minority culture is granted preferred or exclusive jurisdiction over its members in matters of marriage and divorce as part of a state's multicultural accommodation scheme, women may remain exposed to strict intra-group controls that threaten their hard won rights and protections as citizens.⁴⁴

the absence of the human dignity argument and the specific civil provision imposing universal support obligations on parents, she would have been left with no legal remedy solely on the basis of ascribed communal membership and would have been deprived of basic rights guaranteed to all other children.

⁴¹ Although the relationship between gender and the reproduction of ethnic and national categories is obviously complex, most theorists agree that women occupy a special position in constituting collective identities: "[o]n the one hand, they are acted upon as members of collectives, institutions or groupings On the other hand, they are a special focus of . . . concerns as a social category with a special role (particularly human reproduction)." Floya Anthias & Nira Yuval-Davis, *Introduction*, in *WOMAN-NATION-STATE* 1, 6 (Nira Yuval-Davis & Floya Anthias eds., 1989). Anthias and Yuval-Davis's analysis of women's unique position is not aimed at essentializing their role as biological and cultural reproducers of collective identities, nor does it express the view that all reproduction experiences of women are similar. Anthias and Yuval-Davis, therefore, differ from cultural feminists that glorify mothering as the epitome of an ethic of care. Cf. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). For a critique of West's "essential woman," see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

⁴² As Margaret Lamberts Bendroth points out in her sociohistorical analysis of Evangelical Protestantism: "[g]ender issues stood at the heart of fundamentalist desire to be different." MARGARET LAMBERTS BENDROTH, *FUNDAMENTALISM AND GENDER: 1875 TO THE PRESENT* 3 (1993).

⁴³ I view these functions of family law, like other human relationships and institutions, as constructed by law, history, and society, rather than as biologically inscribed. For a similar position, see, for example, Evelyn Nakano Glenn, *Social Construction of Mothering: A Thematic Overview*, in *MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY* 1 (Evelyn Nakano Glenn et al. eds., 1994); see also Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 478 (Richard Delgado ed., 1995).

⁴⁴ For further discussion, see Shachar *Citizenship*, *supra* note 4.

Second, the granting of marriage-making and marriage-breaking authority to accommodated communities often has a negative economic impact upon women. Family law defines property relations between spouses and determines the economic and parental consequences of divorce. When women living within certain religious communities find, in cases of separation or divorce, that they have limited or no legal rights to property, postseparation financial support, or even custody of their children, the accommodation of their group's traditions means that their basic rights and interests as individual citizens are violated.⁴⁵

What makes the multiculturalism paradox a truly complex problem is the fact that, although they may be subject to such injurious burdens within their communities, women may still find value and meaning in their cultural tradition and in continued group membership. This phenomenon is especially visible in situations where the minority culture itself is subject to repressive pressures from the broader society. In such circumstances, group members feel expected, and often obliged, to unite around their cultural membership,⁴⁶ rather than to struggle to reform intragroup patterns of inequality.⁴⁷

It is not surprising that, under circumstances of threats to the collective, whether real or imagined, minority group members, including women, may seek state accommodation of their group's traditions in different social arenas. Such accommodation permits a minority culture to assert its distinct identity and to demarcate its membership boundaries autonomously. Yet, in respecting a minority culture's personal status and lineage rules, contemporary defenders of multiculturalism may defer unwittingly to a set of group-based rules and traditions that have a particular and often detrimental effect on certain group members. Family law, thus, vividly illustrates the troubling paradox of multicultural vulnerability, by demonstrating how well-meaning attempts to respect differences

⁴⁵ For a comprehensive discussion of the generally negative impact of state accommodation within family law on women in specific country contexts, see, for example, *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* (Rebecca J. Cook ed., 1994) [hereinafter *HUMAN RIGHTS OF WOMEN*]; *IDENTITY POLITICS AND WOMEN: CULTURAL REASSERTIONS AND FEMINISMS IN INTERNATIONAL PERSPECTIVE* (Valentine M. Moghadam ed., 1994); *WOMEN, ISLAM AND STATE* (Deniz Kandiyoti ed., 1991); *WOMEN, STATE, AND IDEOLOGY* (Haleh Afshar ed., 1987). However, several scholars claim that, in the context of aboriginal peoples, women's status under customary law was, in fact, better before contact with white colonizers. See, e.g., Mary E. Turpel, *Home/Land*, 10 *CAN. J. FAM. L.* 17 (1991).

⁴⁶ This is not to imply that such a common identity is ever fixed or uncontested in its meanings. For further discussion, see Rainer Bauböck, *Liberal Justifications for Ethnic Group Rights*, in *MULTICULTURAL QUESTIONS*, *supra* note 14, at 138-39; see generally Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 *HARV. C.R.-C.L. L. REV.* 1 (1994).

⁴⁷ For a concrete illustration of this scenario, consider the Indian Supreme Court case, *Mohd. Ahmed Khan v. Shah Bano Begum and others*, A.I.R. 1985 S.C. 945. For commentary, see, for example, Zakia Pathak & Rajeswari Sunder Rajan, *Shabano*, in *FEMINISTS THEORIZE THE POLITICAL* 257 (Judith Butler & Joan W. Scott eds., 1992).

often translate into a license for subordination of a particular category of group members—in this instance, primarily women.⁴⁸

II. Complexities Associated with the Move Toward Differentiated Citizenship

In the second wave of political writings on multiculturalism, the debate has moved away from merely evaluating the justice claims of minority groups to discussing the complexities and challenges associated with the adoption of a differentiated or multicultural citizenship model. Particular emphasis has been placed on the potentially conflicting needs and interests of the three major players in any multicultural system: the group, the state, and the individual. Specifically, two seemingly opposed points of view have come to dominate this subsequent wave of scholarship.

One can label the first and more traditional position the reuniversalized citizenship option. This position assumes that the state must throw its weight behind the individual in any conflict between the individual and her minority group, even if the state contributes to the alienation of the individual from her group. Proponents of this first model, such as Amy Gutmann, Martha Nussbaum, Brian Barry, Ian Shapiro, Stephen Macedo, and Susan Okin, all uphold the traditional liberal image of persons as unencumbered individuals first and foremost, untroubled by other conflicting identities.⁴⁹

One can term the second position the unavoidable costs argument. It claims that a truly multicultural state has little, if any, justification for intervening in a minority group's affairs, even if that minority community systematically violates certain members' basic citizenship rights. This

⁴⁸ Children, too, may be unfairly burdened by such a move toward differentiated citizenship. See *supra* note 40 and accompanying text. Clearly, however, not all women within a particular minority culture suffer intragroup injuries, even if they are subject to the same family law code. This is partly because women in religious or ethnic communities, as elsewhere, differ along lines, such as social status, wealth, or age.

⁴⁹ See, e.g., MARTHA NUSSBAUM, *SEX AND SOCIAL JUSTICE* (1999); Richard J. Arenson & Ian Shapiro, *Democratic Autonomy and Religious Freedom: A Critique of Wisconsin v. Yoder*, in *POLITICAL ORDER* 365 (Ian Shapiro & Russell Hardin eds., 1996); Barry, *supra* note 8; Amy Gutmann, *The Challenge of Multiculturalism in Political Ethics*, 22 *PHIL. & PUB. AFF.* 171 (1993); Stephen Macedo, *Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism*, 26 *POL. THEORY* 56 (1998). Martha Nussbaum stands out for her exceptionally rich study of the types of challenges facing women in the world today. While I admire her careful analysis of many of these complex problems, I am troubled by the solutions that she finds for them, which ultimately propose a separation of the individual from her community. See, e.g., *id.* at 102–03. Such a position neglects the complexity of the subject, who experiences her identity as both a woman and a group member simultaneously.

For a critique of the liberal perception of the unencumbered self, see MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); RONALD BEINER, *WHAT'S THE MATTER WITH LIBERALISM?* (1992).

argument is presented, for example, in the works of Michael McDonald and Chandran Kukathas.⁵⁰

A. *The Reuniversalized Citizenship Option*

The first and more familiar position is effectively articulated in the recent writings of Susan Okin. Okin argues that the relationship between multiculturalism and feminism amounts to a zero-sum game, in which any strengthening of a minority group's rights implies an accompanying weakening of rights for that minority group's female group members.⁵¹ Okin concludes that, if diverse societies wish to achieve greater gender equality, then they should completely abolish minority group practices that do not adhere to the state's legal norms or require these practices to "transcend" to such an extent that they practically conform to the norms and perceptions of the majority communities.⁵² Okin is particularly concerned about the protection of women's rights in response to the growing tide of opinion in favor of multicultural accommodation policies. She argues particularly vehemently against Kymlicka's outline for a differentiated-rights policy, claiming that "group rights are potentially and in many cases actually antifeminist."⁵³ It may well be that Okin is correct in asserting that a basic tension exists between the traditional practices of many minority groups and the citizenship rights of women who live within those minority groups. However, Okin's argument is problematic for at least two reasons.

