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A DELIBERATIVE APPROACH
TO CONFLICTS OF CULTURE

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How should liberal democratic states respond to cultural practices and arrangements that run afoul of liberal norms and laws? This article argues for a reframing of the challenges posed by traditional or nonliberal cultural minorities. The author suggests that viewed from up close, such dilemmas are revealed to be primarily intracultural rather than intercultural conflicts, and reflect the political and practical interests of factions of communities much more than deep moral differences. Using the example of the reform of customary marriage laws in post-apartheid South Africa, this article makes the case for a more pragmatic, politically focused approach to resolving conflicts of culture that it is argued is both more democratic and effective than alternatives recently advanced by liberals and deliberative democracy theorists.

Keywords: *cultural conflict; deliberation; deliberative democracy; negotiation; customary law*

Liberal political theorists have recently argued that the principle of sex equality is jeopardized by attempts to meet the demands of nonliberal cultural groups for greater recognition and powers of self-governance.[1] The broad political approach to the challenges posed by contested cultural practices favored by these thinkers is one that endorses *liberal* but not necessarily democratic principles and procedures.[2] On this view, states can determine the permissibility of minority cultural practices in large part by gauging their compatibility with liberal, individual rights, and/or particular capacities. In contrast to the liberal a priori approach, several democratic theorists argue for

a more dialogical response to cultural conflicts in liberal democracies. James Tully elaborates a model of intercultural dialogue informed by liberal and discourse ethical principles of consent, equal regard, and mutual recognition, in which participants can build common political constitutions from the background of their divergent cultural and political traditions.[3] Seyla Benhabib proposes a "complex multicultural dialogue" that places individuals at the center of "processes of cultural communication, contestation, and resignifiation . . . within civil society."[4] And Bhikhu Parekh conceives of a dialogue between minority and majority communities addressing contested practices, beginning from the core or "operative public values" of a society and ultimately yielding in a process of "intercultural evaluation."[5]

I share many of these thinkers' intuitions about the importance and value of concrete dialogue among affected citizens as the most democratically legitimate and just means of mediating tensions surrounding contested cultural practices, and propose to build upon them here. However, the perspective I advance differs from these other approaches in two important respects. First, rather than locating the source of democratic legitimacy strictly in formal political deliberation, I argue that the *scope* of democratic activity is much wider than this; nonformal democratic expression, such as forms of cultural resistance and reinvention in the private realm, also speak to the issue of a social custom's legitimacy or illegitimacy. Liberal institutions can help to expand and support such democratic activity by supporting the safe public articulation of concerns both within cultural communities and in the wider society. Second, where it is necessary to try to mediate cultural conflicts in more formal political forums, I argue that we should adopt a model of democratic deliberation that engages participants' *strategic* interests and needs, rather than foregrounding *normative* argumentation and justification. The more politically oriented approach I defend aims to secure political compromises through debate and negotiation, rather than normative consensus or even moral compromise. My contention is that such a framework for mediating cultural conflicts better reflects the practical and (what I argue is the) *intracultural* nature of many actual cultural disputes about social customs in liberal democratic states. Deliberative dialogue and decision making that focuses on participants' interests and needs can produce democratically legitimate—though crucially, not necessarily 'liberal'—outcomes that both protect and empower vulnerable group members (such as women) in tangible ways. I illustrate the feasibility of a deliberative model for resolving cultural conflicts, including especially difficult conflicts over gender roles and arrangements, by discussing the recent reform of customary marriage laws in South Africa.

I. RECONCEIVING DEMOCRATIC ACTIVITY
AND THE BASIS OF LEGITIMACY

The deliberative democratic approach to mediating conflicts of culture that I advance begins with a claim (generally endorsed by deliberative democrats) about the requirements of democratic legitimacy in plural, liberal societies. Insofar as liberal states fail to centrally include cultural group members in deliberations about the future status and possible reform of their community's customs and arrangements, they ignore the demands of democratic legitimacy. The liberal a priori response to conflicts of culture surely fails Habermas's test for the normative validity of norms, whereby "only those norms can claim to be valid that meet (or could meet) with the approval of all concerned in their capacity as participants in a practical discourse."[6] But it also fails a broader test of democratic legitimacy, one that includes not merely formal deliberation as a test of normative validity but also looks to informal democratic activity as a means of assessing the normative and political legitimacy of particular practices. Democratic activity is not exhausted by formal political processes; it is also reflected in acts of cultural dissent, subversion, and reinvention in a range of social settings. Inchoate democratic activity can be identified in the homes, schools, and places of worship and religious training of traditional communities; in social practices around marriage, birth, and the initiation of young people into adulthood; and in the provision of community and social services (e.g., domestic abuse centers run for and by women from traditional cultures). These important forms of democratic expression are rendered invisible by oversimple distinctions drawn between social and family life on the one hand and public, political life on the other. We can counter this invisibility by asking how work, social activities, and domestic arrangements and practices function as spaces of cultural resistance and transformation. With an expanded view of the scope of democratic activity comes an expanded view of the *basis* for democratic legitimacy. It is against the backdrop of these expanded conceptions of democratic activity and legitimacy that I propose a deliberative democratic approach to the evaluation and reform of contested cultural practices or arrangements.

In suspending the norm of democratic legitimacy and assuming that fair decision making about cultural practices does not require or indeed may preclude the meaningful inclusion of cultural group members, liberal approaches may also contribute to outcomes that are not only undemocratic, but fatally flawed in content. Policies for the reform of cultural practices that are derived from the mere application of liberal principles or constitutional norms risk misconstruing the actual or *lived* form of these practices; as such, they may generate proposals that, if implemented, might leave untouched or

even worsen the many forms of oppression faced by vulnerable members of cultural groups, such as women. Where no attempt has been made to include cultural communities in conceiving of relevant and plausible reforms of contested customs and arrangements, new legislation may hold out the promise of formal equality in a context in which deep social and cultural inequalities persist. Not only is the necessary information base for appropriate and beneficial reforms overlooked, but their successful implementation is seriously impaired, as they lack both legitimacy and the grassroots structures necessary for effective implementation.

Theorists of deliberative democracy have argued that liberal states need to deepen their democratic practices so as to foster greater inclusion of minority citizens in political deliberation. This is not just a matter of including diverse citizens in existing political institutions, but rather requires the transformation of such institutions in accordance with normative principles of equality, reciprocity, and mutual recognition.[7] But beyond this insight of deliberative democrats, democratic inclusion in culturally plural societies, I suggest, will require that we expand our understanding of what democratic political activity consists in and also try to proliferate the spaces for such activity. And as I argue in the next sections, both informal political expression—such as contestation, resistance, cultural reinvention of traditions—and more formal deliberation can and should encourage deliberative participants to focus on the concrete benefits and harms of specific practices, rather than normative reasoning and justification.

II. PROBLEMS WITH DELIBERATIVE DEMOCRACY AS USUAL

Consider the following three recent examples of conflicts between cultural group practices and liberal norms that pivot on questions of sex roles and status:

1. Arranged marriages among South Asians in Britain have recently come under intense government and police scrutiny. Since early 2001 there have been calls to ban the practice after some well-publicized cases of *forced* marriage came to light. Traditionalists deny the prevalence of forced unions and want the practice to continue without state interference, but many community groups welcome the prospect of increased monitoring as well as practical and legal support for those seeking to avoid or leave forced marriages.

