Multicultural Jurisdictions

Cultural Differences and Women's Rights

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1 Introduction

From Canada to India, from Israel to the United States, the problem of multicultural accommodation is high on the global political agenda. In recognition of the importance of cultural diversity, various countries have begun to revisit their public policies, trying to find a more fitting system of accommodation for their varied communities. The hope is that since "we are all multiculturalists now,"[1] we can explore ways in which state law can be rendered sufficiently pluralistic, allowing different communities to be governed by their own institutions and traditions. This trend toward group-based accommodation raises fundamental questions about the distribution of rights and authority in the multicultural state. These questions in turn focus our attention on the legal-institutional mechanisms of multiculturalism, and how they might affect not only the distribution of rights and authority, but also the distribution of social costs.

Both advocates and critics of multiculturalism have given much attention to the potential for accommodation to erode the social unity of already diverse polities. They are quite reasonably concerned that such societies will lose whatever "social glue" holds their citizens together. Yet relatively little thought is given to the effects that the distribution of differentiated rights can have upon the accommodated group members themselves. One of the aims of this book is to right this omission. Yet my inquiry does not stop there. If the state is to take identity groups seriously, we must re-examine yet another fundamental question of political life: that of institutional design and the division of authority. The basic dilemma here is how to divide authority in the multicultural state in a fair and just manner, in order to strike a balance between the accommodation of minority group traditions, on the one hand, and the protection of individuals' citizenship rights, on the other. The dispute over the nature of this balance has important philosophical dimensions. However, its political and legal-institutional dimensions are even more pressing given the realities outside our own study doors. An urgent need to

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[1] See Glazer 1997.

resolve the problematics of striking such a balance has intensified in recent years, since an increasing number of minority cultures have demanded ever wider autonomy over areas previously regulated by the state.[2]

Many political and legal theorists have come to argue with enthusiasm in favor of accommodating distinctive identity groups by granting them special rights and exemptions, or by offering them some measure of autonomy in matters crucial to their self-definition.[3] Such accommodations, or "differentiated citizenship rights," in Will Kymlicka's terminology,[4] generally aim to ensure that minority groups have an option to maintain what Robert Cover calls their *nomos*: the normative universe in which law and cultural narrative are inseparably related.[5] Multicultural accommodation presents a problem, however, when pro-identity group policies aimed at leveling the playing field between minority communities and the wider society unwittingly allow systematic maltreatment of individuals within the accommodated group – an impact which in certain cases is so severe that it can nullify these individuals' citizenship rights.

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[2] The upsurge in interest in multiculturalism is closely tied to the fact that many countries in the world today are already confronted with increased demands for accommodation in matters as different as linguistic and education policy, family law and immigration regulation, national symbols, and public holidays. The rise in demands for group-based accommodation is itself connected to changes in the way modern democracies operate, such as the adoption of race-blind immigration policies, universal suffrage (regardless of gender or race), the rise in the politics of identity, and the moral and legal recognition that equality in practice, or in society, sometimes requires differentiated treatment under the law.

[3] These scholars focus on assessing the justice claims of minority groups, and argue in favor of respecting group-based cultural differences under a new multicultural (or "differentiated") citizenship regime. Among those who have advanced this argument, Will Kymlicka has probably been the most influential (see Kymlicka 1995). While the literature on multiculturalism is too vast to cite comprehensively, the following texts are helpful as an introduction to the field: Bauböck 1999; Carens 2000; Galston 1995; Kymlicka and Norman 2000; Levy 1997; Margalit and Halbertal 1994; Minow 1997; Parekh 2000; Taylor 1991; Taylor 1994; Tully 1995b; Van Dyke 1977; Young 1989; Young 1990.

[4] Kymlicka 1995, p. 26.

[5] Many associate Robert Cover with the use of the Greek term *nomos* to refer to minority communities that generate sets of group-sanctioned norms of behavior that differ from those encoded in state law. See Cover 1983. I use the terms "*nomoi* communities" or "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 a law for the community." See Greene 1996, p. 4. 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 worldview 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 or oppression by the state, 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.