First, she claims that "much of most cultures is about controlling women,"⁵⁴ based on sweeping generalizations about the majority of the world's different cultures and religions. Okin views this phenomenon as universal and synchronic. Indeed, she states that "virtually all cultures,

⁵⁰ See Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POL. THEORY 105 (1992) [hereinafter Kukathas, *Cultural Rights?*]; Chandran Kukathas, *Cultural Toleration*, in ETHNICITY AND GROUP RIGHTS 69 (Ian Shapiro & Will Kymlicka eds., 1997) [hereinafter Kukathas, *Cultural Toleration*]; Chandran Kukathas, *Liberalism and Multiculturalism: The Politics of Indifference*, 26 POL. THEORY 686 (1998) [hereinafter Kukathas, *The Politics of Indifference*]; see also Michael McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism*, 4 CAN. J.L. JURIS. 217 (1991). McDonald argues from a communitarian point of view, while Kukathas supports a "cultural *laissez-faire*" libertarian approach. See Kukathas, *Cultural Rights?*, *supra*, at 122-23; McDonald, *supra*, at 236. However, their noninterventionist policy recommendations are closely related, as is their shared concern that proponents of the weak version of multiculturalism will extend protection only to minority groups that are themselves liberal. See Kukathas, *Cultural Rights?*, *supra*, at 122-23; McDonald, *supra*, at 236.

⁵¹ See Susan Moller Okin, *Feminism and Multiculturalism: Some Tensions*, 108 ETHICS 661 (1998) [hereinafter Okin, *Feminism*]; Susan Moller Okin, *Is Multiculturalism Bad for Women?*, BOSTON REV. 25 (Oct./Nov. 1997) [hereinafter Okin, *Bad for Women?*].

⁵² Okin, *Feminism*, *supra* note 51, at 680.

⁵³ Okin, *Bad for Women?*, *supra* note 51, at 26.

⁵⁴ Okin, *Feminism*, *supra* note 51, at 667.

past and present" are bad for women.⁵⁵ Yet, Okin fails to recognize that the power dynamics at play within cultural groups are not static. She overlooks arguments about the malleability of culture and the various political manifestations of identity that may dramatically affect the intra-group status of women.⁵⁶ She also fails to address the fact that many religious and cultural traditions have changed over time due, in part, to women's resistance and agency.⁵⁷

Second, women who remain loyal to minority groups' cultures appear as victims without agency in Okin's account.⁵⁸ Women who participate in minority group traditions and their politicized expressions are characterized as victims of such extreme socialization that they can no longer discern gender inequalities.⁵⁹ As Okin puts it, women living in minority cultures are "socializ[ed] into inferior roles, resulting in [a] lack of self-esteem [and] a sense of entitlement."⁶⁰ By making such blanket statements, Okin glosses over two important questions: why women might support certain aspects of their cultures, even when these cultures systematically impose disproportionate burdens on them and how women might renegotiate their historically disadvantaged position through the infusion of new meanings into their traditional gender roles.⁶¹ Unfortu-

⁵⁵ *Id.* at 678.

⁵⁶ For further discussion, see, for example, Azizah Y. al-Hibri, *Marriage Laws in Muslim Countries: A Comparative Study of Certain Egyptian, Syrian, Moroccan, and Tunisian Marriage Laws*, 4 INT'L REV. COMP. PUB. POL'Y 227 (1992); Nadia Hijab, *Islam, Social Change, and the Reality of Arab Women's Lives*, in ISLAM, GENDER AND SOCIAL CHANGE (Yvonne Yazbeck Haddad & John L. Esposito eds., 1998).

⁵⁷ For example, Okin does not acknowledge the various ways in which women try to improve their intragroup status, critique their subordination, and resist the controls imposed on them, without giving up their cultural identity.

⁵⁸ This equation of women's cultural loyalty with lack of agency fits into the broader zero-sum pattern of Okin's analysis, which assumes that the world can be divided into clear-cut dichotomies: us versus them, good versus bad. Okin discusses "liberals" in comparison to "non-liberals" (mainly referring to communitarian thinkers), feminists versus multiculturalists, and "those who consider themselves politically progressive" versus "those [who] in the present look to the past." Okin, *Feminism*, *supra* note 51, at 663, 664, 678, 665-66. The thread that unites these pairs of friends and foes is tellingly revealed in the title of her article, see Okin, *Bad For Women?*, *supra* note 51.

⁵⁹ See Patricia Jeffery, *Agency, Activism, and Agendas*, in APPROPRIATING GENDER: WOMEN'S ACTIVISM AND POLITICIZED RELIGION IN SOUTH ASIA 222 (Patricia Jeffery & Amrita Basu eds., 1998).

⁶⁰ Okin, *Feminism*, *supra* note 51, at 675. According to this view, we should consider women that remain loyal to their group cultures as mere puppets, trapped in a massive false consciousness regarding their subordinate position within their cultural communities.

⁶¹ Women's attempts to transform their cultures' gender-biased family law norms can often begin through a challenge of traditional interpretations of religious scriptures. Women have appealed to the rich legacies of their cultures to demand greater gender equality, as in the case of various Muslim feminists who reinterpret the *Qur'an* and the *Shari'a*. See, e.g., FATIMA MERNISSI, *WOMEN'S REBELLION AND ISLAMIC MEMORY* (1996); HAIDEH MOGHISSI, *FEMINISM AND ISLAMIC FUNDAMENTALISM: THE LIMITS OF POSTMODERN ANALYSIS* (1999); H  lie-Lucas, *supra* note 36. In the case of Orthodox Judaism, see, for example, SUSANNAH HESCHEL, *ON BEING A JEWISH FEMINIST: A READER* (2d ed. 1995).

nately, Okin seems to ignore such expressions of women's resistance by overstating her case and by portraying millions of women around the world as powerless victims who are unable to comprehend or resist the injuries that they suffer at the hands of their own cultures. Furthermore, Okin fails to recognize that women within nondominant communities may find their cultural membership a source of value and not only a source of oppression.⁶² Okin consequently draws too simple a picture, in which cultural membership and its accommodation is either good or bad for women. She refuses to consider what it most often is: both good and bad, simultaneously.

Thus, while Okin points to the very real potential for sanctioned maltreatment of women in certain legal arenas by some cultural traditions, she provides a very unsatisfactory explanation of why so many women participate in traditions that are to their distinct disadvantage (compared to other group members). Her explanation of this extremely complex question is relegated to a passing remark: "older women often become co-opted into reinforcing gender inequality."⁶³ Even if one were to accept Okin's assertion that multiculturalism is merely bad for women (ignoring for a moment the important possibility that women may find value in the accommodation of their cultural memberships independent of their heightened vulnerability), perhaps the most crucial consideration that Okin ignores is that women stay in minority groups because they have no real alternatives. One could speculate that this is often the case, particularly under legal regimes that both severely restrict women's rights to acquire independent means of livelihood (e.g., through control over property or waged work) or to develop their educational skills and circumscribe women's ability to seek recourse and remedy against group-sanctioned practices that systematically disadvantage them. Under such constrictive conditions, the main problem may not be that older women have been coopted by community group think.⁶⁴ Rather, it seems plausible that the agency of women is at least equally affected by the operating state legal framework as it is by the operating group legal framework.

Okin's views lead her to suggest that women might be "much better off . . . if the culture into which they were born were . . . gradually to become extinct."⁶⁵ This conclusion assumes that the best solution to the complex relations between the group, the state, and the individual lies simply in reiterating the lexical priority of state norms over any compet-

⁶² Other commentators on Okin's work share this concern. See the responses by Bonnie Honnig, Azizah Y. al-Hibri, Sander L. Gilman, Abdullahi An-Na'im, Bhikhu Parekh, Homi K. Bhabha, & Janet E. Halley in Okin, *Bad for Women?*, *supra* note 51.

⁶³ Okin, *Feminism*, *supra* note 51, at 684.

⁶⁴ I agree with Carol Rose's observation that "the property-less or entitlement-less person has no alternative game to play." Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 453 (1992).

⁶⁵ Okin, *Feminism*, *supra* note 51, at 680.

ing sources of authority, such as those arising from group traditions. This approach has already been attempted by various modern states over the past two centuries, and it has met with only partial success. This approach has failed to suppress the quest of some minority group members (both male and female) to preserve their distinct cultural identities, even when the preservation of these nondominant traditions and unique ways of life has entailed the high costs of direct and indirect measures of suppression. In short, the reuniversalized citizenship solution to the paradox of multicultural vulnerability is guided by an either-your-rights-or-your-culture ultimatum, in which women may either enjoy the full spectrum of their state citizenship rights or participate in their minority communities. They cannot have both simultaneously.

The reuniversalized citizenship option, thus, forces at-risk group members into a stand off between two vital aspects of their lived experience. It fails to provide room for women (or any other group members facing systemic risk of internal maltreatment) to maintain their cultural identity if they hope to be able to utilize their state citizenship rights to transform their historically subordinated intragroup status.

B. The Unavoidable Costs Approach

The unavoidable costs approach suggests that cultural tolerance requires a strictly noninterventionist multicultural policy on the part of the state. *Tolerance* here means that minority cultures are best left alone to practice their own traditions, even if those traditions routinely condone the maltreatment of certain classes of group members. The recent work of Chandran Kukathas illustrates the contours of this argument.

Kukathas claims that, because state citizens have the freedom to associate, they should be given the right to preserve their distinct cultures and live by the norms of their cultural associations—even if these norms clearly differ from those that the wider society embraces.⁶⁶ Kukathas, therefore, defends the rights of minority cultures to impose as many internal restrictions as they wish upon their members, as long as individuals within these communities are allowed a right of exit.⁶⁷ According to this view, group members should not enjoy appeals to the state to intervene on their behalf against the cultural community, even if their citizenship rights are systematically violated in intragroup situations. Similarly, no state should grant an outside entity the authority to demand changes in a group's cultural practices because, in Kukathas's view, such a demand would amount to "intolerance and moral dogmatism."⁶⁸

⁶⁶ See Kukathas, *Cultural Rights?*, *supra* note 50, at 116–18.