2. During negotiations for Native or Aboriginal self-determination in Canada in the early 1990s, Aboriginal leaders insisted that their communities should not be bound by the 1982 Charter of Rights and Freedoms, which they thought would restrict the ambit of

Native political power and self-governance. By contrast, some Native women worried that this constitutional exemption would leave them unprotected and vulnerable to the patriarchal attitudes and practices of their leaders. Although they supported the goal of Aboriginal self-government, some Native women's groups therefore lobbied the Canadian government to ensure that any future political arrangement would not exempt Aboriginal peoples from the individual rights guaranteed by the Charter.[8]

3. In South Africa in early 1998, the government initiated a process for reforming African customary marriage, an institution that accords many more benefits and rights to men than to women. In hearings sponsored by the South African Law Commission, traditional African chiefs argued that customary marriage should remain unchanged and free of legal monitoring by the state, and that their own roles (and those of their traditional courts) vis-à-vis family law be preserved. By contrast, women's rights advocates— including those representing black women—and legal reform groups, countered that a reformed, egalitarian form of customary marriage should prevail.

A few things strike the reader about these examples. First, each involves considerable *intracultural* conflict over the interpretation, meaning, and legitimacy of particular customs;[9] the communities themselves disagree about the purpose and proper form of given practices and arrangements. And second, the disputes all share a strategic and political character; these are for the most part disputes about interests, benefits, and power, not about discrepancies in ostensibly fixed normative frameworks. Certain of these aspects of cultural disputes are recognized by the democratic theorists discussed above. Both Benhabib and Parekh, for instance, insist on the essentially fluid and contested character of social customs, and emphasize the narrative character of cultures as a whole. As Parekh writes,

A culture has no essence. It includes different strands of thought, and reformers are right to highlight those that have been marginalized, suppressed, or misconstrued by the dominant interpretation of their tradition. Furthermore, every tradition can be read in different ways, none of them definitive and final.[10]

Similarly, Benhabib emphasizes the complexity and contestability of social and cultural identities, and claims that a process of complex multicultural dialogue can respond to this complexity in ways that a liberal, juridical model cannot.[11] These accounts of culture, social identities, and customs as constantly in flux, however, do not emphasize the *political* dimension of conflicts as much as they should. They therefore risk overlooking the extent to which disputes about the validity of cultural practices reflect new or intensified challenges to communities' internal decision-making structures—challenges that arise both from within and outside of the group.

The recognition that disagreements about the legitimacy of customs and arrangements are often specifically intracultural and political in character

gives us a preliminary glimpse into why a pragmatic *deliberative* approach to resolving such disputes might be preferable to either a liberal, a priori approach or an idealized discourse-ethical model of deliberation. If disputes about the status of cultural practices and arrangements are largely internal and reflect struggles over the decision-making authority and power of group members, then a democratic process specifically designed to engage the views of all stakeholders should help to focus debate on these issues, as well as to enfranchise and empower many of those previously excluded from political decisions. A more strategic model of deliberation would make it easier to acknowledge and address the disputes over authority and legitimacy that typically underlie cultural conflicts.

This brief characterization of cultural conflicts however also generates at least two clusters of objections to the adequacy and fit of deliberative democratic frameworks, particularly those that conceive of deliberation as a process of ideal, rational moral argumentation. Below, I discuss these objections briefly and the deliberative models of politics that are most vulnerable to them. Subsequently, I try to show in section III why an *amended* model of public deliberation—one that is pragmatic, political, and emphasizes strategies of negotiation and compromise—holds out the most promise for democratic and legitimate resolutions of some types of cultural conflict.

i. The Challenge from Pluralism

Critics of deliberative democracy theory, both immanent and otherwise, have issued a range of criticisms of idealized models of discourse and deliberation relevant to the issues at hand. These center on the following problems: Who is to participate in deliberation? Who is included, silenced, and who speaks for whom? What norms are presupposed by the deliberative scheme, and are these genuinely shared norms or do they result in unjust exclusions? How is deliberation to be conducted: Who does it privilege, and who does it disadvantage? What kind of outcome is desired? If thick consensus, whose views does this stifle? These objections take on particular salience in contexts of social diversity, and are more important still in situations of cultural conflict. In connection with the first two problems, Iris Young criticizes the assumption that particular representatives can speak for whole communities or social groups in democratic politics.[12] James Bohman notes that although idealized versions of deliberative democracy require "the inclusion of everyone affected by a decision," failure to account for the effect of social ine- qualities on civic participation and political inclusion can render the norm of inclusion ineffectual.[13] Potential participants can also be excluded

from deliberation, or else silenced within a deliberative setting, through the introduction of onerous normative constraints on the form and content of deliberative communication. For example, the insistence that participants adhere to norms of reasonableness and/or rationality by giving "public" reasons—reasons that are morally universalizable and so accessible to public reason—may further render deliberative designs inhospitable or closed to some citizens. Cultural minorities whose traditions of communication and standards of justification are at odds with these norms, including some religious minorities, are especially likely to have their particular styles or forms of deliberative communication discredited or disqualified.[14] And particularly where norms of rationality and reasonableness are stipulated as *criteria for inclusion* in public deliberation, they can have a tremendously exclusionary effect, as John Dryzek and others have observed.[15]

In addition to their potentially exclusionary effect, models of public deliberation that stipulate norms of reasonableness and universalizability in moral argumentation often *presuppose* agreement upon what kinds of arguments and procedures are fair and reasonable. If agreement about fair procedures is merely assumed, then the outcomes of deliberation will be equally contested. But it may not be the case that "deliberative democracy requires a full commitment to public reasoning" of the formal, idealized type.[16] Norms of reasonableness and universalizability can be rejected as *conditions for participation in public dialogue*; as Jack Knight and James Johnson argue, deliberation must have more "expansive conditions of entry" if it is to help mediate conflicts arising in plural states.[17] Relatedly, deliberative models of politics that emphasize normative and reasoned public discourse have been roundly criticized for stipulating that deliberation should result in moral consensus, for this assumes a greater degree of overlap and agreement among citizens than is warranted in socially diverse societies. Certainly, many proponents of deliberative democracy interpret the normative criterion of public reason as requiring that citizens participating in deliberation appeal to the common good.[18] To forge moral consensus from citizens' divergent convictions, needs, and interests, however, typically requires an appeal to a conception of the *public good* that may deny the scope of citizens' differences.

The normative requirements of consensus and shared rational grounds in particular appear to be losing support among deliberative democracy proponents, some of whom now agree that moral consensus is not a sensible goal for public deliberation in socially diverse societies.[19] Even Habermas has recently acknowledged that conditions of deep social pluralism in liberal democratic states make it difficult to discover "generalizable interests" or to reach agreement on issues with normative content;[20] and although he remains

committed to a conception of rational moral consensus, he now accords more importance to bargaining and compromise as strategies in deliberation.[21] However, rather than moving towards more practical and strategic models of conflict resolution, as I urge, many deliberative democrats are simply replacing the goal of *moral consensus* with that of reasoned, *normative agreement* and/or *moral compromise*.[22] Dryzek declares that "in a pluralistic world, consensus is unattainable, unnecessary, and undesireable," but he rejects a model of political deliberation as essentially negotiation and bargaining, which he thinks reduces politics to "strategic action."[23] Bohman also rejects the goal of normative consensus but holds out moral compromise as the aim of dialogue; this, he claims, is a far cry from *modus vivendi* politics involving mere "strategic bargaining" and "tradeoffs."[24] In his theory of "intercultural evaluation," Parekh situates intercultural dialogue firmly against the backdrop of an appraisal of society's core public values, and encourages appeals to universal values as well as to the common good.[25] And finally, Benhabib, while subscribing to a complex, constructivist ("narrative") account of culture, insists that a broad framework of "normative universalism" is perfectly compatible with her model of multicultural dialogue.[26] Democratic dialogue should seek to address cultural differences, which Benhabib claims "run very deep and are very real," but she assures us they are best negotiated through a process of moral argumentation structured according to norms of moral rationality and publicity. While normative consensus may not always be achievable, it should not be jettisoned as a goal, for "consensually attained moral norms" are, according to Benhabib, attainable, even in deeply plural societies.[27]