Under such conditions, well-meaning accommodation by the state may leave members of minority groups vulnerable to severe injustice within the group, and may, in effect, work to reinforce some of the most hierarchical elements of a culture. I call this phenomenon the *paradox of multicultural vulnerability*. By this term I mean to call attention to the ironic fact that individuals inside the group can be injured by the very reforms that are designed to promote their status as group members in the accommodating, multicultural state.

This tension between accommodating differences and protecting the rights and interests of vulnerable group members within communities has been brought to the forefront of various countries' public policies, thanks to the recent global socio-political movement toward a multicultural or "differentiated" concept of citizenship. According to this new model, the basic building blocks of a just society continue to rely on the protection of basic citizenship rights and the nourishment of individuals' capacities. However, in certain cases justice also requires the recognition of traditions and unique ways of life for members of non-dominant cultural minorities.[6] 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 family law and education. While these multicultural schemes ensure the decentralization of state power and provide for potentially greater diversity in the public sphere, they do not necessarily promote the interests of *all* group members. Indeed, the same policy that seems attractive when evaluated from an *inter-group* perspective can systematically work to the disadvantage of certain group members from an *intra-group* perspective.

Multiculturalism, then, may create serious moral and legal hazards which must be addressed by defenders of differentiated citizenship. Unfortunately, proponents of state accommodation have left unresolved many of the complex questions associated with this new model. For example, if accommodation involves certain identity groups being vested with legal authority over their members, how do we protect group members from routine violations of their citizenship rights, when those violations arise from the traditional practices of the group which we have already sanctioned through accommodation? What entity has the responsibility for intervening when respect for groups becomes a pretext for the systematic maltreatment of certain group members? And how precisely are we to balance the twin goals of accommodating differences and respecting rights? These are the questions I mean to explore in this book.

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[6] See, for example, Kymlicka 1995; Taylor 1994; Young 1990. Note, however, that 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, for example, Barry 1999.

Accommodating differences and respecting rights:[7] an unattainable marriage?

I believe the main question we are faced with in the present age of diversity is not whether the accommodation of different cultures can conflict with the protection of certain members' citizenship rights. Undeniably, it often does.[8] The mere recognition of this fact represents, however, only the initial stage in any serious rethinking of the tangled dynamics inhering between the group, the state, and the individual. It tells us very little about how we can best redress the troubling fact that well-meaning accommodations aimed at mitigating power inequalities between groups may end up reinforcing power hierarchies within them. Some scholars have suggested that this tension should lead us to abandon any attempt to enhance the autonomy of minority cultures or to respect their distinct ways of life.[9] But I take the paradox of multicultural vulnerability to raise a different, and more complicated, challenge. We need to develop a conception of differentiated citizenship which is guided by an ambitiously innovative principle: one that strives for the reduction of injustice *between* groups, together with the enhancement of justice *within* them.[10]

In an ideal world, enhancing the autonomy of *nomoi* groups would also always improve the status of at-risk individuals inside the group, or at least would never serve to legitimize the maltreatment of certain group

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[7] My usage of the term "respecting rights" or interchangeably "individual 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. While it is true that the concept of rights has traditionally implied a moral absolutism in which the self exists in glorious isolation, unencumbered by obligations and relations to others, feminist insights have rejected this narrow understanding of rights. Instead, they have infused this legal category with new meanings, stressing, for example, the relationships and connections that rights construct and enforce, but also the value inherent in the boundary-marking feature of rights (a feature which is of special importance for vulnerable categories of persons, including women). As Martha Minow explains, the whole concept of boundary depends on relationship: relationship between the two sides drawn by the boundary, and relationships among the people who recognize and affirm the boundary. As Minow puts it, "[t]he choice is not between boundaries and connections; it is a question of what kinds of boundaries and connections to construct and enforce." See Minow 1990, p. 11. For a concise overview of these debates, see Kiss 1997; Nedelsky 1993.

[8] I have discussed this tension in Shachar 1998; Shachar 2000a.

[9] One of the scholars who has explicitly suggested that we should abandon multiculturalism is Brian Barry. See, for example, Barry 2001.