⁶⁷ See *id.* at 133.

⁶⁸ Kukathas, *Cultural Toleration*, *supra* note 50, at 78.

Kukathas's argument is problematic for at least three reasons. First, he considers dispositive minority group members' right of exit without ensuring that group members will actually be able to exercise this right. Kukathas fails to explain how his imagined liberal state can ensure that its citizens have the means, capacities, and freedoms to abandon their traditional cultures when, according to his approach, such a state should ideally "do nothing."⁶⁹ Minority group members that are subject to strict intragroup controls and sanctioned maltreatment are precisely those members who commonly lack the economic stability, cultural know-how, language skills, connections, and self-confidence needed to exit their minority communities successfully.

Second, because Kukathas promotes a noninterventionist state policy towards minority groups, he must also maintain a rigid conceptual opposition between the inside realm controlled by the minority group and the outside realm controlled by the state. Kukathas overessentializes the distance between minority group cultures and the dominant state culture, thereby denying the inevitable interplay between them. Although Kukathas admits that all cultural communities are predominantly social and historical constructions, his noninterventionist policy prescription may, nevertheless, result in reifying group identity by turning an essentially fluid and mutable cache of customs, beliefs, and practices into a far more fixed and unchanging one.

This, in turn, leads to a third shortcoming. Recall that Kukathas's justification for comprehensive protection of minority group practices from state intervention relies on the assumption of individual freedom of association. Yet the main beneficiaries of this noninterventionist policy are most likely to be cultural communities that acquire the bulk of their members by birth, rather than by explicit adult consent.⁷⁰ The only way for Kukathas to overcome this potential difficulty is by assuming that all adult individuals that are group members have made a conscious choice, and the proof (according to this argument) lies in their continued group membership. To reach this conclusion, however, Kukathas must downplay the fact that even the most adherent minority group members possess multiple affiliations—to their minority groups, genders, religions, families, states, and so on. These different facets of individual identity may overlap and intersect in complex ways. None can be said to have absolute priority over all others at all times. Kukathas ignores this manifold and potentially fluid intersection of affiliations, reducing this richness of personal identity to a single opposition: minority group member versus citizen.

This rigid framework means that, once state citizens enter (or choose to remain within) minority communities, they are regarded solely as

⁶⁹ Kukathas, *The Politics of Indifference*, *supra* note 50, at 687.

⁷⁰ See McDonald, *supra* note 50, at 233.

group members. Group members are further presumed to have relinquished the set of rights and protections granted to them by virtue of their citizenship. If a certain group member does not avail herself of her right of exit, it is because, in Kukathas's view, she has chosen to accept all of her group's practices and policies, including those that violate her basic state-protected rights as a citizen. Kukathas's blindness to individual differences of position within cultural community hierarchies, thus, allows him to condone state inaction with respect to minority groups' affairs, even in the face of group-sanctioned, systemic maltreatment of certain traditionally vulnerable classes of group members.

By analogy, it has long been understood that the state must not intervene in any couple's marital affairs, even in cases of domestic abuse, because a battered wife's failure to exit a marital relationship into which she voluntarily entered can be interpreted as implicit consent to atrocities like rape or spousal battering. This, in fact, was the legal doctrine for much of the nineteenth century in American law, which, like Kukathas, favored a policy of state nonintervention in domestic life.⁷¹ While we have abolished the implied consent doctrine in the context of state law, we allow it to persist in the current multicultural debate.

C. Transcending the Either/Or Framework

The reuniversalized citizenship option and the unavoidable costs argument present opposing solutions to the paradox of multicultural vulnerability. While advocates of the reuniversalized citizenship option argue that it would be better for at-risk group members if their minority cultures became extinct, proponents of the unavoidable costs argument reach the opposite conclusion: that minority groups' traditions should be respected by denying others the right to intervene in their practices.⁷² The immediately apparent opposition between these two approaches belies a more fundamental continuity. Both approaches offer a misguided either/or resolution of the paradox of multicultural vulnerability. Both require that women and other potentially at-risk group members make a choice between their rights as citizens and their group identities. This amounts to a choice of penalties. Either they must accept the violation of their rights as citizens in intragroup situations as the precondition for retaining their group identities, or they must forfeit their group identities as the price of state protection of their basic rights. Neither the reuniversalized citizenship option nor the unavoidable costs approach has satisfactory answers to offer women and other group members that legiti-

⁷¹ For a detailed account, see Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996); see also Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990).

⁷² See Kukathas, *Cultural Rights?*, *supra* note 50, at 117–18.

mately wish both to preserve their cultural identities and to challenge the power relations encoded within their minority groups' traditions.

The main question in the multicultural age is not whether or not group-differentiated rights come into conflict with women's interests. Clearly, they often do.⁷³ The mere recognition of this fact represents only the initial stage of any serious rethinking of the tangled dynamics inhering between the group, the state, and the individual.⁷⁴ A new multicultural paradigm must break away from the either/or opposition that underpins existing solutions to the paradox of multicultural vulnerability. A systematic new means must be developed and adopted in order to determine how much accommodation should be granted to which groups and based on what criteria. Such a new postidentity politics approach should aim to dismantle power hierarchies not only between particular minority cultures and the broader society, but also within the minority cultures themselves.

A key to achieving these goals can be found by reexamining the question of jurisdiction—that is, the methodology for determining which legal forum possesses the authority to resolve a given legal dispute. From an institutional point of view, jurisdiction is essentially an arrangement that allocates power among competing entities in a given polity (e.g., federal governments, localities, churches, and regional and international fora). Since these competing entities share a desire to control and shape certain aspects of individuals' lives, conflicts over jurisdiction are a common feature of the contemporary political and legal reality in liberal democracies. Thus, a consideration of the paradox of multicultural vulnerability in the context of the broader jurisdictional issues that have partly created it will allow policymakers and legislators to develop more effective differentiated citizenship models. Although many jurisdictional conflicts may never be satisfactorily resolved (we need only think of the centuries-old battle between church and state), an emphasis on jurisdictional issues can only enrich the current multicultural debate because of the rich set of historical and institutional concerns that they entail.⁷⁵ At the same time, a jurisdictional focus can lend welcome weight to multicultural concerns through firm institutional grounding, since the debate over differentiated citizenship models has been conducted primarily in abstract philosophical terms.

III. Seeking New Solutions: Redrawing Jurisdictional Boundaries

Whenever a minority group's traditional practices produce intra-group power asymmetries, well-meaning accommodation policies that

⁷³ See Shachar, *Multicultural Accommodation*, *supra* note 4, at 287.

⁷⁴ I try to untangle some of these issues in Shachar, *Citizenship*, *supra* note 4.

⁷⁵ See Shachar, *supra* note 29.

transfer a degree of authority and jurisdiction from the state to the group may, in fact, sanction and perpetuate the maltreatment of disproportionately burdened group members within their own minority community.⁷⁶ This tension is, as we have seen, most clearly manifested in legal arenas that serve to demarcate the group's own membership boundaries, such as education and family law. Despite the best of intentions, existing differentiated citizenship models address only one horn of the multicultural dilemma (reducing intergroup cultural domination), at the expense of unwittingly affirming the other (perpetuating intragroup power inequalities).

While the unavoidable costs argument and the reuniversalized citizenship model both acknowledge that accommodation sometimes threatens group members' citizenship rights, neither offers a model that can facilitate diversity while simultaneously protecting group members disproportionately burdened by state-accommodated discriminatory group traditions. Is there a way to transcend this deadlock? That is, is it possible to disentangle the association between preserving cultural identity and maintaining intragroup power hierarchies by challenging the latter while upholding the former?

It would be naïve, of course, to hope for some formula that could quickly and neatly resolve the paradox of multicultural vulnerability. However, one can start by eliminating those solutions that, in the name of promoting intergroup cultural recognition, end up affirming systemic intragroup power inequalities. More attractive solutions seek to set in motion a transformative accommodation process in which the devolution of authority to the community is designed with an eye to creating a drive for group authorities to reduce subordinating internal restrictions. Such solutions would be more concerned with creating a dynamic incentive structure that could, over time, enable at-risk group members to control both their personal circumstances and communal destinies.

In order to arrive at more successful measures for tackling the problem of sanctioned intragroup vulnerability, one must first recognize that, from the perspective of the historically subordinated group member, the state may seem a particularly untrustworthy partner. Women, in particular, have good reasons to be suspicious of state-drafted efforts to improve their status. It is widely acknowledged that, with the rise of the modern state and the political promise of equal citizenship throughout the eight-

⁷⁶ An example of a group's accommodated internal practice is when transgressive women and children are left with little or no financial support by the adult male members of the community who had previously provided for their basic needs. Similarly, if traditional norms of the community do not allow particular subgroups to acquire skills to support themselves, such disempowered groups may find themselves without adequate resources. In both instances, intragroup gender and socioeconomic inequalities are tacitly aggravated and implicitly legitimized by the state's accommodation of the minority group's cultural traditions.

eenth and nineteenth centuries, married women, nevertheless, continued to be treated as second-class citizens. In common law countries, women were relegated to the domestic sphere and deprived of basic individual rights under the common law doctrine of coverture.⁷⁷ Similarly, women (like men) that maintained their differences while living in minority communities were historically subject to a host of direct and indirect state-sanctioned mechanisms of legal and societal discrimination.⁷⁸ In North America, for example, aboriginal peoples, African Americans, Jews, Catholics, and Jehovah's Witnesses are just some of the nondominant communities that have experienced the heavy hand of the state.⁷⁹ As if one level of oppression were not enough, women have often been subjected to a second level of systematic maltreatment within these different communities. Given this history, to whom should women turn if they seek to improve their gender status without giving up their group identity?