ii. The Problem of Covert Power and Interests

While recent models of intercultural dialogue endorsed and developed by democratic theorists provide an answer to some of the criticisms made of idealized models of discourse ethics, then, they remain vulnerable to other important criticisms. In particular, proponents of these models remain committed to what I argue is a problematic conception of dialogue and deliberation as fundamentally a process of *normative* argumentation, bound by norms of reasonableness and universalizability (and sometimes several additional norms). Deliberative outcomes, on this account, will ideally reflect moral compromise if not something approaching consensus. What, if anything, is wrong with this view? When public deliberation is conceived primarily as reasoned argumentation about policies and norms that reflect citizens' *normative* beliefs and what Avigail Eisenberg calls their "identity-related differences," the practical interests and motivations of participants tend to recede

from view. Deliberation conceived thusly, I argue, may have a distorting effect on the actual issues and conflicts at stake in cultural conflicts. As the intracultural character of the conflicts sketched above suggests, cultural disputes often have more to do with the concrete interests of members and the distribution of power in communities than they have with differences in moral value.[28] If this is so, then attempts to resolve disagreements about cultural practices by focusing on the evaluation of normative claims and beliefs may fail to get to the heart of the matter.

To suggest that we demote the normative dimension of deliberation concerning cultural conflicts in this way may seem an odd proposal. Much more so than rival liberal models of politics, deliberative democracy endorses explicitly normative and reasoned discussion between rational, uncoerced, and equal participants as a means of resolving disagreement and conflict. It is this conviction in the normative basis of politics that, as Bohman argues, links together diverse models of deliberative democracy: "they all reject the reduction of politics and decision making to instrumental and strategic rational- ity."[29] Through deliberation, Dryzek contends, participants are expected not simply to communicate their beliefs, but more importantly, to reflect upon and transform these in dialogue with others.[30] Dialogue is supposed to help us get clear on our own evaluative attachments as well as our deepest shared commitments, as Simone Chambers notes.[31] As we have seen, however, to obtain this level of ideal argumentation requires normative constraints of reasonableness and publicity that may produce unjust exclusions in political life. Equally troubling, a model of political deliberation that privileges normative reason giving and public reason gives individuals and groups *ample incentive* to present their interest-based concerns in terms of cultural identity claims that may or may not speak to the crux of the issues at stake. Arguments that appeal to cultural identity have increasing purchase in constitutional democracies committed to policies of cultural pluralism, where groups are often rewarded politically for framing their arguments in such terms. By contrast, the desire to maintain one's own status or the status of one's subgroup within the wider community, to shore up one's position of power vis-à-vis others, or to further one's own financial gain, do not make for good moral reasons in deliberation. Defenders of idealized models of deliberative democracy argue that these strategic kinds of motives should in any case be deemed illegitimate on the grounds that they would fail the test of public reason and so cannot count as valid justifications for policies.[32] Benhabib, for example, acknowledges that strategic reasons are often uppermost in the minds of participants to deliberation yet insists nonetheless that moral or normative argument is what is needed.[33] But attempts to neutralize

unjust motives and pernicious interests by excluding certain kinds of reasons a priori from public discourse—as illustrated by the deliberative approach advocated by Amy Gutmann and Dennis Thompson[34]—may simply push these underground without in any way lessening their effect on political life.

As the examples cited earlier show, when factions of cultural groups insist on a particular view of a custom, or maintain that a practice ought not to be reformed, they are often concerned to preserve their own power, status, and advantage vis-à-vis others in the group. An idealized model of deliberation that either denies the force of participants' interests and relative power in determining outcomes, or else rules out certain kinds of reasons in advance in the hope that these will not impact deliberation, may succeed in only reinforcing the advantages enjoyed by powerful participants in deliberation. Nor is it clear that deliberation consisting mainly in the exchange of normative claims about cultural identity and values is more likely to yield fair and practicable solutions to the sorts of conflicts cultural groups are often embroiled in—conflicts about religious personal and family laws, land and resource claims, and group membership laws. Arguments that appeal strictly to group cultural identity can make it very difficult to reach compromises in political deliberation.[35] The same group identity can be invoked to support very disparate views about traditions, and so may not, by itself, illuminate or resolve anything.

If I am right that struggles over the meaning and validity of contested cultural traditions in liberal states are centrally about the concrete interests of group members and the distribution of power and decision-making authority in these communities, then arguably any sound procedure for mediating cultural conflicts ought to recognize this. Practically, this means that reason giving in deliberation ought not to privilege, or be restricted to, normative justification, but rather should foreground the strategic and pragmatic concerns of cultural members. What is aimed for is a more *transparent* political process in which cultural group members can present some of their concerns about particular practices and arrangements, and these concerns and interests—and the normative justifications that may or may not attach—are subject to critical scrutiny and evaluation in democratic processes of deliberation and negotiation. Political deliberation about contested practices should, in the first instance, aim to provide an accurate description of the *lived form* of contested cultural practices (for this is often what is precisely in dispute), as well as some account of what the concrete, practical interests of diverse participants are. These understandings are then used to develop relevant policy reforms and generate negotiated political compromises.

III. AN AMENDED MODEL OF POLITICAL DELIBERATION: INCLUSION, NEGOTIATION, AND COMPROMISE

If a deliberative framework for resolving what I have argued are mainly intracultural conflicts is to take seriously the principle of democratic legitimacy, it must include a diverse range of voices from within traditional communities. Democratic legitimacy is not secured by merely soliciting the views of established leaders in communities, but rather requires that a plurality of group members with divergent interests and circumstances be included in deliberation.[36] Deliberative democratic procedures can provide spaces for these voices, as well as help to amplify criticisms of particular practices and arrangements within communities by supporting their safe public articulation. The establishment of forums and neighborhood panels by some local government authorities in areas of Britain with a high density of racial, religious, and cultural minorities is an example of how local decision-making structures might be transformed so as to facilitate greater community input and even self-governance.[37] It may also be possible, as Ayelet Shachar proposes, to "empower at-risk group members" by allocating formal legal jurisdiction over certain cultural practices and arrangements to some social groups, provided that democratic processes of decision making are observed.[38]

The inclusion in deliberation of a diverse range of group members—both those rejecting change and those seeking reform—is therefore not a gloss or afterthought to legislated reforms but rather a critical part of the process of democratic conflict resolution. And indeed, for cultural conflicts involving cultural communities that are reasonably democratic in their internal structure, group members could well constitute the majority of participants to deliberation. In this regard, the proposal that voluntary associations be essentially self-governing over their social affairs, as suggested by proponents of associative democracy, is an important resource.[39] But the traditional cultural groups under discussion are ones that are often marked by dramatic inequalities of power and in which issues of authority and governance are precisely at issue. Consequently, unlike those who, like Jeff Spinner-Halev,[40] argue essentially for group autonomy over cultural practices and arrangements, I contend that decision making about contested cultural practices should normally bring to the table representatives from legal reform and women's groups, as well as scholars and government policy makers. In part this move is in recognition of the permeable boundaries of different cultural communities of citizens in plural, liberal states, and of the common constitutional norms that bind them. But the inclusion of social activists and government and political representatives—some of them also members of the cultural

group in question—can also serve as much-needed political pressure on the reform process at the same time as providing solidarity and support for cultural dissenters.