[10] My definition of "justice" here draws from Iris Young's "enabling conception of justice," i.e. a conception of justice that refers not only to the distribution of rights but also to the institutional conditions necessary for the development and exercise of individual capacities and collective communication and cooperation. Under this conception of justice, "injustice refers primarily to two forms of disabling constraints: oppression and domination." See Young 1990, p. 39. This conception of justice also shares certain attributes with Philip Pettit's definition of "freedom as non-domination." See Pettit 1997.

members. In such a world, the paradox of multicultural vulnerability would not arise. Unfortunately, the ideal continues to elude us and thus the paradox of multicultural vulnerability continues to persist. In practice, the multiculturalism paradox presents real and troubling problems which require vigilance if we wish to both engage in accommodation and uphold rights. It may be that when the ideal is out of reach, we need to turn to something very different indeed.[11]

In the context of this discussion, that "something different" means switching our focus from the usual multicultural concerns about relations between the group and the state, and drawing back to take in a broader view. This view enables us to see the highly dynamic set of interactions that prevail between the *three* parties to the multicultural triad: the group, the state, and the individual who is situated so as to have interests and rights that derive from *concurrent* membership in both group and state. It is my belief that we cannot comprehend (let alone redress) the plight of the individual caught in the paradox of multicultural vulnerability, if we remain blind to the web of complex and overlapping affiliations that exist between these competing entities.[12]

With this more complete picture in view, we can redirect our thoughts to the kind of institutional design that will get us closer to our goal, which is to accommodate cultural difference within the multicultural state, while simultaneously attending to the interests and protecting the rights of individuals who are put at risk at the hands of their own culture. A new approach to multicultural accommodation must break away from the prevailing yet misleading "either your culture or your rights" ultimatum that underpins existing solutions to the paradox of multicultural vulnerability – solutions which I critically evaluate in this book. Admittedly, we still need a way of determining how much accommodation we should extend, over what matters, and to which groups, depending upon the particularities of each minority society or community. While there are no magic formulas that can neatly resolve the paradox whole, I believe that we can, and should, articulate a new way of practicing multiculturalism.

In this book, I present a new approach to accommodating differences and respecting rights in the multicultural age, known as *joint governance*. This new paradigm proposes the possibility for expanding the jurisdic-

[11] Robert Goodin makes this very same point in "Designing Constitutions: the Political Constitution of a Mixed Commonwealth." See Goodin 1996b, p. 229.

[12] My use of the term "individual" does not refer to an atomistic and isolated self. Nor does it assume that the individual lacks agency, or is fully "constituted" by her community. Rather, I use the word to refer to the locus of potential for individual selfhood and freedom, while acknowledging that people operate within manifold social contexts, networks of affiliation, and structures of power. For related accounts, see, for example, Nedelsky 1989; Shapiro 1999; Walzer 1990; Young 1997.

tional autonomy of religious and cultural minorities. But it also offers hardnosed and practical legal-institutional solutions to the problem of sanctioned in-group rights violations. Drawing on many fields of study – including political theory, law, institutional design, sociology, history, and gender and cultural studies – my discussion proceeds in two major steps.

First, I outline the paradox of multicultural vulnerability and how it relates to justifications for the accommodation of cultural differences in the public sphere, via a redefinition of group–state relations. I then review pioneering works by theorists such as Will Kymlicka, Charles Taylor, and Iris Young, who ushered in the current age of multicultural debate. These scholars focused on assessing the justice claims of minority groups, and argued in favor of respecting group-based cultural differences. While I accept much of their shared critique of standard difference-blind citizenship models, I find that what remains missing in their analysis is an awareness of how changes in the division of authority in the multicultural state can impact on the individual. The earliest proponents of multiculturalism too often forget the position of the citizen-insider, who simultaneously belongs to, and is affected by, both the group and the state authority.