There is no easy answer to this question. However, one can only begin to address it once one acknowledges the manifold, overlapping, and potentially conflicting identities that intersect in group members' lives. This richer understanding of identity must be complemented by a multi-dimensional perception of power that takes into account the possibility that intragroup dynamics are often affected by the relationship between the state and the group. Though multicultural accommodation may indirectly cause intragroup discrimination, one must imagine its potential as a mechanism to improve the situation of disfavored group members without violating the group's *nomos*. Given that a group's established traditions are more fluid than we sometimes acknowledge, it is theoretically possible for the group to reinterpret those traditions that disproportionately burden certain group members. Admittedly, changes are difficult to obtain in any established system. However, by permitting a greater degree of accommodation (i.e., by redefining relationships between group members and the wider society), differentiated citizenship models open up the possibility for changing relationships within these communities as well. Some recent legal developments offer concrete, encouraging instances of such possibilities. The exploration and evaluation of these real

⁷⁷ Coverture gave the husband nearly absolute control over the wife's property, as well as her personal status. Under this doctrine, a married woman lost her independent legal personality and could not acquire property, sign a contract, or create a will. Thus, a married woman's name, home, children, and property all became part of her husband's estate. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (1765).

⁷⁸ For a concise overview of such measures of social control, see Leon Shaskolsky-Sheleff, *'Thou Shalt Not be Too Different': Civil Rights, Social Control and Deviant Religious Practices in the United States*, 23 ISR. Y.B. HUM. RTS. 193 (1993).

⁷⁹ This is not to say that all of these groups have shared the same experience of maltreatment by the state. Racism and colonialism have made the experiences of aboriginal peoples and descendants of African slaves in the United States qualitatively different from those of other ethnic and religious minorities.

life cases not only put multicultural accommodation theories to the test, they also promise to provide the foundation for transcending the either/or paradox of multicultural vulnerability.

*A. Hierarchical Imposition vs. Fragmentation:
Two Traditional Legal Paradigms of Accommodation*

Standard legal responses to the challenge of accommodation can be broadly categorized as falling into two existing paradigms: the model of hierarchical imposition and the model of fragmentation.⁸⁰ The hierarchical imposition of state law paradigm holds that in the face of deep cultural diversity, the best that one can do is to preserve a strict separation between state law and the manifestation of any religious or cultural identity. According to this model, religious and cultural differences are respected and can be freely manifested, as long as they are relegated to the private sphere. In the context of family law, this means that uniform state law is enforced upon all citizens, demanding conformity with dominant norms and failing to respect group-based traditions. Like the theoretical reuniversalized citizenship response, the hierarchical imposition of state law places a greater burden on nondominant cultural minorities.⁸¹

Conversely, fragmentation provides greater leeway for different religious and cultural traditions to maintain their norms and practices. This model delegates jurisdictional authority to the institutional representatives of distinct cultural communities, in order to allow them to regulate independently the marriage and divorce affairs of their members. Recent proposals calling for a fragmentation-style amendment to existing family law arrangements have been advanced in both Canada and England, so that Muslims who wish to follow the *Shari'a* law in lieu of state law are now free to do so.⁸² However, the main problem with this more generous style of legal allowance is that the respect it shows towards group-based differences is often maintained in spite of intragroup rights violations.⁸³

⁸⁰ See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1046–52 (1977).

⁸¹ For further critique of this model, see Ayelet Shachar, *Should Church and State be Joined at the Altar? Women's Rights and the Multicultural Dilemma*, in CITIZENSHIP IN DIVERSE SOCIETIES 199 (Will Kymlicka & Wayne Norman eds., 2000).

⁸² For further discussion and critical evaluation of these proposals, see POULTER, *supra* note 38, at 195–236; Samia Bano, *Muslim and South Asian Women: Customary Law and Citizenship in Britain*, in WOMEN, CITIZENSHIP AND DIFFERENCE 162 (Nira Yuval-Davis & Pnina Werbner eds., 1999); Shahnaz Kahn, *Canadian Muslim Women and Shari'a Law: A Feminist Response to 'Oh! Canada!'*, 6 CAN. J. WOMEN & L. 52 (1993).

⁸³ Variants of the fragmentation model are currently implemented in countries like Israel and India. These countries' experiences can help illustrate some of the potentially negative impacts of such comprehensive accommodation upon women's rights, particularly in the realm of family law. On Israel, see FREEDOM OF RELIGION, *supra* note 29, at 440; Frances Raday, *Israel—The Incorporation of Religious Patriarchy in a Modern State*, 4 INT'L REV. COMP. PUB. POL'Y 209 (1992). On India, see MINISTRY OF INFORMATION AND BROADCAST, GOVERNMENT OF INDIA, INDIA 1999 546–51 (1999); Kirti Singh, *Obstacles to*

Under such circumstances, certain group members are required to bear disproportionate burdens in order to preserve the group's cultural traditions (a result normatively approved by the unavoidable costs theoretical response). Both legal paradigms are problematic for the same reasons: they grant exclusive jurisdictional authority over group members either to the state (the hierarchical imposition model) or to the group (the fragmentation model).

A new and more complex vision of authority in the multicultural state should not grant jurisdiction in such an all-or-nothing fashion. Instead of entrusting the state or the group with full responsibility for improving the status of traditionally subordinated classes of group members, one could adopt an old principle regarding the separation of power:⁸⁴ the more diffusely that power is structured and the more entry points that the legal system offers those who are seeking recourse and remedy, the better.

More specifically, a devolution of jurisdictional authority to the group can truly serve the interests of women only if it is accompanied by an institutional attempt to defy entrenched power hierarchies, like gender hierarchies, within the group itself. A viable new multicultural institutional design would be grounded in the recognition that both the state and minority groups have a legitimate interest in shaping the policies under which their members operate.

The challenge, then, is to establish a legal mechanism in which powers and responsibilities relating to the individual are shared by the group and the state. Such a division of authority would rest on an institutional structure that would ensure that neither the group nor the state could acquire full jurisdiction over matters that affect disproportionately burdened group members. The best institutional design should therefore create a dynamic system of checks and balances between the state and the group, ensuring that power is never fully concentrated in the hands of either of these competing entities.

Today, nearly every field of human activity is already governed by a complex and often overlapping mosaic of regulations deriving from multiple sources of legal authority. Moreover, with the rise of international trade, migration, and intercultural interaction, private international law often raises the same sets of issues that currently dominate the multicult-

Women's Rights in India, in HUMAN RIGHTS OF WOMEN, *supra* note 45, at 375-96.

⁸⁴ For one of the most famous defenses of the separation of powers, see THE FEDERALIST No. 51 (James Madison).

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

tural debate. For example, questions regarding which legal forum can establish legitimate jurisdiction over a given case and which substantive law may be allowed to govern the case in a court once it has established jurisdiction represent routine matters for courts engaged in conflict-of-law resolutions.⁸⁵

Clearly, no single jurisdictional writ can fully encompass the complex web of tensions embedded in the legal terrain of asymmetrical power relationships within the state, between different constituent communities, and among different groups of individuals sharing a given culture. However, there are some existing arrangements that suggest ways in which partial accommodation by the state of a minority group tradition can initiate an ongoing legal dialogue. In the long run, such a system of dialogue can not only alter the often hierarchical relations between the state and the group, it can contribute to improving the status of traditionally vulnerable insiders within the group as well. In other words, the critical question becomes a constituent task: how to divide and share jurisdictional authority in order to reflect the complex reality of multicultural identity better.⁸⁶

B. Concentric Circles

One point of departure for considering multiple affiliations consists in what may be called the concentric circles approach.⁸⁷ According to this view, one may regard oneself as being both a citizen of the state and a member of the group. However, these two affiliations derive from different sources of human attachment and express themselves at different levels of allegiance. Hence, one can remain fully loyal to state law and also express one's group identity at religious ceremonies and cultural activities in the private sphere or at the level of civil society.

Such a concentric overlap appears to accommodate differences by demanding nothing but strict state neutrality, while still permitting significant space for self-expression as a group. However, in cases of conflict, this view would presumably demand that one's innermost circle

⁸⁵ This is not to suggest that such decisions are ever easy or uncontested. Similarly, any jurisdictions strategically allocated between the state and the group are likely to be contested. This is not necessarily a deficiency, however. It could provoke a much needed renegotiation of the limits of authority and the appropriate interrelations between state- and group-defined norms in different social arenas of the multicultural state. On some of the built in complexities of conflict of law resolutions, see, for example, Ed Morgan, *Cyclops Meets Privy Council: The Conflict in the Conflict of Laws*, 33 CAN. Y.B. INT'L L. 3 (1995).

⁸⁶ This is a reality where competing claims of jurisdiction do not meet at the outer limits, like the frontiers of states; instead, such claims tend to meet and overlap within the same person, with regard to social and cultural matters in which both the state and the group share an interest.