Participants in the proposed deliberative process initially use the framework of discussion and consultation as a means of gaining a clearer picture of contested social customs and practices, and to begin to outline the different interests and needs at stake. The democratic tools of negotiation, bargaining, and compromise—crucial alternatives to deliberative democracy's traditional focus on reasoned, normative argumentation—emerge next. By making it possible for participants in deliberation to give frank and concrete reasons in support of particular customs and proposals for or against change with a view to securing a political compromise, it becomes easier to expose unjust reasons and to foreground the abuses perpetuated by particular practices. By framing the process of conflict resolution in terms of debate about the concrete purposes, benefits, and disadvantages of cultural traditions, it becomes difficult fully to camouflage the strategic concerns and interests at work. These interests, whether articulated by those who hold them or identified by critics, are then subject to critical evaluation in policy debates about the proposed reform of customs, and are reflected in the ensuing political compromise. Such a deliberative approach would still encourage debate and decision making about norms and the social practices that they help to shape, and indeed, good normative reasons may remain more persuasive in public deliberation than will those interest-based reasons that fail to speak to the needs of other citizens. However, practical and interest-based reasons would no longer be shunned, but would rather be made subject to evaluation and discussed as possible grounds for concessions and compromises.

Previously, proponents of deliberative democracy have suggested that negotiation, bargaining, and compromise should be used in public deliberation only when conditions of social pluralism preclude common premises and consensual outcomes. For Habermas, it is only when normative discussion is not feasible or collapses as a result of incommensurable moral differences that bargaining and compromise become acceptable as (temporary) procedures in decision making.[41] Bohman likewise mistrusts bargaining as a method and goal of deliberation on the grounds that it requires participants to treat their beliefs as mere interests, which he claims is both normatively unreasonable and impractical.[42] And for Benhabib, ever confident in the rational and moral nature of dialogue, strategic bargaining is mostly an unnecessary step down from moral discourse, which is bound by "norms of universal respect and egalitarian reciprocity."[43] By contrast, I argue that negotiation, bargaining, and compromise are sometimes the best methods to adopt in attempting to resolve disputes about the validity or future status of a

contested cultural practice. These strategies lend themselves better to deliberation that openly engages and acknowledges participants' strategic interests without necessarily privileging or catering to those interests. As my discussion of the reform of customary marriage in South Africa will show, it is precisely in negotiation-style debate that the validity of participants' interests can be evaluated.

How can this explicitly political model of deliberation avoid merely shoring up the advantages of the powerful? It is not the case that bargaining somehow suspends all norms of respect and reciprocity among participants to a dialogue. Quite the contrary: procedures can and should be implemented that prevent any one participant or faction from dominating deliberation or its outcome. Negotiation and bargaining as strategies in political deliberation are in the first instance subject to the norm of democratic legitimacy, as discussed earlier. But in addition to this, I contend that the *process* of political deliberation ought to be bound by three further normative principles: *nondomination, political equality, and revisability*. There is some overlap between these norms and constraints specified by other proponents of deliberative democracy, but arguably mine are more minimal. I do not claim that these norms are deliberatively conceived, nor do I suggest that they should be open to negotiation. Rather, I argue that they are justified as deliberative constraints because of their central role in supporting democratic legitimacy in settings where cultural and political authority is contested and subordination is widespread.

Nondomination is simply a constraint that prevents some participants (usually with greater social or economic power) from coercing other participants in a dialogue situation. Coercion could include attempts to exclude some individuals from deliberation, to prevent less powerful interlocutors from articulating concerns or proposals by threatening unfavorable repercussions, or to control voting through similar means. Nondomination may seem a very minimal constraint but is nonetheless an important background condition for democratic political dialogue. In disputes over the validity of cultural customs and arrangements in liberal democratic states, there is always the danger that traditional leaders or élites of a cultural group will seek to silence dissenters through pressure tactics or more overt forms of oppression. Even where intracultural disputes are not at issue, nondomination in deliberation can still be an important principle to stipulate. Bohman, for instance, uses a version of this, the "non-tyranny constraint"—drawing on the work of James Fishkin—as a way of preventing concentration and abuse of power in deliberation generally.[44]

The principle of *political equality* is more controversial both because it is ambiguous in content and may potentially constrain decision making more

directly than the mere principle of nondomination. Following Bohman, I take political equality in the context of deliberative democracy to mean the presence of real opportunities for all citizens to participate in debate and decision making. This means not only ensuring that such opportunities are available, but also trying to prevent "extra-political or endogenous forms of influence, such as power, wealth, and preexisting social inequalities" from impacting deliberation and its outcomes.[45] Who can participate in deliberation—as Joshua Cohen has observed—ought not to be determined by their access to power and resources.[46] We can and should use the ideal of political equality to shape discussion and decision-making procedures, by ensuring wherever possible that participants have equal access to formal political deliberation and also that their contributions *count*—for example, by balancing interests in negotiations and employing equal voting procedures.

Political equality as applied to deliberation about cultural conflicts is a still more complex matter, especially if we take this principle, as I do, to require substantive equality of opportunity for participation and equality of influence in political deliberation.[47] Who can participate in political life is, for many, culturally determined. Often it is precisely the role and status of certain subgroups—for example, whether women ought to have a political voice—that is at issue. Moreover, who counts as a member of what cultural group is not always clear: sometimes membership is contested as a way of denying the justice claims of minorities within the group. Even if agreement about membership and roles is reached, the difficulty of ensuring that marginalized segments of communities are fully included is enormous. In addition to insisting on guidelines for fair and representative inclusion in formal political consultations, the political enfranchisement of marginalized and vulnerable members of communities can be fostered through the deliberate *expansion* of informal sites of social and political debate and contestation. State funding for social and community services (especially those that support vulnerable members of cultures), local media sources with a broadly democratic outlook, and community groups that foster debate about the changing face of cultural practices, are a few examples of ways in which liberal democratic states can directly facilitate the expansion of spaces of democratic activity.[48]

The third principle that I propose ought to shape political deliberation about cultural conflicts is that of *revisability*. By this I mean that decisions and compromises, once reached, may be revisited at a later point when there are good grounds to do so. The prospect of revisability may make it easier to reach compromises in the first place, for participants and groups understand that if and when they need to redress problems or settlements it will be possible to do so.[49] But the main advantage of an assumption of revisability in the

context of deliberation about cultural conflicts is that it acknowledges the gradual character of real change and the ways in which a range of processes *outside* of legislation—processes of a social, cultural, and economic nature—contribute to the transformation of customs and cultural arrangements. A revisable deliberative process for evaluating disputed customs and initiating reforms can be responsive to the fluid character of social practices. Internal criticism of practices and arrangements by group members are often the impetus for their reform, and by allowing policy decisions about customs to be revisited we remain open to this input. As a recent United Nations report on gender justice puts it, "the history of internal contestation reinforces what should be the starting point for thinking about issues of multiculturalism and rights: that cultures are not monolithic, are always in the process of interpretation and re-interpretation, and never immune to change."[50]

The revisability condition implies a further constraint that is really a constraint on *what counts as a just outcome* of political deliberation: just as outcomes are not legitimate if they systematically exclude sections of the community seeking to be heard, they are not legitimate or tenable if they undercut the future ability of citizens to deliberate on these or other issues, if and when policies are revisited. This Kantian-style constraint[51] would be violated, then, by the adoption of a policy that prohibits all women in a particular society or community from voicing their views in public or from voting. The ban on female political participation would in any case also violate the constraints of democratic legitimacy, political equality, and, probably, noncoercion, but skeptics might ask, what of a situation where women appear to endorse or at least not to protest such a rule? My response to this is that it is difficult if not impossible to imagine a scenario whereby such a policy could be *democratically arrived at*, under conditions of noncoercion and nonintimidation. Wherever customs and cultural arrangements subordinate women and harm them in tangible ways, there are signs of resistance, faint as these may be in some circumstances.[52] Acts of cultural subversion and resistance are however not always easy to recognize, especially as they often occur in informal spaces, particularly in the home.