Next, I embark on an exploration of the process whereby women have been subject to systemic violations of their citizenship rights under the auspices of state accommodation policies in the family law arena. Understanding this process requires that we appreciate the complex relations between cultural preservation, multicultural accommodation, and the in-group subordination of women. What we need is a theoretical framework that captures both the centrality of family law in the preservation of collective identities and, at the same time, an appreciation of its tendency to perpetuate an unequal distribution of rights, duties, and (ultimately) powers between men and women within the community. By specifically examining the situation of women living in orthodox religious communities, I explore how and why certain kinds of multicultural policies can put these particular women in an impossible bind, so that remaining loyal to their *nomos* means, in practice, forfeiting their citizenship rights. Multicultural policies which invest the group with full authority in the name of accommodation only blind themselves to this problem since they provide little help to women and other at-risk group members. Even more disturbingly, such policies' "respect for difference" often encourages group leaders to exert that much more "sanctioned" internal pressure against its most vulnerable members.

Further, I distinguish and critically evaluate two theoretical responses to the multiculturalism paradox. These two approaches, which I call the "re-universalized citizenship" option and the "unavoidable costs" response, do not merely evaluate the justice claims of minority groups: they cogently discuss the complexities and challenges associated with the

adoption of a differentiated citizenship model. The first and more famil-iar "re-universalized citizenship" position is effectively articulated by the recent writings of Susan Okin, while the second and lesser known "unavoidable costs" argument is well represented by the recent work of Chandran Kukathas. These two responses may appear to be diametrically opposed but they effectively function as mirror images of one another, since both are underpinned by the same basic logic.

Following from this analysis, I proceed to map out the two dominant legal responses to the challenge of accommodation, which have already been adopted by numerous democratic countries around the globe. I once again more specifically examine the accommodation policies related to religiously defined *nomoi* communities. In modern liberal theory and con-temporary constitutional law these communities are considered prime candidates for acquiring a certain degree of autonomy in arenas crucial for their self-definition, such as family law and education. But the existing legal models pertaining to these communities are once again flawed, for many of the same reasons that plague the "unavoidable costs" and "re-universalized citizenship" approaches. I thus turn toward the task of envi-sioning an alternative way of practicing multiculturalism, one which seeks to enhance the autonomy of distinct *nomoi* communities, while at the same time providing at-risk individuals with viable legal-institutional tools to enhance their leverage within the group, as well as the potential to better control their personal circumstances and communal destinies.

This task begins with a rethinking of the existing responses to the multi-culturalism paradox, by remembering to pay special attention to the posi-tion of the individual who has affiliations to, and rights derived from, both the state and the group. The way out of the paradox of multicultural vulner-ability lies in a fresh approach: one that rests on a sober acknowledgment of the potentially negative in-group effects of well-meaning multicultural accommodations, while also seeking to implement a new institutional design. This brave new blueprint should be capable of aligning and balanc-ing the benefits of enhanced external protections between groups with the benefits of reduced internal restrictions. My proposed model of joint governance describes a repertoire of accommodation designs which can be combined and applied in creative ways according to different social needs and arenas. The capacity of joint governance to assume different guises depends on its establishing structures of authority which require the state and the group to coordinate their exercise of power, while at the same time ensuring that no group member is left without fundamental legal rights and social resources. I am not suggesting, however, that any mere legal formula, or even the best of institutional designs, can ever single-handedly resolve all the immensely complex philosophical problems and near-inexorable moral

and ethical tensions that arise out of encounters between different cultural communities in shared political spaces. These tensions seem to be the inevitable predicament of contemporary multicultural societies consisting of members who share equal citizenship but who may adhere to very different normative systems and codes of behavior.[13]

Yet we can, and should, tackle the multiculturalism paradox head on, and seek a better way of addressing the plight of vulnerable group members/citizens. It is my hope that the joint governance approach can make a contribution in this respect, since unlike any of the existing normative and legal models explored in this book, it ties the mechanisms for reducing sanctioned in-group rights violations to the very same accommodation structure that enhances the jurisdictional autonomy of *nomoi* groups in the first place. In this way, joint governance seeks to positively align the benefits of *enhanced* external protections between groups with the benefits of *reduced* internal restrictions.