⁸⁷ See generally JOSEPH WEILER, *THE CONSTITUTION OF EUROPE: 'DO THE NEW CLOTHES HAVE AN EMPEROR?'* AND OTHER ESSAYS ON EUROPEAN INTEGRATION (1999).

(one's attachment to the state) take precedence over any other loyalty. In other words, the concentric circle approach is simply a dressed-up version of the familiar hierarchical imposition model.

C. Temporal Accommodation

1. The Paradigm

An alternative view invites one to think of jurisdiction as divided along lines following the different stages of life. According to this temporal accommodation approach,⁸⁸ certain life events crucial to the continuation of the group's collective identity (such as the creation of a family or the early education of children) are governed by group tradition as the sole and definitive source of authority. At other, less crucial, moments, individuals must turn to state law. Under this model, much depends on the precise definition of time- and issue-based jurisdictional boundaries between the state and the group. The novelty of this approach lies in its consideration of the likelihood that a group member's sense of affiliation can and will shift across time.

The temporal accommodation approach is not merely a theoretical construct. It has been exercised in the family law arena in both Canada and the United States, specifically in the province of Ontario and the state of New York. In both jurisdictions, state law recognizes as valid those marriages endorsed and solemnized by a religious official.⁸⁹ The Ontario Marriage Act explicitly states that a person "ordained or appointed according to the rites and usages of the religious body to which he or she belongs" can solemnize marriage (so long as he or she is registered with the provincial ministry at the same time).⁹⁰ This multicultural accommodation is temporal in the sense that the state recognizes the authority of different religious communities to regulate entry into families. However, the state reserves for itself the exclusive power to regulate procedures governing withdrawal from families, such as separation or divorce, regardless of the fact that the marriage was initially created in accordance with a different set of solemnities. Unfortunately, this separation of powers between the group and the state leads to serious implementation problems.

First, many religious communities do not recognize the termination of a marriage by the state (i.e., divorce performed by a civil official) as automatically dissolving a marriage initiated by a religious act. Instead, these communities maintain a distinct procedure for separation, divorce,

⁸⁸ For an outline and critical evaluation of this approach in greater detail, see Shachar, *supra* note 29.

⁸⁹ See N. Y. DOM. REL. § 11 (McKinney 1999); Ontario Marriage Act, R.S.O., ch. M.3 (1990) (Ont.).

⁹⁰ See § 20.

or annulment, which is not understood as replicating the procedures performed by the state. In the case of Orthodox Judaism, a state-issued civil divorce cannot terminate a marriage created by *din torah* (Jewish law).⁹¹ Similarly, religious divorce according to Islamic law is distinct from civil divorce, since religious constraints require adherents to follow certain divorce procedures.⁹² While the Catholic church does not recognize a religious divorce, it does, under certain circumstances, grant a declaration of annulment. This represents yet another proceeding, wholly distinct from the termination of marriage according to state law.

Without cooperation between the religious and secular systems of personal law, these differences can lead to a situation in which an individual effectively has two different marital states. A couple may terminate their marriage according to secular law and be considered legally divorced in the eyes of the state, yet remain legally married in the eyes of their group tradition. In certain cases, such lack of cooperation between state law and group tradition can impose a heavier burden on women than on men.

2. Failure to Cooperate—The Agunah Test Case

In the case of Jewish family law, a husband can anchor his wife in a religious marriage relationship—even if the relationship has been formally terminated by state law—by refusing to consent to the religious divorce decree (or *get*). Such an anchored woman (or *agunah*) cannot “acquire herself” or become free to marry another man within the Jewish faith, as long as her husband refuses the *get*.⁹³ While she can remarry under secular or civil law before a judge even without obtaining the *get* (since, in the eyes of state law, the first marriage has been legally terminated), “she must then abandon her convictions and, to some extent, abandon traditional Judaism.”⁹⁴

⁹¹ For a clear summary of Jewish divorce law, see Menachem M. Brayer, *The Role of Jewish Law in Pertaining to the Jewish Family, Jewish Marriage and Divorce*, in *JEWS AND DIVORCE* 1 (Jacob Fried ed., 1968).

⁹² For a concise overview, see Judith Romney Wegner, *The Status of Women in Jewish and Islamic Marriage and Divorce Law*, 5 *HARV. WOMEN'S L.J.* 1, 16–18 (1982).

⁹³ The *agunah* problem in Jewish law is rooted in the Biblical law of divorce: “A man takes a wife and possesses her. She fails to please him because he finds some [matter of] indecency, and he writes her a bill of divorcement, hands it to her, and sends her away from his house.” *Deuteronomy* 24:1 (translated by Rachael Biale). Rachael Biale offers a concise and clear analysis of the interpretive controversies regarding the biblical formation of Jewish divorce law and a description of the various legal constraints imposed by *Halakic* authorities over the course of Jewish history to limit a husband's right in divorce. See RACHAEL BIALE, *WOMEN AND JEWISH LAW: AN EXPLORATION OF WOMEN'S ISSUES IN HALAKHIC SOURCES* 70–101 (1984).

⁹⁴ John Syrtash, *Removing Barriers to Religious Remarriage in Ontario: Rights and Remedies*, 1 *CAN. FAM. L.Q.* 309, 313 (1987). The same set of tensions arise in Muslim communities, where the wife is free to remarry according to family law but is still considered married by *Shari'a* law. See DAVID PEARL & WERNER MENSKEI, *MUSLIM FAMILY LAW*

The *agunah* problem is a serious cause for concern to Orthodox Jewish communities across North America. Orthodox leaders do not encourage the anchoring of wives by estranged husbands, nor the imposition of barriers to their spouses' religious remarriage. Yet no rabbi or *beth din* (Jewish religious court) can force a spouse to grant the *get* because, in Jewish tradition, the act of divorce is a private contractual agreement between the parties. Differently put, divorce according to Jewish tradition is not ordained, nor is it strictly speaking a religious act, although it does take place in a religious context.⁹⁵ If both parties agree to the divorce, the *get* procedure can be effortlessly arranged. However, if one of the parties refuses to consent (which, in the majority of cases, turns out to be the husband), that spouse can use the *get* as a tactic to impede the other party from entering into a new marriage or as a means to extort rights to which the recalcitrant spouse would not normally be entitled under state law. Most problematically from the perspective of Jewish law, some recalcitrant husbands abuse the *get* procedure as a means of blackmailing their spouses.⁹⁶ They offer consent to the religious divorce only on the grounds that the other party agrees to relinquish or modify their property, support, custodial, or access rights.⁹⁷ Under such conditions, leaders of the Jewish Orthodox community find that they have little power effectively to remedy the gaps between state law and group tradition that were ushered in under the temporal accommodation approach.

In 1983, in an attempt to find a solution to this problem, some of the most conservative representatives of the Orthodox Jewish community urged the state of New York to adopt changes in state law that would prevent the abuse of religious law. They sought to create a formal, legal connection between religious and civil divorce proceedings.⁹⁸

D. A Dual System

These negotiations led to the enactment of a new alternative approach to multicultural accommodation: the dual system approach. According to this view, the best way to minimize tensions between different sources of authority in the lived experience of individuals is to establish some level of synchronization between the sources of authority. In the past, the Jewish community sought to regulate its members' behavior through moral persuasion and ostracism. However, these social measures

79 (3ded., 1998).

⁹⁵ For a detailed discussion, see J. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201 (1984).

⁹⁶ See Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312 (1992).

⁹⁷ See Syrtash, *supra* note 94, at 314.

⁹⁸ See Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law?*, 15 PACE L. REV. 703, 706 (1995).

are far less effective if the recalcitrant spouse can acquire divorce in accordance with state law, but still confine his spouse to a religious marriage.⁹⁹ Under such circumstances, the dual system approach at least minimizes the power of a spouse to exploit his partner's religious beliefs and cultural traditions. This is the case because a dual system approach guarantees that an applicant seeking to terminate a marriage by turning to a state forum for acquiring a secular divorce must also guarantee that all religious barriers to remarriage are removed. This provides remedy if the recalcitrant spouse seeks to obtain a civil divorce, but at the same time refuses to follow the religious divorce proceedings. The original dual system route adopted by New York State in 1983 ordered that such an applicant will not be able to obtain the benefits of a civil divorce without filing a sworn affidavit that he or she has already removed any "barriers to remarriage" that the other spouse may face.¹⁰⁰ The rationale for this provision was twofold: first, that it is unfair to permit a spouse to exploit his or her partner's religious beliefs and cultural tradition by interfering with divorce;¹⁰¹ and second, that the state legislature has a legitimate interest in ensuring the removal of all barriers to remarriage following the grant of a secular divorce.¹⁰²

The 1986 Ontario Family Law Act¹⁰³ went one step further than its New York precedent. Whether the recalcitrant spouse is the applicant or the respondent,¹⁰⁴ the Ontario Act permits a civil official of a secular court to set aside a separation agreement between the religious parties "if the court is satisfied that the removal by one spouse of barriers that would prevent the other spouse's remarriage within that spouse's faith

⁹⁹ Related problems are also a source of concern for Muslim minority communities in countries like Canada and England, particularly in cases where the wife has obtained a civil divorce decree but the husband refuses to release her from the Muslim marriage. For further discussion, see PEARL & MENSKI, *supra* note 94, at 59–80. English law does not recognize Muslim marriage or divorce proceedings. However, Islamic law operates as an unofficial system of law. Attempts to coordinate the marital status of individuals according to English and Muslim law has led members of the Muslim communities in the United Kingdom to establish informal dispute resolution forums, as well as to develop formal bodies like the Islamic Shari'a Council. The Council provides expert advice to lawyers and courts on matters of Islamic law and deals with difficult marital disputes, the majority of which concern divorces in which the wife has obtained a civil decree, but the husband refuses to release her from the Muslim marriage. For a concise description of the Council's work, see Zaki Badawi, *Muslim Justice in a Secular State*, in GOD'S LAW VERSUS STATE LAW: THE CONSTRUCTION OF AN ISLAMIC IDENTITY IN WESTERN EUROPE 73 (Michael King ed., 1995).