The constraints that I propose should shape political deliberation about contested cultural practices, and arrangements in plural, liberal democratic societies are designed to accord maximum support to the principle of democratic legitimacy. Participants in deliberation debate the meaning, relevance, and future status and form of contested social practices and try to reach negotiated political compromises. These discussions, as I envisage them, would occur not merely in formal political institutions but also in forums sponsored by local community and cultural associations, in the media, and in any number of spontaneous social settings. Those involved in deliberations speak

from their partial, situated perspectives, with their beliefs and interests intact, though these may of course change. The inclusion of the perspectives of diverse members of cultural and religious communities contributes to a more accurate picture of *actual* social customs and their problems and benefits; this more representative account of *lived cultural practices* is essential if deliberative participants are to determine which reforms might render customs more empowering for vulnerable members of the group, including women.

Deliberation, on the account developed here, should be bound by minimal norms, and ultimately aims to secure democratic political solutions, emphasizing concessions for contending parties.[53] Rather than a zero sum game, the dialogue is intended to bring about imperfect, negotiated compromises.[54] In many cases, deliberation about the development of cultural practices would in many cases be linked to processes of legislative reform, through public hearings and community consultations and the like, and therefore subject to certain procedural and even constitutional norms. The example of the reform of customary marriage laws in South Africa, discussed below, is one such illustration. However, this is by no means politics as usual. The emphasis that my proposed model of deliberation and conflict resolution places on democratic legitimacy, and the relative minimalism of the principles to serve as procedural constraints, leaves the outcome of deliberation wide open.[55]

IV. SEX EQUALITY AND THE REFORM OF CUSTOMARY MARRIAGE IN SOUTH AFRICA

To understand how a deliberative democratic approach to conflicts of culture might work in practice, it is useful to consider a specific case. In late 1998, the South African legislature passed into law the Customary Marriages Act, for the first time granting traditional or customary African marriage equal status with civil (usually Christian) marriage. That the Act recognizes and sets out national guidelines and laws governing customary marriage for the first time is surprising given that at least half of the country's 80 percent black majority marries under some form of customary arrangement. Finally put into force in November 2000, the Act was the culmination of deliberative and consultative hearings held to solicit views about the practice of customary marriage and to draft proposals for its reform. It is for this reason an instructive example for exploring how deliberative solutions to cultural conflicts might work in practice.

The impetus for the act was the need to bring some of the more discriminatory traditional customs associated with customary marriage in line with the

state's 1996 Constitution, widely considered to be the most liberal and progressive in the world. The founding provisions of the Constitution declare that South Africa is committed to principles of "non-racialism and non-sexism," and the Bill of Rights it contains sets out extensive protection for individual rights as well as an equality clause prohibiting discrimination on practically every possible ground.[56] It is this constitutional guarantee of sex equality that was seen as warranting the overhaul of customary laws governing traditional practices prevalent in black South African communities. The question of how to reform customary practices and arrangements so as to bring them in line with the sex equality provision of the Constitution has proved to be no easy matter, however: what the Constitution does for sex equality and individual rights generally, it also does for the rights of cultural, linguistic, and religious groups. Moreover, the Constitution specifically recognizes the validity of African customary law and the system of traditional leadership associated with it.

Nowhere were these constitutional protections of the right to culture and the right to sex equality seen to clash more than in customary law governing marriage, divorce, and inheritance. Traditional southern African cultures, such as those of the Zulu, Xhosa, and Sotho peoples, are patriarchal and patrilineal. Under the system of customary law that most black South Africans adhere to in their family affairs, women were until recently accorded the legal status of a minor—unable to inherit land, enter into contracts, or indeed to initiate their own divorces. Women married under customary law pass from their father's realm of authority to that of their husbands (or nearest senior male relative) for the duration of their lives. Payment for the bride—known as bridewealth, or *lobolo*, traditionally paid in cattle but nowadays more commonly in cash—passes from the prospective groom to the father of the bride (or a male guardian in the event of his death) and without it, marriages are deemed invalid. If a woman subsequently seeks to leave her marriage, the bride's family is expected to return the *lobolo* to the groom or the groom's family—a requirement widely blamed for keeping women fearful of her own impoverishment and that of her family, and thus trapped in abusive marriages. Finally, custody of children is automatically awarded to fathers (or the father's family) under customary law, as required by the principle of primogeniture. These customs developed through a complex interface with colonial administration and law, and reflect what came to be known as the "official code of customary law" recorded by colonial officials in the nineteenth and twentieth centuries.[57]

The clear potential for friction between customary law provisions and the equality clause in the Bill of Rights made it crucial to eliminate any ambiguity in the relationship between these two, but instead political disagreement

about the issue plagued the constitutional process. In the CODESA (Convention for a Democratic South Africa) talks leading up to the drafting of the 1993 interim constitution, African traditional leaders sought to ensure that customary law would not be limited by the provisions of the Bill of Rights. Later, in talks surrounding the drafting of the final 1996 Constitution, they urged that the Bill of Rights be interpreted as applying only vertically between the state and individuals, not horizontally between private citizens, in a bid to drastically restrict the Bill's scope. By contrast, women's rights activists wanted to ensure that the equality clause in the Bill of Rights would trump the authority of customary law, as well as applying to relations between private individuals.[58] In the end, a political compromise was struck: the final 1996 Constitution recognizes and protects customary law and the right to culture to the extent that these are consistent with the rights guaranteed in the Bill of Rights, including the equality clause.[59]

The Constitution, still very much in its infancy, has however seen some legal challenges that do not bode well for gender equity. In *Mthembu v. Letsela and Another* (1997), the Supreme Court of Appeal heard a challenge from a widow married under customary law who wanted to have her only child, a daughter, declared the sole heir to her husband's estate, contrary to customary law. The judge ruled against her, reasoning that customary law did not represent an instance of *unfair* discrimination as the system of primogeniture provides for the maintenance of the deceased's widow and her children.[60] Aside from the *Mthembu* decision and a few others like it is the fact that actual practices and arrangements in African communities have not magically altered in accordance with the Constitutional recognition of sex equality. Customary law continues to permit discrimination against women on many fronts: by denying them inheritance, forcing some to accept polygynous marriages they may not want, and leaving them destitute after divorce or upon the death of their spouse. Moreover, traditional leaders still overstep their legal authority and attempt to settle custody and property disputes automatically in favor of men.