An exploration of the institutional issues surrounding multicultural accommodation

General principles and theoretical formulations may seem attractive on paper, but we cannot fully appreciate them until we see them interpreted and applied in a variety of specific contexts.[14] Social actions, whether individual or collective, always take place in an institutional context. The spectrum of available choices for different agents is thus shaped and affected by the institutional context in which they are set.[15] Relations between majority and minority communities (as well as within accommodated communities) are always shaped by the unique structures of authority under which they operate. This book therefore makes frequent reference to real-life examples of multiculturalism, as it is practically experienced in the world today. These legal examples include recent multicultural experiments from Canada, the United States, and Britain, as well as from other countries which have adopted expansive accommodation policies in various social arenas such as India, Kenya, and Israel. Such a comparative perspective can provide us with considerable insights

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[13] In fact, I doubt if any meta-solution to this extremely complex set of issues is theoretically plausible, or practically feasible.

[14] My approach here fits comfortably with that adopted by "contextualist" political theorists. Indeed, it has been largely shaped by their work. See, for example, Carens 2000; Shapiro 1999; Walzer 1983.

[15] The power of institutions lies precisely in their ability to render transparent, perhaps sometimes even invisible, the legal conventions and coercive authority structures that hold any society together, even as these structures actively shape the options, payoffs and expectations of the different players.

into both the potential promises and pitfalls of multiculturalism. Although circumstances may differ substantially from country to country, important lessons can be learned by looking at familiar dilemmas as they appear in less familiar contexts.

Surprisingly, proponents of multiculturalism have given little consideration to a thorough exploration of the legal-institutional dimension of accommodation. Significantly more attention in the ongoing debate has been devoted to the theoretical question of differentiated citizenship. Yet relatively little thought has been given to the key issue of authority: how it might be differently divided in the multicultural state, and what the implications of this change might be for those who experience this new system of authority. Unfortunately, this lack of comprehensive discussion inevitably limits our ability to evaluate the attractiveness of the move toward multiculturalism. For without such a larger understanding of both the practical and the theoretical ramifications, we can only fumble toward implementing specific accommodation measures in different social arenas – and it becomes that much harder to distinguish who stands to gain and who stands to lose under each new approach.[16]

This dearth of discussion is especially puzzling given the unprecedented boom in the contemporary political theory and public policy literature which aggressively re-examines long-standing propositions about the role of the state in relation to competing forces from the sub-state and supra-state levels. In today's world, state-centered perceptions of law and sovereignty are under increasing scrutiny.[17] As a consequence, many functions traditionally invested in the state are presently being re-allocated away from it, in both a downward and upward direction. At the same time, the pressure to retain, or even strengthen, the core social, economic, and political functions of the state has scarcely dissipated.[18] Instead of linking up with these important policy debates, most of the scholarship in the

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[16] Of the existing literature, Will Kymlicka's *Multicultural Citizenship* offers the most comprehensive discussion of how we might envision the new multicultural state. While Kymlicka's work is path breaking and has, to a significant extent, shaped the debate over multiculturalism in recent years, he does not seek to explore institutional models. Kymlicka's chief concern is to establish that group-differentiated rights can be justified within liberal theory. Yet Kymlicka's typology of group-differentiated rights does provide a useful starting point for such work, by assigning different degrees of accommodation to different types of groups. See Kymlicka 1995, pp. 26–33.

[17] It is common parlance today to describe the contemporary state as caught between several contradictory trends, including increasing globalism, the rise of localism and group-based demands, the solidification of supranational regimes, heightened migration and cross-border intermingling of peoples from different backgrounds, and rising decentralization pressures.

[18] For example, Young 1999 still confines important distributive functions to the state. On the economic argument for a proactive state in a global world, see, for example, Rodrik 1997.