¹⁰⁰ See 1983 N.Y. Laws 1904 (codified as amended at N.Y. DOM. REL. § 253 (McKinney 1999)).

¹⁰¹ John T. Syrtash, *Removing Barriers to Religious Remarriage in Ontario: Rights and Remedies*, 1 CAN. FAM. L.Q. 309, 315–16 (1987).

¹⁰² See IRVING A. BREITOWITZ, *BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY* 181 n.532 (1993).

¹⁰³ See Family Law Act, R.S.O., ch.F-3 (1990) (Ont.).

¹⁰⁴ See §§ 2(6)(a)- 2(6)(b).

was a consideration in the making of the agreement or settlement.”¹⁰⁵ Simply put, this provision is intended to guard against excessive concessions that might encroach on the vulnerable party’s state-guaranteed economic and custodial rights simply because the other party was attempting to abuse the religious tradition that both share. Indeed, the original New York *get* law was revised in 1992 in light of the Ontario Family Law Act.¹⁰⁶

Thus, instead of forcing the Jewish *agunah* woman into a zero sum choice between the tenets of her faith (as they pertain to remarriage) and the secular definition of divorce, the dual system closes the gaps between civil and religious law. It establishes that once a party has filed for a civil divorce, the other party must comply, by removing all religious barriers to remarriage. To implement this new legal arrangement, civil authorities have been given discretionary power to refuse to make a secular divorce decree absolute or to adjourn property proceedings until satisfied that all religious or customary impediments to remarriage have been removed.

While the dual system seems well suited to solving most individual instances of marital oppression, it does not create any incentive for a religious or cultural community to reexamine its internal (discriminatory) norms. Instead, it creates a legal route for utilizing a secular authority to limit the exploitative power used by religious spouses to gain excessive economic and custodial rights in exchange for a religious divorce decree. Formally, this does not compromise the religious jurisdiction over divorce, because the state has no direct power over defining one’s marital status according to one’s religious or cultural tradition. However, the dual system arrangement can be viewed as indirect usage of the machinery of the state, because of the way that it compels a recalcitrant spouse—within whose hands the community has vested the power to consent to the religious divorce decree—to do so.¹⁰⁷

¹⁰⁵ See §§ 56(5)–56(7).

¹⁰⁶ See N.Y. DOM. REL. §§ 253 B(5)(h) & (6)(d) (McKinney 1999)). In 1996, England followed the American and Canadian lead by enacting remedial legislation to address the *agunah* problem. See The Family Law Act, 1996, ch.27, § 9(3) (Eng.) (providing that either the applicant or the respondent in a divorce proceeding can apply for a direction that there “be produced to the court a declaration by both parties that they have taken such steps as are required to dissolve the marriage in accordance with [Jewish] usages”). For a comparative study of legal solutions to the *agunah* problem, see THE SOUTH AFRICAN LAW COMMISSION, REPORT, PROJECT 76, JEWISH DIVORCES (1994).

¹⁰⁷ The main constitutional problem with the dual system is whether it can be characterized as a permissible accommodation of free exercise of religion or an impermissible establishment of religion. To date, no successful constitutional challenge has been launched against the main features of the dual system legislation in New York or Ontario. See *Chambers v. Chambers*, 471 N.Y.S.2d 958 (Sup. Ct. 1983); *Friedenberg v. Friedenberg*, 523 N.Y.S.2d 578 (App. Div. 1988).

Currently, the dual system approach is encoded in legislation in New York¹⁰⁸ and in Ontario.¹⁰⁹ Both jurisdictions now require that, in order fully to exit a marriage initiated through religious solemnization, a couple must go through two different processes of divorce: those mandated by state law and those mandated by religious group traditions. This approach is important in that it establishes mutual recognition between state law and group traditions. However, it does so at the cost of institutionalizing a highly cumbersome marriage and divorce procedure and by indirectly subordinating religious tradition to state law.

E. Joint Governance

An alternative way of responding to the difficulties engrained in the present dual system resolution can be found in a model that I call joint governance.¹¹⁰ Like the three approaches already outlined (concentric circles, temporal accommodation, and the dual system), joint governance aims to accommodate individuals that see themselves as belonging to more than one membership community and that bear allegiance to more than one source of authority.

¹⁰⁸ See N.Y. DOM. REL. LAW § 253 (McKinney 1999). Following the revisiting of the original *get* law in 1992, New York now requires that a marriage bond cannot be legally terminated without securing a coordinated divorce under civil and religious law. Furthermore, in determining property division and maintenance, the court may consider a husband's refusal to remove "barriers to remarriage" by conditioning or limiting his entitlements accordingly. See N.Y. DOM. REL. § 236B (McKinney 1999); see also BREITOWITZ, *supra* note 102, at 209–23.

¹⁰⁹ See The Family Law Act, R.S.O., ch.F-3, §§ 2(4)–2(7); 56(5)–56 (7) (1990) (Ont.). The Canadian legislation initially was enacted as an amendment to the Ontario Act, which was later incorporated into the Canada Divorce Act. The Federal Government and the province of Ontario enacted the Family Law Act, which provides that: "the court may, on application, set aside all or part of a separation agreement or settlement, if the court is satisfied that the removal by one spouse of barriers that would prevent the other spouse's remarriage within that spouse's faith was a consideration in the making of the agreement or settlement." See Canada Divorce Act, R.S.C., ch.3, § 21(1) (Supp.II 1985) (Can.); Family Law Act, R.S.O., ch. F-3 (1990) (Ont.). This legislation aims to eliminate blackmail, in terms of parental or economic concessions made for the sake of receiving the secular divorce or the religious *get* decree. For further analysis, see Syrtash, *supra* note 101, at 328. The Family Law Act obliges a recalcitrant spouse to remove all barriers within his or her control that will prevent the other spouse's remarriage within the faith, via *affidavit*. The affidavit is a statement, verified by oath or statutory declaration, indicating that the author of the statement has removed all barriers that would prevent the other spouse's remarriage while the other party has not done so. See §§ (2)(4)–(2)(5). This legal route grants that, once an affidavit is served to a state court, the other party immediately must affirm and serve upon his or her spouse an affidavit stating that he or she has completed the required procedures in the religious court. Otherwise, if the party is an applicant, the proceedings may be dismissed; if he or she is the respondent, the defense may be struck out. See § (2)(6). In other words, Canadian law holds that neither party to a civil divorce proceeding may obtain any relief from the court unless he or she complies fully with the *get* procedures. The 1992 New York *get* law incorporated many of the features of the 1986 Canadian *get* law. See N.Y. DOM. REL. § 236B(5)(h)–(6)(d) (McKinney 1999). For commentary, see BREITOWITZ, *supra* note 102, at 209–23.

¹¹⁰ See Shachar, *Multicultural Accommodation*, *supra* note 4, at 299–304.

Joint governance is more radical, however, in that it seeks to establish an ongoing interaction between different sources of authority as a means of eventually improving the intragroup situation of traditionally vulnerable group members. This can be achieved by establishing a multicultural mechanism that allows mutual input from different sources of authority, such as state law and group tradition, towards the governing of different social arenas. More specifically, joint governance permits each entity to control certain (but never all) aspects of situations where accommodation produces intragroup discrimination. In this way, joint governance takes seriously the principle of jurisdictional autonomy. Yet, it also carefully delineates the boundaries of that authority by instituting a no monopoly rule. This rule establishes that neither the state nor the group can govern an arena of social life that matters greatly to both (such as education and family law) without the other entity's cooperation.¹¹¹

Accepting that group members can be attached to more than one membership community and subject to more than one legal authority, joint governance prohibits the concentration of power in any one center of authority. Like other separation of power models, joint governance intentionally eschews the deeply embedded idea of exclusive or "absolutist" understandings of state authority¹¹² in order to enable individuals to act as group members and as citizens simultaneously.

Instead, it envisions a new way of allocating jurisdiction. It begins by offering an insight often overlooked by other accounts of differentiated citizenship: that contested social arenas (such as education, family law, immigration law, criminal justice, resource development, and environmental protection) are internally divisible into submatters—multiple, separable, yet complementary, legal concerns. Existing legal and normative models rarely recognize that most contested social arenas in the multicultural state encompass multiple contested and diverse submatters. Rather, they operate on the misguided assumption that each social arena is internally indivisible and, thus, should be under the full and exclusive jurisdiction of one authority, be it either the state or the group. On this account, there is always a winner and a loser in the jurisdictional contest.

Joint governance recognizes the divisibility of social arenas and utilizes it to allow for the allocation of jurisdictional authority along submatter lines. The salient feature of submatters is that only when they

¹¹¹ Not all social arenas fit this dual qualification requirement. However, the social arenas most significant for our discussion, such as family law, education, resource development, immigration, or criminal justice—arenas in which conflicts have already arisen in practice—are precisely those in which both the state and the group have a stake in the legal norms and procedures that govern individuals' behavior. For further analysis, see Shachar, *supra* note 29.