It is no surprise, then, that in 1998, as part of a long-term project titled *Harmonization of the Common Law and the Indigenous Law*, the South African Law Commission sponsored a series of consultations and hearings on the reform of customary marriage. These meetings included a cross section of the community, including representatives of legal reform groups and women's associations, chiefs from the Congress of Traditional Leaders (CONTRALESA), and scholars of constitutional law and customary law. Representatives from CONTRALESA, in keeping with their position during constitutional negotiations, argued that the government should simply recognize marriage under customary law as it is currently practiced, including

those aspects that subordinate women. A customary law specialist at the University of the Witswaatersrand, Likhapa Mbatha, explained that in the meetings she attended traditional leaders kept hiding behind the word "culture" when making their case against proposed reforms, and steadfastly resisted suggestions that women should enjoy greater decision-making roles in African society.[61] Contrarily, women's equality and legal reform advocates voiced their opposition to women's status as minors under customary law, and to the system of primogeniture more generally. Proponents of radical reform advocated (unsuccessfully) the institution of a single civil marriage code that would protect the rights of all women, irrespective of their race, culture, or religion.[62]

By including participants who represented different interests in African communities—traditional leaders, customary law scholars, rural women's advocates, and so on—as well as concerned representatives from legal reform and women's groups, the Commission made it possible for a range of views on the merits and disadvantages of various aspects of customary marriage to be heard. Discussion focused on unions under the actual or "living" customary law and the changing gender roles and practices that it reflects, with the effect that no single, canonical (and likely false) account of customary marriage and the roles and practices surrounding it was taken at face value. Mbatha and others pointed out to traditional leaders in the Law Commission meetings that women's roles have in fact *already* changed in African communities, and that chiefs misrepresent reality when they conjure up romantic ideals of separate spheres and men's leadership. Contrary to the chiefs' account, for example, under the "living" customary law, women negotiate and receive *lobolo* and often act on behalf of their sons and daughters in negotiating the precise terms of marriages. Another widespread but false belief pointed to was the belief that wives have no economic responsibilities in marriage and that they are provided for both by their husbands and by their husband's families if they are widowed.[63]

The process of deliberation initiated by the South African Law Commission can best be characterized as putting into motion a politics of negotiation and compromise in which the focus was on cultural members' concrete experiences of customary marriage, as well as their practical interests and needs. This then provided the backdrop for discussions of prospective policies and their potential consequences. The frankness of the deliberative format accounts for the easy exposure some of the more pernicious interests and motivations at work, particularly those of the chiefs who were concerned that their own positions of power might be endangered if they were no longer permitted to adjudicate matters of divorce, custody, and inheritance in their local traditional courts. The openness and explicitly political tone of deliberations

also accounts for the relative ease with which compromises were ultimately reached on specific reforms and policies. Crucially, traditional leaders were eventually persuaded that it was in their own best interests and those of their constituents to agree to moderate reforms of customary marriage that would preserve the essence of the institution, albeit in modified form.

As in the debate on the status of customary law in the earlier constitutional negotiations, a political compromise was struck in the Law Commission's consultations on customary marriage. On the side of reform, women's contractual and proprietary capacities are now fully affirmed and wives have (formally) equal status. Both spouses are deemed to be married in community of property[64] as the default arrangement, consistent with the wide popularity of the principle of shared or joint property among black South African women.[65] Women are now equally entitled to initiate divorce proceedings, and married parents have equal guardianship and custody rights with respect to their children. On the issue of family law jurisdiction, it was decided that in the future only family law courts may handle divorce, maintenance, and custody matters, thereby taking this power away from local chiefs (but not their right to try to mediate relationship disputes).

Equally, the deliberations yielded a number of concessions for chiefs or traditional leaders. Chiefs were relieved that *lobolo* is still recognized, although it is no longer required to prove a marriage's validity. Interestingly, the Law Commission initially thought *lobolo* might be eliminated on the grounds that it is offensive to women's dignity, but the widespread support for the custom voiced in consultations made this all but impossible.[66] An important reform of the practice, however, now leaves it open to either parent to assume the role of negotiating and receiving bridewealth. Another custom that the Commission originally expected to recommend to abolish is that of polygyny, or the practice of a man taking more than one wife. Most participants in deliberations however felt this would be a mistake—both because the practice is deemed by many to be an important (though diminishing) variation of customary marriage, and because merely abolishing it in law would be ineffectual, leaving women in polygynous marriages essentially unprotected. An agreement was eventually reached whereby polygyny will continue to be permitted, but a man intending to marry another wife must have a written contract with his existing wife that protects her financial interests and establishes an equitable distribution of his assets in the event of divorce or his death.

The explicitly political nature of the consultation process surrounding the recognition and reform of customary marriage in South Africa rendered the power relationships and interests more visible, and at least on some level, more open to contestation. Reforms that might not have been thought neces-

sary were proposed, and other reforms were dismissed or amended in response to political pressures. The relative openness of the political process made clear just what the most forceful complaints were. In particular, the denial of women's proprietary and contractual capacities was seen as the most odious aspect of customary law, and proposals to eliminate these were not especially contested.[67] Similarly, it was only through consultation and deliberation that the Law Commission was able to discover which practices were widely thought to be valuable and worth preserving.

This example illustrates, I believe, that a deliberative approach to resolving disputes about contested cultural practices, one that emphasizes inclusive debate and decision making and that uses strategies of negotiation and compromise, can produce fair and equitable solutions. The outcome of deliberations in this instance did not, of course, please all of the participants. Traditional leaders would have much preferred to retain their role in adjudicating divorce and custody disputes, largely because of the power that it represents. Some women's groups, including the government-initiated Commission on Gender Equality, were unhappy with the retention of polygyny.[68] But the compromises that the hearings eventually produced were nonetheless seen by most as a fair and legitimate outcome of deliberation and negotiation. The consultation process lent a legitimacy to the reforms that they would not otherwise have enjoyed, because they were the result of democratic negotiations among representatives of many different constituencies. To sustain this legitimacy, it will be important to follow up the new legislation with government spending on programs needed to implement the reforms.[69]

Finally, this case also shows that deliberation may yield outcomes with *nonliberal* features—in this case, the preservation of African customs of polygyny and bridewealth payment—that are nonetheless consistent with norms of political equality and democratic legitimacy. The revisability of the outcome of deliberations (through future amendments to the act) will help to ensure that any unjust or unfeasible aspects of the new laws that come to light can be revisited and changed. For instance, one problematic aspect of the new act is that it has only very limited applicability to customary marriages entered into before the act came into effect. In part this provision reflects the difficulty of amending marriage contracts retrospectively, but it also signaled a concession to traditional leaders. Already there are calls from women's equality groups and legal lobbyists to reform this aspect of the act, and it seems almost certain that new legislation will need to be brought in to ensure greater equity for those whose customary marriages predate the legislation. Similarly, some believe that the new laws governing polygyny may well need to be revisited in order to reflect changing attitudes and practices in South Africa.

V. CONCLUSION

I have argued that a deliberative approach to resolving disputes about the status of contested practices meets the demands of democratic legitimacy and demonstrates respect for cultural pluralism. Three important criticisms of this deliberative democratic approach to conflicts of culture are, however, sure to be raised.

One objection points to the open-ended and so possibly illiberal nature of the political outcomes of this approach. My response to this concern is to reiterate the importance of taking seriously the principle of democratic legitimacy in the context of cultural diversity. The deliberative democratic model of conflict resolution sketched here insists on radically democratic and inclusive processes of discussion and decision making; as such, it cannot guarantee that deliberation about cultural conflicts will issue in liberal outcomes. By contrast, the liberal a priori view sketched earlier suggests that dilemmas of justice involving nonliberal cultural groups can be determined in the main by applying liberal norms and principles. This approach may ensure that liberal policies follow from deliberation—however ineffectual such policies may be in practice—but it cannot deliver democratically legitimate solutions. Similarly, the extensive normative constraints that some democratic theorists propose to impose on deliberation, and which reflect the ideal of deliberation as a process of moral argumentation, are in large part designed to ensure that results are just by measurable liberal standards. These constraints may however be inconsistent with the demands of democratic pluralism. Moreover, they direct our attention away from contested issues of power, authority, and legitimacy within cultural communities.