English-speaking world has chosen to respond to this critical impasse by retreating into a rather detached discussion about the philosophical merits of multiculturalism. There is nothing wrong with this pursuit of theory, as long as it is tempered with some consideration of the constraints and logistics of institutional applications. Yet these theories often boil down to a recurring deliberation between autonomy and toleration, as two competing normative justifications for respecting cultural differences.[19] These debates ask *which* of our public values should guide us as members of diverse societies in finding a way to live together peacefully and with mutual respect and equal dignity. However, they provide very limited guidance about *how* we are supposed to structure that multicultural state.[20] They completely neglect to address questions about the institutional dimensions of power and the limits of authority, which are fundamental to political philosophy and inextricably linked to claims about justice. The time for enlarging the scope of the multiculturalist debate is thus highly overdue. It is only by tackling the rougher business of structural design head on – with an eye to redressing power inequalities both *between nomoi* groups and the wider society and *within* those same groups – that we can hope to at last embark on this long-neglected task.

Outline of the book

Proponents of multiculturalism aim to expand the traditional understanding of citizenship. In a realm previously occupied only by the individual and the state, they wish to carve out a public space for identity groups. The first part of chapter 2 offers a brief discussion of the standard models of citizenship and summarizes why we need to move toward a new model based on multicultural citizenship. With this innovation comes new problems, however – problems concerning the appropriate relations between group and state authorities, particularly with regard to jurisdiction over individuals living in accommodated minority cultures. Attempts to come to grips with these problems have given us strong and weak versions of multiculturalism. I outline these different approaches and evaluate them in the light of a conceptual perspective which cautions against the often unseen costs of accommodation. Thus I challenge Will Kymlicka's all-too-easy distinction between "external" and "internal" aspects of accommodation, and to illustrate this point I turn to an exploration of the interrelations between the group and the state. I argue that

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[19] On autonomy-based arguments see, for example, Levey 1997. On toleration-based arguments see, for example, Kukathas 1997.

[20] My concern for advancing the debate over multiculturalism in this direction is shared by others. See, for example, Bauböck 2000; Van Parijs 2000.

there are three ways in which group members may respond to state assimilation pressures, all of which raise challenges for the multicultural state. The third, "reactive culturalism," is a response aimed at group self-preservation which takes as its goal the maintenance of a separate and distinct ethos. It may in the process, however, enforce hierarchical and rigid interpretations of group traditions which can, once multiculturalism is introduced into the equation, exacerbate the disproportionate costs imposed upon traditionally less powerful group members. In the final section of chapter 2 I critique two common responses to the problem of unfair in-group distribution of costs: first, the argument that says it is not our place to intervene, and second, the argument that says that those at risk are adequately protected by the right of exit. Both, I contend, prove highly inadequate in practice.

Chapter 3 takes the observations developed in chapter 2 and applies them in relation to a specific social arena where the multiculturalism paradox often hits hardest: that of family law. Family law is a hard test case for proponents of the weak version of multiculturalism. Practices and traditions pertaining to the family are central to the self-conception of many minority groups that seek to preserve their differences under a common citizenship regime. However, these very same practices and traditions often impose disproportionate costs on women to such an extent that when group practices are accommodated by the state, their rights as citizens are systematically put at risk. This intimate connection between external and internal aspects of family law is most evident in those groups which have followed the path of the third response to state assimilation pressures – that of reactive culturalism. Thus well-meaning policies designed to accommodate the practices of different minority cultures in the family law arena can actually serve to *sanction* the maltreatment of women according to the rules of their own *nomos*.

Chapter 3 ends with an exposition of the complex relations between cultural preservation, multicultural accommodation, and women's in-group status, and argues that this relationship need not always work to women's disadvantage. For example, women's powerful position in preserving and reproducing collective identities could, in theory, earn them a powerful position within their respective groups. In practice, however, it has often done exactly the opposite: women's indispensable contribution to the intergenerational transmission of group identity has become a main source of in-group subordination, creating a situation that can take an extremely high toll on women under the cover of multiculturalism.