¹¹² Thomas Hobbes is probably the political theorist most closely associated with deeply seated modern assumptions about the exclusivity of state legal authority. See THOMAS HOBBS, *LEVIATHAN* 148–49 (Richard Tuck ed., Cambridge University Press 1996) (1651).

are addressed together can any legal dispute in a given social arena be resolved. If only one submatter comes into play, no complete decision can be made. A useful analogy here is to think of different submatters in a single social arena as pieces of a larger jigsaw puzzle. Each piece of the puzzle, or each submatter, has limited value when standing on its own but, when these pieces are properly aligned together, they offer a full and coherent picture of greater value than the sum of each of its parts. The fact that one can divide power in this way within a single social arena opens up a new space and makes possible a more creative, nuanced, and context-sensitive allocation of jurisdiction.

For example, family law is one social arena but, because the subject of its concern—the family—is a complex entity, it contains many different legal submatters. In the context of marriage, there are at least two submatters involved: a demarcating function and a distributive function. The demarcating function regulates, among other things, the change of one's marital status (from single to married or from married to divorced); the distributive function covers, among other things, the definition of rights and obligations that married spouses are bound to honor and a determination (in the event of divorce) of the economic and custodial consequences of this change in marital status. These demarcating and distributive functions parallel the two legal aspects of marriage and divorce proceedings: status and property relations. While often intermingled in practice, status and property are two legally distinct subject matters.¹¹³

Within the family law example, the no monopoly rule would require that certain aspects of a given legal dispute (such as divorce proceedings) would be subject to the jurisdiction of the group, while other complementary powers of adjudication would be vested in the state. Given the centrality of marriage and divorce to the preservation of a group's membership boundaries (based on distinct personal status laws and lineage rules), one could predict that at least some nondominant communities would elect to control the demarcating aspect of family law. The state would then be allotted the complementary authority of shaping the distributive aspects of family law, which affect various third parties (including children, tax payers, employers, insurance companies, etc.), as well as social services administered by the welfare state bureaucracy.

Similarly, the no monopoly rule would enable the state to share authority with different religious or other minority communities in other social arenas, such as education, criminal justice, immigration law, resource development, and environmental protection.¹¹⁴ In each social arena, joint governance would require a context-specific analysis of the

¹¹³ For further discussion, see Allan D. Vestal & David L. Foster, *Implied Limitation on the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1 (1956).

¹¹⁴ For an analysis of how joint governance might operate in these different social arenas, see Shachar, *supra* note 29.

different submatters involved, in accordance with the different issues raised. Agreements on how to divide the jurisdictional pie between different normative systems could be reached along the lines of joint governance, so long as they follow the no monopoly rule and allow vulnerable insiders meaningful access to effective legal remedies that could, over time, improve their intragroup positioning.¹¹⁵

Under a joint governance system, the power imbalance between spouses in an *agunah* situation could be significantly modified by ensuring that the religiously observant woman would have recourse to certain economic and custodial rights that would be administered under the jurisdiction of the state in its distributive range of authority. As Robert Mnookin and Lewis Kornhauser have shown, divorcing couples often “bargain in the shadow of the law” and are consequently affected by the rules and norms set by the legal system, or systems, that govern them.¹¹⁶ These rules shape the parties’ assessments of their options and enable them to work out the possible outcomes of demarcation and distribution questions concerning marital property, maintenance, child support, etc., even before they involve the group or the state in their dispute.¹¹⁷

Here is an example of how the shared distribution of authority could affect this bargaining process. Assume that a divorcing couple has entered marriage through a religious solemnization. This couple has no children and the only issue that they have to resolve is how to divide the \$10,000 that they accumulated during the marriage. Suppose that it were clear that the state distributive rules would award one-half of the sum to each spouse. This property allocation rule would kick in as soon as proof was established that the couple has been separated for a minimum period (perhaps one year), even if the parties are still considered married by the group’s demarcation rules. One might expect that the parties would normally settle for \$5,000 each and save themselves the time and cost of litigation. The husband could not get more than \$5,000 regardless. However, without the separation of demarcation and distribution submatters, this divorce could degenerate into an unnecessary legal battle where group-specific gender-biased status demarcation rules are used to achieve material gain (as can currently happen under both the hierarchical imposition and the fragmentation model). In the process, the woman may be made to pay emotionally and financially for the accommodation of her group’s traditions.

¹¹⁵ My analysis focuses on designing legal remedies for resolving the multiculturalism paradox. These legal remedies are compatible with, and, in certain circumstances, are explicitly designed to create, complementary mechanisms and strategies for internal change (for example, in socioeconomic, educational, and cultural fields).

¹¹⁶ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 959 (1979).

¹¹⁷ See *id.* at 975–76 (providing a similar divorce example to the one discussed here).

A system that allowed the *agunah* woman to pursue basic capacities and freedoms in the wake of a separation would dissolve some of her husband's exclusive power. The underlying connection between the state- and group-controlled submatters that jointly affect individuals subject to both sources of authority could, thus, help women to acquire greater leverage in their relationship and their communities.

What is more, this approach could also better address *nomoi* groups' interests by preventing the conditions that may lead to alienation and exit. The joint governance system critically challenges discriminatory and subordinating internal norms and practices by delegating to the group's authorities the power to decide whether to risk alienation and exit by upholding those traditions.

The divorce example is significant and can provide real solutions in the majority of circumstances, but it still leaves unresolved those cases where the more powerful party simply abuses a discriminatory demarcating group tradition to cause pain and disadvantage to the other party. Some partners who deny their spouses the religious divorce decree are not motivated by a cost/benefit analysis. Rather, they may act out of spite or vengeance. In such circumstances, even if there is no material or custodial motivation to refuse the divorce, a recalcitrant husband may still refuse to agree to the dissolution of his marriage. This brings us back to the pre-*get*-law era of confusion in marital status: although the parties are *de facto* separated, they are *de jure* considered married.

The joint governance model could offer a practical response to this impasse by carefully drafting specific opt-out provisions, thus allowing individuals an alternative to the group's submatter authority—even if they voluntarily subjected themselves to that jurisdiction in the first place. This last resort safeguard option should not be used lightly. It is justified only if the group has failed to provide internal remedies to the plight of the individual (in this case, the woman trapped in the marriage relationship because of discriminatory demarcating practices sanctioned by her own community). In such a case, she has a fair claim against that community. However, forcing each individual woman to fight her case in court amounts to an expensive, time-consuming, and cumbersome legal procedure, which can lead to social ostracism of that individual. The consequences of legal action can be so burdensome that a woman may ultimately revoke her claim, and such recourse would most likely fail to lead to internal revision of the discriminatory practice itself. The better solution is to ensure that group insiders have a choice in acquiring a predefined remedy through the complementary power holder (in this case, the state) after the original jurisdiction (the community) has failed to offer a meaningful remedy.¹¹⁸

¹¹⁸ This does not mean, necessarily, that the life circumstances of traditionally vulnerable group members will be dramatically or instantaneously altered. It does provide for

If the group failed to provide an answer in this marital context—in other words, if it could not come up with internal mechanisms to apply pressure to the recalcitrant husband to free his wife from a dead marriage—then the trapped insider would be given the option of appealing to the state's jurisdiction instead, after a specified separation period. At this point, the state would have the authority to terminate the civil aspect of marriage (even if the marriage was originally created by religious solemnization).¹¹⁹ This type of reversal of authority would offer a structural remedy, by carving out (upon consultation with the group's representatives) the exact terms for such last resort opt-out options in each social arena. In short, the idea is to transfer the costs of accommodation to the level of the collective, instead of disproportionately imposing them on certain individuals within the group, whether in family law, education, or any other related social arena where the group and the state vie for control in the multicultural age.

By including the group in the state process of defining key issues, the joint governance approach would create a strong incentive for authorized group leaders to seek solutions for overcoming entrenched power inequalities encoded in the group's traditions. However, it would entrust each community with the capacity to articulate such solutions. In the case of family law, this tactic could encourage an accommodated community to review and revitalize its tradition by seeking internal mechanisms for ensuring that a proper change in the parties' marital status is implemented because, otherwise, the collective would stand to lose its power to demarcate who is inside and who is outside of its membership boundaries. Unlike the temporal accommodation and the dual system approaches, the pressure here would be on the group to transform its laws from within, since it would have authority over the formal definition of status issues.

Once in place, joint governance could help to free minority cultures from their ongoing struggle with the ever encroaching bureaucratization of the modern state, because certain crucial aspects of their *nomos* would

such a potential outcome. The basic logic operating here is similar to that demonstrated by Amartya Sen when he observed that the mere participation of women in the workforce outside of the home created an improvement in their positioning within the family, even if the household still remained a traditional (male-headed) household. Small steps still transform the power balance in the home when women are not fully dependent on others for support. See Amartya K. Sen, *Gender and Cooperative Conflicts*, in *PERSISTENT INEQUALITIES: WOMEN AND WORLD DEVELOPMENT* 123, 139 (Irene Tinker ed., 1999).