A second concern suggests that the deliberative approach I defend rests on a conception of political legitimacy paradoxically at odds with the canonical views of certain traditional groups whose cultural practices are in question, particularly conservative religious communities. In requiring groups to democratize their own internal political processes so as to permit dissenting members to have a role in decision making, do we not fail to respect their collective political practices and self-understandings? While acknowledging the tension, a stronger charge of paradox seems unwarranted, for it wrongly supposes that the ideal of democratic legitimacy is strictly a liberal conception—that it has no purchase at all within nonliberal cultures, not even among vulnerable and exploited members. The charge of paradox further assumes, falsely, that democratic activity is neither permissible nor possible within traditional cultures in liberal states. As I have argued, nonliberal social groups may be marked by deeply hierarchical relationships that make it difficult to see signs of resistance or democratic activity. Such deep hierarchies certainly

pose challenges to the fair and representative inclusion of groups members in deliberations about contested cultural practices, but they do not warrant suspending the norm of democratic legitimacy altogether.

Finally, a related worry points to the possible effects on traditional communities of the requirement that deliberations about the status of contested cultural practices be broadly inclusive. There is no doubt that requiring democratic decision-making procedures for settling the status of disputed social practices and arrangements, and where necessary, reforming them, will trigger social changes within traditional communities. As Bohman observes,

> The cost of interaction in the public sphere may well be the loss of some cultural forms of authority. The self-interpretations of such cultures and their traditions will be thrown open beyond their authorized interpreters to a wider set of participants, even to non-members with whom they engage in dialogue.[70]

The requirement that groups adopt changes that will permit the democratic inclusion of their own members in formal spaces of democratic activity may indeed be onerous in some cases. But as I have argued, disputes about the status of customs of traditional cultures in liberal societies frequently arise as a result of dissent *within* cultural communities, and include challenges directed against prevailing decision-making structures. Since such democratic contestation often occurs outside of formal political spaces, it is easily overlooked and the conflict described, falsely, as a clash of core values held by the liberal state and traditional or illiberal cultures.[71] But those who insist that the liberal state oppresses nonliberal groups by requiring them to open up or democratize their internal decision-making procedures make the mistake of overlooking the role of dissenting members in bringing the issue of contested customs to the fore.[72]

Notwithstanding this tension between respect for the autonomy of nonliberal cultures and the norm of democratic legitimacy, a political process that aims to facilitate deliberation among members of cultural communities, representatives of groups in civil society, and state officials is, I think, potentially more democratic and equitable than the alternatives. Within the context of liberal constitutional democracies, demonstrating respect for cultural communities does not require that any or all practices, however much in tension with democratic norms, be accommodated. Equal respect is better demonstrated by requiring the meaningful inclusion of group members in the process of evaluating, defending, and proposing changes to their communities' cultural practices. By putting members of cultural communities at the center of debates and decision-making processes about the future of their cultural practices, we express formal respect and equal regard for them as citi-

zens and as members of groups—surely a moral requirement of plural, liberal states. A deliberative democratic approach to cultural conflicts does not contrive to guarantee liberal outcomes, nor does it promise that deliberative outcomes will always be the most fair or just from the point of view of all concerned. But the procedures for evaluating and, if necessary, reforming contested cultural customs sketched here are, I have argued, democratic and practically grounded. As such, they can generate proposals that are both democratically legitimate and politically viable in their reflection of cultural practices and communities in flux.

NOTES

1. By "nonliberal" I refer to traditional groups adhering to practices that reflect and reinforce conservative cultural (often religious) norms, role, and worldviews. The main sense in which the customs of traditional groups are nonliberal, for present purposes, is that they stipulate strict social hierarchies and very pronounced sex-role differentiation.

2. Brian Barry, Will Kymlicka, and Susan Moller Okin have all argued that cultural practices and arrangements that discriminate against women are morally indefensible from the standpoint of a liberalism committed to norms of individual autonomy and equality. Martha Nussbaum has employed her Aristotelian-inflected liberalism to argue that citizens' capabilities for human functioning are undercut by customs common in traditional societies, such as arranged marriage and polygyny. See Brian Barry, *Culture and Equality* (Cambridge, MA: Harvard University Press, 2001); Susan Okin, "Is Multiculturalism Bad for Women?" "Response," and Will Kymlicka, "Liberal Complancencies," in *Is Multiculturalism Bad for Women?* ed. Joshua Cohen, Matthew Howard, and Martha C. Nussbaum (Princeton, NJ: Princeton University Press, 1999); Susan Okin, "Feminism and Multiculturalism: Some Tensions," *Ethics* 108 (1998): 661-84; Will Kymlicka, *Multicultural Citizenship* (Oxford, UK: Oxford University Press, 1995), chap. 3 and 5; Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge, UK: Cambridge University Press, 2000), esp. chap. 4.

3. James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: Cambridge University Press, 1995), 183-84.

4. Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, NJ: Princeton University Press, 2002), 101.

5. Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Cambridge, MA: Harvard University Press, 2000), 270, 272, 292-93 and throughout.

6. Jürgen Habermas, "Discourse Ethics: Notes on a Program of Philosophical Justification," in *The Communicative Ethics Controversy*, ed. F. Dallmayr and S. Benhabib (Cambridge, MA: MIT Press, 1990), 90.

7. Seyla Benhabib, "Deliberative Rationality and Models of Democratic Legitimacy," *Constellations* 1 (1994): 26-52.

8. This Canadian case is the subject of my "Conflicting Equalities? Cultural Group Rights and Sex Equality," *Political Studies* 48, no. 3 (2000): 522-39.

9. Victoria Bronstein also argues that disputes within customary law are primarily matters of "intra cultural conflicts between internal women and other members of the group." See her

"Reconceptualizing the Customary Law Debate in South Africa," *South African Journal on Human Rights* 14 (1998): 388-410, esp. 390.

10. Parekh, *Rethinking Multiculturalism*, 175.

11. Benhabib, *Claims of Culture*, 71.

12. Iris Marion Young, *Inclusion and Democracy* (Oxford, UK: Oxford University Press, 2000), 121-22.

13. James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge, MA: MIT Press, 2000), 16, 18.

14. Young discusses the example of storytelling as an important communicative strategy likely to fail normative rigorous discursive requirements in *Inclusion and Democracy*, 75.

15. John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford, UK: Oxford University Press, 2000), 58. See also James Bohman, "Deliberative Democracy and Effective Social Freedom: Capabilities, Resources, and Opportunities," in *Deliberative Democracy: Essays on Reason and Politics*, ed. J. Bohman and W. Rehg (Cambridge, MA: MIT Press, 1997).

16. John Ferejohn, "Instituting Deliberative Democracy," in *Nomos XLII: Designing Democratic Institutions*, ed. Ian Shapiro and Stephen Macedo (New York: New York University Press, 2000), 76.

17. Jack Knight and James Johnson, "What Sort of Political Equality Does Deliberative Democracy Require?" in *Deliberative Democracy: Essays on Reason and Politics*, ed. J. Bohman and W. Rehg (Cambridge, MA: MIT Press, 1997), 287.

18. Joshua Cohen, "Deliberation and Democratic Legitimacy," in *Deliberative Democracy: Essays on Reason and Politics*, ed. J. Bohman and W. Rehg (Cambridge, MA: MIT Press, 1997), 77.

19. Dryzek, *Deliberative Democracy and Beyond*, 47-48; Ferejohn, "Instituting Deliberative Democracy," 79-80; Richard Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (London: Routledge, 1999), 110.

20. Jürgen Habermas, *Between Facts and Norms*, trans. W. Rehg (Cambridge, MA: MIT Press, 1996), 165.

21. Ibid., 166.

22. Dryzek endorses "reasoned agreement" as a goal of deliberation in *Deliberative Democracy and Beyond*, 47.

23. Ibid., 170.

24. Bohman, *Public Deliberation*, 91; Bohman, "Public Reason and Cultural Pluralism," *Political Theory* 23 (1995): 253-79 at 266.