In chapter 4 my discussion shifts from formulating and illustrating the paradox of multicultural vulnerability to asking what attempts have already been made to address it. I identify and map out the leading

normative and legal approaches currently offered, and ask how well each fares in terms of alleviating the multiculturalism paradox. My investigation begins with a critical evaluation of two dominant theoretical responses that have emerged in the political theory literature, and which are concerned with the tensions between respecting culture and protecting rights. The first and more traditional response, "re-universalized citizenship," holds that in a conflict between an individual and a minority group, the state should put its weight behind the individual, even if in doing so the state helps to alienate the individual from her group. The second position, the "unavoidable costs" response, claims that although tensions can arise between the goals of accommodating differences and protecting rights, a genuinely tolerant state will very rarely intervene in minority group affairs – even if that minority group systematically violates certain of its members' citizenship rights and imposes disproportionate costs upon specific categories of group member. Such situations, so the argument goes, are the price one pays for upholding a multicultural system. I believe that these two theoretical responses are based on a common error: an oversimplified "either/or"-type understanding of legal authority which is not tailored to respect individuals' manifold identities. As a consequence, neither the "re-universalized citizenship" nor the "unavoidable costs" response offers much hope to at-risk group members who may legitimately wish to preserve their cultural identity, while at the same time exercising their hard-won citizenship rights in an effort to transform power hierarchies from within their different communities. In other words, neither of these responses actually resolves the paradox. Both opt instead to satisfy one or the other of its sides.

In the second part of chapter 4 I move from the realm of theory to practice, and turn to an evaluation of the two most influential current legal approaches for dividing authority over individuals who hold both group and state affiliations. I call these two paradigms the *secular absolutist* model and the *religious particularist* model. For the sake of analytical clarity, I represent each model in its pure ideal type form. This representation is not intended to fully correlate with any specific country's implementation of either of the two models. Rather, it draws on observations of real-life practices of accommodation in various democratic countries, observations which in turn serve as the basis for extrapolating the basic principles of each model.[21] In order to more systematically integrate practical legal experience with accommodation into the normative debate over differentiated citizenship, and to make sense of the vast range of experience with

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[21] In exploring these two models, I have confined my analysis to mapping the scope and degree of authority that each model would grant to religious communities in the family law arena.

these models, it is helpful to think of the secular absolutist and the religious particularist models as two poles of a continuum. If one imagines a point of conflict arising over the exercise of authority within a given legal arena, one can visualize a line stretching between two extreme choices: the decision to grant full jurisdictional powers to *either* the state (the secular absolutist model) *or* the group (the religious particularist model). It appears that while the secular absolutist model is better at protecting the rights of at-risk group members, it does so at the expense of relegating their cultural identities to the private realm, thereby failing to publicly accommodate their *nomos*. Conversely, the religious particularist model protects cultural diversity, but at the cost of enabling the systematic maltreatment of specific categories of group members at the hands of their accommodated traditions. I evaluate the relative merits and pitfalls of each model in the light of the following two questions. First, how well does the division of legal authority established by this model preserve the cultural uniqueness of minority groups? Second, how does the division of legal powers established by this model affect the in-group status of vulnerable group members? As a result of these key points of inquiry, it seems that neither model provides an adequate balance between the protection of at-risk group members' citizenship rights and the preservation of their group's *nomos*.

In chapter 5, I turn toward exploring some creative innovations with multiculturalism which reformulate the relationship between the group, the state, and the individual. I argue that a truly comprehensive differentiated citizenship model must identify and defend only those group-based accommodations which coherently coalesce with the improvement of the status of traditionally subordinated classes of individuals within minority group cultures. I develop the outline of a new approach to multicultural accommodation and then sketch four accommodation schemes which represent different variants of the new approach in action. I call this new proposed model the *joint governance* approach, because it rests on the recognition that some persons will jointly belong to more than one community, and will accordingly bear rights and obligations that derive from more than one source of legal authority. Instead of having *either* the state *or* the group control the full range of issues affecting their members, joint-governance inspired accommodations open up a new separation of powers fostering ongoing interactions between different sources of authority, as a means of eventually improving the situation of traditionally vulnerable insiders, without forcing them into an "either/or" choice between their culture and their rights.

Joint governance thus envisions a new architecture for dividing and sharing authority in the multicultural state. Governance is now organized

along a horizontal rather than vertical axis; it is composed of dialogue between different non-monopolist power centers, rather than a hierarchical imposition by either state or group officials. As such it promises to open up a new field of choices.