¹¹⁹ This means that she can remarry according to state law. However, the motivation for this reversal of authority is not to encourage this partial solution. Rather, the thought is that the creation of such narrow, last resort, opt-out options will signal to group leaders the possibility of losing authority over a submatter that is crucial for preserving the *nomos*, as a result of these leaders' failure to find answers within the tradition to the plight of a specific category of group member. These guardians of the *nomos* will then have to consider whether it is better to provide meaningful answers within the group or to lose jurisdiction over these individuals in designated submatters.

be granted publicly enforceable authority. Yet, in providing this guarantee to the group, joint governance also would impose the no monopoly rule and would make possible a gradual process of in-group transformation. The purpose of such an arrangement would not be for the state to impose its laws on the group externally. Rather, the objective here would be to break the vicious cycle of reactive culturalism whereby the group adopts an inflexible interpretation of its traditions precisely because of the perceived threat from the modern state.¹²⁰ Joint governance, thus, would create conditions of sufficient security so that the group could revive its own *nomos* and make it, once again, a vital, dynamic tradition.¹²¹ Such transformation would be anything but easy but, at least, it now seems finally possible.

The innovation in such an approach is that it does not expect change necessarily to occur because of the good will of a given minority group's leaders. Rather, joint governance draws upon a real politic consideration that it may be better to accommodate women (or any other category of group members that is structurally put at risk by the group's sanctioned traditions) in order to ensure that they follow the group's self-defined traditions, rather than to run the risk that significant numbers of insiders will emphasize the citizenship/identity dichotomy alone and break their loyalty to the group altogether.¹²² Group leaders, perhaps more than any-

¹²⁰ For greater detail on the reactive culturalism response, see Shachar, *supra* note 29.

¹²¹ Susannah Heschel makes a similar point in a powerful way. Referring to the failure of Orthodox Judaism today to resolve the problem of the *agunah*, she says: "A living legal system never has the luxury to ignore a serious conflict; it must respond in one way or another. Only when a legal system dies can problems be ignored or passed over." SUSANNAH HESCHEL, *ON BEING A JEWISH FEMINIST* xlii (1983).

¹²² While some groups may, in the short run, try to force compliance with tradition by further enhancing the subjection of traditionally vulnerable group members, at the end of the day, no cultural community that wishes to preserve its viability while operating within the boundaries of a wider liberal society can maintain authority over its members based on any combination of inherent loyalty, intimidation, and internal group pressure. The pre-*get* law reality can serve as an illustration of this point. Once the group leaders acknowledged that growing numbers of Orthodox women were painfully leaving the group after numerous attempts to secure their religious divorce decrees had failed, it was the community (one of the most conservative Jewish communities in New York) that turned to the state in an attempt to establish some degree of coordination with secular norms. See Zornberg, *supra* note 98, at 706 (discussing the lobbying efforts spearheaded by Agudath Israel to persuade state legislatures in New York that the plight of the *agunah* merited attention). The forced exit option is a lose/lose solution: not only does it impose unfair burdens on the individual (who is effectively leaving everything behind in order to escape an unhappy marriage), but it also clearly contradicts the interests of the collective. On the relationship between women's interests and the community's interests, see Oonagh Reitman, *Women Unchained? English Divorce Law and the Dissolution of Jewish Marriages*, paper presented at the Political Science Department, University of Toronto (1997) (on file with author). The community loses out, at the very least, in terms of its sheer number of participants and in terms of its moral strength. In the long run, however, it may also cripple its capacity for future regeneration, since a child born from any subsequent union that the *agunah* might enter into is not eligible for membership and might not find interest in such group membership.

one else, have much to lose if their members (or constituents) turn in growing numbers to state law in lieu of the group tradition.

This type of pressure for change can be created only when group members' continued loyalty can no longer be taken for granted. It must instead be earned by deed. Joint governance would not promote the exit of vulnerable insiders from their home community as a preferred policy solution. Rather, it attempts to take the very real concerns that responsible group leaders have in practice—those relating to issues of regeneration and the continued existence of their group's unique world view in the foreseeable future—and turn them into an incentive for protecting the vulnerable within.

This, one might argue, is indirect intervention in the group's private affairs, which is unjustified in a multicultural state. However, the group and the state are constantly interacting, and multicultural accommodations inevitably exert an impact both on the political expressions of a culture and the power relations that it propagates. Thus, rather than tacitly condoning in-group subordination in the name of respecting cultural differences, joint governance loads the dice towards redistributing the internal costs of preserving the group's collective identity. The object is not to strip communities of their *nomos*. If that were the goal, there would be no reason to invest so much in a system that institutionally guarantees that the key identity-preserving aspects of different social arenas would be governed by the group. Instead, the point of this strategy is to limit exploitation and sanctioned subordination by utilizing the principles of submitters and the no monopoly rule in order to enhance the leverage of those most vulnerable to the multiculturalism paradox. This may, in turn, stimulate *nomoi* communities to earn their allegiances, rather than merely inheriting them, because they would recognize a need to rework their traditions internally, along more accommodating lines.

In sum, the best way to create a lasting transformation in the position of vulnerable group members is to create incentives for the community, in order to ensure that individuals who see themselves as belonging to more than one membership community will find value in upholding and following the group's distinct cultural traditions.

Conclusion

The joint governance system for dividing and sharing authority promises to establish more than one set of standards that would jointly govern or coprevail in a contested social arena. It hopes to replace the dominant all-or-nothing division of authority with a more fluid and dynamic conception of power and jurisdiction. Joint governance offers minority communities a unique means of controlling crucial aspects of their identities, while opening possibilities for legal recourse to traditionally vulnerable group members at the same time.

The move towards differentiated citizenship, therefore, has a radical element in it: it would require that certain citizens of the state be simultaneously bound by more than one set of norms. Furthermore, by stipulating that, in certain social arenas, the group would have authority over submatters that it views as crucial for cultural survival, joint governance would restrict the power of the state. However, it also would impose limits on the accommodated group by denying it a jurisdictional monopoly over its members.

Not all minority cultures would be happy with this basic principle. It would not allow a *nomoi* group to insulate its members fully from the effects of state law. This would be especially unpopular with groups that seek absolute control and exclusive regulation over all aspects of their members' lives. Some might argue that in order to preserve groups, multicultural accommodation must defer to their practices even in the event of systemic internal injury. However, even though the state may try to disassociate itself from responsibility for such internal restrictions imposed by the group, the disproportionate injury that some members suffer at the hands of their *nomos* is inextricably related to the external measures of accommodation taken by the state. In other words, the state always affects minority cultures, even if this effect is limited to turning a blind eye to in-group violations of members' rights as citizens.¹²³

"Power," as Lord Acton concisely put it, "tends to corrupt, and absolute power corrupts absolutely."¹²⁴ Rethinking the tangled relationship between the state and its nondominant cultural minorities should lead us to resist allocating absolutist notions of jurisdictional authority to either of them. Greater promise lies in envisioning new ways of dividing and sharing jurisdictional authority between them. All four approaches to accommodating multiple affiliations—concentric circles, temporal accommodation, the dual system, and joint governance—attempt to imagine structures of authority that require the state and the group to coordinate their exercise of powers. Each approach responds to the challenge of finding new ways of sorting out and sharing the pieces of jurisdictional authority in increasingly diverse societies. Of these four jurisdictional models, the joint governance approach is the most promising. This accommodation design is an outcome of the contemporary rethinking of the relationship between rights and culture, citizenship and group membership. This rethinking has served to challenge entrenched power relations between the state and *nomoi* groups but, as I hope to have shown, it must also challenge entrenched power relations within them.

¹²³ Given this analysis, the fundamental problem ceases to be whether the state should meddle in the private affairs of identity groups. It inevitably will. Rather, the central question becomes how the state should protect the interests of individuals put at risk by their *nomos*, while still allowing their group maximum jurisdictional autonomy?

¹²⁴ Letter to Mandell Creighton, 5 April 1887, 19 THE INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCE 1 (1991).

By creating an ongoing dialogue between state- and group-based norms, where each entity is required to contribute its distinct legal input, a new horizontal separation of powers will hopefully become established. This will not be an easy transformation. It will require a constant breaking away from deep-seated modern assumptions about the exclusivity of jurisdictional authority. One must reject the hands-off message broadcast by the unavoidable costs approach to multiculturalism, because this often simply cements the group's license to perpetuate preexisting power hierarchies at the more vulnerable group members' expense. At the same time, one must reject the hierarchical enforcement of state law, as it is replayed in the reuniversalized citizenship response. In rejecting these simple either/or solutions to the paradox of multicultural vulnerability, we are opening the door to newer, more complex, and more attractive state- and group-based possibilities for dialogue. Any serious attempt to resolve the multiculturalism paradox must attempt to address not only the recognition of cultural differences, but also the sober acknowledgement of their potentially injurious intragroup effects.

I do not want to suggest that legal formulae or institutional designs can single handedly resolve all of the immensely complex philosophical problems and tensions that arise out of encounters between different cultural communities in shared political spaces. This fundamental lack of resolution seems inevitable in contemporary societies, whose members may share equal citizenship, but often adhere to very different normative systems and codes of behavior at the same time.¹²⁵ However, this lack of a single solution does not imply that there is nothing to be done. Instead of resorting to so many established, tired, and misguided approaches towards a just and workable multiculturalism, one would do better to follow a road less traveled. That may make all of the difference.

¹²⁵ On this final point, see Bhikhu Parekh, *Balancing Unity and Diversity in Multicultural Societies*, in LIBERALISM AND ITS PRACTICE 106, 123-24 (Dan Avnon & Avner de-Shalit eds., 1999).