25. Parekh, *Rethinking Multiculturalism*, 292-94, 341.

26. Benhabib, *Claims of Culture*, ix.

27. Ibid., 7, 134-43, 144-45.

28. For example, the "difference-based approach" advanced recently by Avigail Eisenberg "requires that conflicts be assessed in terms of the identity related interests and values at stake for each side." See her "Diversity and Equality: Three Approaches to Cultural and Sexual Difference," *Journal of Political Philosophy*, 11, no. 1 (2003): 41-64.

29. Bohman, *Public Deliberation*, 5.

30. Dryzek, *Deliberative Democracy and Beyond*, 30.

31. Simone Chambers, *Reasonable Democracy: Jürgen Habermas and the Politics of Discourse* (Ithaca, NY: Cornell University Press, 1996), 11.

32. Joshua Cohen defends an ideal of deliberative democracy as centrally about political justification. See his "Procedure and Substance in Deliberative Democracy," in *Deliberative*

Democracy: Essays on Reason and Politics, ed. J. Bohman and W. Rehg (Cambridge, MA: MIT press, 1997).

33. Benhabib, *Claims of Culture*, 143.

34. See, for example, Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Harvard University Press, 1996).

35. Daniel Weinstock, "Les 'identityés': sont-elles dangereuses pour la démocratie?" (manuscript).

36. Jeff Spinner-Halev also cautions against merely consulting with male leaders in "Feminism, Multiculturalism, Oppression, and the State," *Ethics* 112 (2001): 84-113 at 108. See also Okin, "Response."

37. John Stewart, "Democracy and Local Government," in *Reinventing Democracy*, ed. P. Hirst and S. Khilnani (Oxford, UK: Blackwell, 1996), 51.

38. Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge, UK: Cambridge University Press, 2001), 132. My argument for a deliberative approach to resolving cultural conflicts is largely compatible with Shachar's proposal for a system of "joint governance," under which cultural groups and the state would have responsibility for different aspects of community governance. Whereas I focus on the public deliberations that might produce reforms, however, Shachar focuses on the legal and to a lesser extent political institutions and procedures in her proposed power-sharing scheme.

39. Paul Q. Hirst, *Associative Democracy* (Amherst: University of Massachusetts Press, 1994), 13, 60, and throughout.

40. Spinner-Halev, "Feminism, Multiculturalism."

41. Habermas, *Between Facts and Norms*, 165-66.

42. Bohman, *Public Deliberation*, 90.

43. Benhabib, *Claims of Culture*, 11.

44. Bohman, *Public Deliberation*, 35.

45. Ibid., 36.

46. Cohen, "Deliberation and Deliberative Legitimacy," 74.

47. Knight and Johnson ("What Sort of Political Equality") use the term "equal opportunity of political influence" to capture these criteria.

48. Proponents of associative democracy suggest that voluntary associations should be supported through taxation, and I agree. Strategic funding of cultural community groups could surely help to increase internal debate about changing norms and practices.

49. Simone Chambers also emphasizes the importance of leaving deliberative agreements open to revisitation, in *Reasonable Democracy* (103-4) and "Discourse and Democratic Practices," in *The Cambridge Companion to Habermas*, ed. Stephen White (Cambridge, UK: Cambridge University Press, 1995), 248.

50. "Gender, Justice, Development and Rights," Report of the United Nations Research Institute for Social Development Workshop (2000).

51. Here I draw on the work of Kantian philosopher Onora O'Neill, especially *Bounds of Justice* (Cambridge, UK: Cambridge University Press, 2000).

52. See also Anne Phillips, "Multiculturalism, Universalism, and the Claims of Democracy," Democracy, Governance and Human Rights Programme Paper No. 7, United Nations Research Institute for Social Development (2001).

53. Bellamy also advocates a politics of negotiation and compromise for democratic societies more generally in *Liberalism and Pluralism*.

54. Shachar makes a similar claim in support of her joint governance proposal: state and cultural group officials "are . . . forced to abandon their perfectionist and maximalist jurisdictional aspirations, which are so often the source of conflict." *Multicultural Jurisdictions*, 143.

55. My argument does presuppose that deliberation about contested cultural practices takes place against the background of a liberal democratic state that protects fundamental rights and freedoms and that prohibits harm or other cruel treatment through criminal laws.

56. The South African Constitution states that neither the state nor individuals may "unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth."

57. See T. W. Bennett' comprehensive *Human Rights and African Customary Law* (Cape Town, South Africa: Juta, 1999 [1995]).

58. The Women's National Coalition, an ad hoc alliance of South African women's groups, applied direct political pressure to the negotiations. Less seasoned political activists were also involved: famously, women from the Rural Women's Movement traveled up to Johannesburg from the Eastern Cape to lobby the Convention for a Democratic South Africa talks in favor of sex equality protections. Gertrude Fester, Commissioner for the Western Cape, Commission on Gender Equality, interview by the author, at Bloubergstrand, Western Cape Province, January 16, 2002.

59. The Constitution also states that in interpreting the provisions of the Bill of Rights, the courts should consider relevant international treaties. South Africa has signed and ratified the Convention on the Elimination of All Forms of Discrimination against Women, which specifically calls for the reform of cultural traditions that perpetuate sex discrimination.

60. Lisa Fishbayn notes that the customary duty to support widows and their children has diminished in practice in southern Africa in recent years, due to urbanization, migrant labor, and the dramatic rise in HIV and AIDS. "Litigating the Right to Culture: Family Law in the New South Africa," *International Journal of Law, Policy and the Family* 13 (1999): 147-73.

61. Likhapa Mbatham, Centre for Applied Legal Studies (CALS), interview by author, at the University of the Witswaatersrand (Johannesburg), January 25, 2002.

62. Cathy Albertyn, director of CALS, reports that her organization recommended a single, civil marriage process; this proposal was seen by many as a demotion of customary marriage and customary law more generally, and so rejected. Interview by author, January 24, 2002, Johannesburg.

63. See also Chuma Himonga, "Law and Gender in Southern Africa," in *The Changing Family: International Perspectives*, ed. J. Eekelaar and T. Nhlapo (Oxford, UK: Hart, 1998), 289; Fishbayn, "Litigating the Right," 165.

64. The community of property reform was viewed as especially important by women's legal reform groups, which view poverty as the gravest problem facing rural black women. Coriaan de Villiers, Women's Legal Centre, interview by author, Cape Town, South Africa, January 18, 2002.

65. In a study of attitudes of women in the Western Cape and Eastern Cape Provinces, 82 percent of women supported joint ownership and control of property in monogamous marriages. Prakashnee Govender, *The Status of Women Married in Terms of African Customary Law: A Study of Women's Experiences in the Eastern Cape and Western Cape Provinces*, Research Report No. 13 (Cape Town, South Africa: National Association of Democratic Lawyers, 2000), 26-28.

66. As Govender (Ibid.) notes, women overwhelmingly (85 percent) supported the custom of *lobolo*.

67. Likhapa Mbatha, personal communication. Also, Govender's study found that a mere 2 percent of married women supported the principle of primogeniture (p. 27).

68. The Commission for Gender Equality (CGE), in a brief addressing the Recognition of Customary Marriages Bill, describes the practice of polygyny as "discriminatory." CGE, *Submission to the Justice Portfolio Committee* (September 30, 1998), 7.

69. Johanna Kehler, director, National Association of Democratic Lawyers, interview by author, Cape Town, South Africa, January 18, 2002.

70. Bohman, *Public Deliberation*, 146.

71. See, for example, Okin, "Is Multiculturalism Bad for Women?" and her " 'Mistresses of Their Own Destiny': Group Rights, Gender, and Realistic Rights of Exit," *Ethics* 112 (January 2002): 205-30.

72. See Spinner-Halev, "Feminism, Multiculturalism," 108.

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