Chapter 6 introduces the most optimistically practical variant of joint governance, which I call *transformative accommodation*. This approach aims to enhance the jurisdiction of *nomoi* groups over matters crucial for their self-definition, *and* to ameliorate the disproportionate injury that certain categories of group members can suffer at the hands of their own cultures. This style of accommodation is "transformative" because it is designed to encourage group authorities themselves to *reduce* discriminatory internal restrictions. And it succeeds by persuading them to enact three cumulative principles: the "sub-matter" allocation of authority, the "no monopoly" rule, and the establishment of clearly delineated choice options. All of these principles define how authority can be usefully divided, how transformative accommodation can maintain the separation of powers, as well as how members of groups are able to exercise their agency once jurisdiction has been shared. Since transformative accommodation is designed to alleviate, or at least significantly mitigate, the paradox of multicultural vulnerability by equipping members with means of combating unjust internal restrictions, it also works to preserve and even enhance the accommodation of group traditions through state-backed external protections. So rather than accepting with resignation the potentially injurious effects of well-meaning accommodation, transformative accommodation accepts this problem as its litmus test.

Finally, I evaluate the practical potential of this latest new approach by revisiting some of the most intractable problems encountered in the family law arena. (An exploration of how transformative accommodation works in three other social domains – immigration, education, and criminal justice – is offered in a separate appendix.) By explicitly utilizing a "political" understanding of power and identity, which assumes an interaction between internal and external aspects of accommodation, I demonstrate how this variant of joint governance nevertheless persists in permitting once-vulnerable group members the opportunity to remain full participants in their *nomos* while transforming the conditions of their membership.[22]

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[22] Taken together, these examples from different social arenas reveal how transformative accommodation provides us with the tools and the justifications for expanding the jurisdictional autonomy for cultural communities, while at the same time creating a dynamic incentive structure that encourages accommodated communities to internally rework their practices.

The road ahead

By accommodating cultural differences and by recognizing certain group-based traditions as legally binding, the multicultural state inevitably finds itself involved, to some degree, in shaping in-group relations. Indeed, even where the multicultural state formally refrains from intervening in *nomoi* groups' traditions, it still participates in the solidification of the power relations encoded in these traditions. Instead of overlooking the *Catch-22* situation by which power hierarchies within groups are propagated through the very accommodationist policies which seek to mitigate cultural biases between groups, we would do better to directly acknowledge it.

We can begin this process by abandoning the kind of thinking that has enmeshed us in an oversimplified and misguided "either/or" fixation, already all too characteristic of current normative and legal approaches. We next need to re-acquaint ourselves with the complex and multi-layered nature of multicultural identity.[23] From there, we can start to think about multiculturalism in ways appropriate to that complexity and multiplicity. Any attempt to seriously address the multiculturalism paradox must begin with the acknowledgment that in today's day and age, no single authority can expect to be the sole source of legal norms and institutions affecting its members. At the same time, well-meaning accommodation by the state, or the distribution of multicultural benefits and costs, does not necessarily affect all group members in the same way. Truly new thinking on multiculturalism requires that we recognize that we are dealing with a highly dynamic system of inter-related interactions occurring between the group, the state, and the individual. Instead of traditionally entrusting either the state or the group with *full* responsibility for improving the status of traditionally subordinated categories of members, we are better off heeding an old truism: the more diffuse the power, and the more entry points to affect the jurisdictions that bind them, the better it will be for the individual. A devolution of state authority to the group can truly serve the interests of women and other traditionally vulnerable group members only if it is accompanied by an institutional design which equips them to dismantle the power hierarchies that put them at risk in the first place. It is possible to envision institutions

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[23] As Pierre Birnbaum observes, in contemporary multicultural theory "individuals . . . are [mistakenly] understood as the bearers of a single oppressive and quasi-essentialist idealized cultural identity from which no escape is possible. Such an immutable collective identity is not compatible with the expression of other identities (sexual, religious, etc.) in which some might wish to recognize themselves at certain moments of their existence." See Birnbaum 1996, p. 41.

which meet these requirements, and it is through such a creative rethinking – with the complexities of identity held fully before us in view – that we will make our strongest headway against the paradox of multicultural vulnerability.