Disrupting Individualism and Distributive Remedies with Intersubjectivity and Empowerment: An Approach to Justice and Discourse

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INTRODUCTION

I will start with a quotation from Andre Gorz that will help set the tone:

> We have no words to speak about our oppression, our distress, our bitterness, and our revolt against the exhaustion, the stupidity, the monotony, the lack of meaning of our work and of our life, against the contempt in which our work is held; against the despotic hierarchy of the factory; against a society in which we remain the underdogs and in which goods and enjoyments that are considered normal by other classes are denied to us and are parceled out to us only reluctantly, as though we were asking for a privilege. We have no words to say what it is and how it feels to be workers, to be held in suspicion, to be ordered around by people who have more and who pretend to know more and who compel us to work according to the rules *they* set and for purposes that are *theirs,* not ours. And we have no words to say all this because the ruling class has monopolized not only the power

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of decision-making and of material wealth; they
have also monopolized culture and language.[1]

In the article that follows I argue that neither individualism nor
communitarianism create a language or a space for full and fair
participation in and constitution of democratic structures, and that
empowerment is the language necessary for achieving these goals. In
order to explore these notions, I will consider the following questions
in the context of individuals, communities, cities, and regions:

I.   What are the consequences of the dominant ideology of
        individualism for members of subordinated groups?
II.   How does the ideology structure the relationship
        between dominant and oppressed groups?
III.   Can a solution be found among communitarian
        ideology?
IV.   How can we transform the nature of this relationship
        and this language?

I. WHAT ARE THE CONSEQUENCES OF THE DOMINANT IDEOLOGY OF INDIVIDUALISM FOR MEMBERS OF SUBORDINATED GROUPS?

A. Assimilation, Racing and the Dominant Language

"Individual" or the ideology of individualism[2] is one of the
most dominant images that oozes out of liberalism.[3] "Individualism" is
a set of principles built upon the idea that people are "separate and
self-contained atoms, each with the same formal rights, [including the]

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1. *See* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 192 (1990)
(quoting Andre Gorz) (citation omitted from original).

2. "Ideology" is defined as "a set of ideals that 'helps reproduce relations of
domination or oppression by justifying them or by obscuring possible more emancipatory
social relations.'" john a. powell, *The Multiple Self: Exploring Between and Beyond
Modernity and Postmodernity,* 81 MINN. L. REV. 1481, 1482 (1997) (quoting IRIS MARION
YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 112 (1990).

3. "Liberalism" in this context is different from the common American political
parlance. "Liberalism" here "describes a tradition of thought that emphasizes toleration and
respect for individual rights . . . ." MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA
IN SEARCH OF A PUBLIC PHILOSOPHY 4 (1996).

rights to keep others out, [to] separate" from the other.[4]

One of the ways I approach the issues of exclusion and racial subordination is by looking at language. I conceive of "law" as a public language, and this language of law monopolizes. In some ways, it may be the most important monopoly for society. The hegemony of law as language, replicative of and interacting with the hegemonic notion of the individual, will rear its ugly head throughout this discussion.

Individuality is a model and a process of assimilation and racing. A book by Theodore Allen called *The Invention of the White Race* discusses this process of "racing."[5] According to Allen, "racing" is a process by which a people are subjected to a kind of "social death." Here, the dominant group takes away the subordinate group's history, religion, culture, language, and voice.[6] The dominant denudes the subordinate group as human beings, and then gives them the language and symbols of their dominant culture, with which they are to reconstruct themselves.[7]

B. The Language of Individuality: Just Who Are Individuals?

Part of the language of the dominant culture—for us in this society and in this time—is the language of individuality. While I am not suggesting that those of us who are members of subordinate groups are not individuals, it is certainly not true that we are all *just* individuals.[8] And yet, I believe that the dominant language and ideology of individuality blinds us to the ways in which we are not just individuals.

The ideology of individuality had its origins in the Enlightenment, which came concurrently with the emergence of Colonialism.[9] During this germinative period, the essence of individualism was that Europeans were individuals as opposed to other

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4. *See* YOUNG, *supra* note 1, at 227.
5. *See generally* THEODORE W. ALLEN, THE INVENTION OF THE WHITE RACE, VOLUME ONE: RACIAL OPPRESSION AND SOCIAL CONTROL (1994).
6. *See id.* at 35.
7. *Id.*
8. *See generally* john a. powell, *The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 MINN. L. REV. 1481 (1997) [hereinafter *The Multiple Self*].
9. *Id.* at 1486.

people who were a "collective."[10] The collectivity of the other served
as a rationale and justification for the exploitation of the collective
other.[11] In other words, part of the longing to be a member of the
dominant group was tied up with being an individual. In that sense,
individuality was already racialized. Individuality and membership in
the dominant culture meant something in particular in a specific
moment related to white Europeans, although it was not clear at that
moment that they were white.[12] In fact, they were still in the process
of becoming white.[13] The ideology of individualism as opposed to the
ideology of collectivity was part of the whiteness process.[14]

Given the racialized origination of individualism, the decision
to position oneself outside of the language and process of the ideology
has tempted members of subaltern groups. Rejecting this temptation,
feminist scholar Robin West has suggested that if what is meant by
"human being" is a self-contained, free standing, autonomous
individual, then women are not individuals.[15] Because women
experience a sense of relationship that is counterfactual for that
definition of human being, women are not human beings.[16]

Embracing the language of individualism is fraught with
dangers. As we think about what it means to be an individual and how
the law pulls us into that discourse, the negative effects of insinuating
ourselves into the ideology of individuality often blind us. Still, the
negative effects of trying to be like everyone else are not totally
obscured. For example, consider the debate surrounding affirmative

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10. *Id.*

11. *See generally id.* at 1490; and ALLEN, *supra* note 5, at 32-35 (noting that at that
moment in history the category of the "other" included the Irish, indigenous people in the New
World, and people of Africa and African descent).

12. *See* ALLEN, *supra* note 5, at 27-28 (noting that historically, groups like the Irish,
though "white" were still treated as the "other").

13. *See, e.g., id.*(noting that various authors have noted that "whiteness" is a transparent
concept, meaning different things at different times, depending on the current politically
dominant culture's need to oppress the subordinate one).

14. *See The Multiple Self, supra* note 8, at 1490 (noting "[b]y construing the essence of
the human self as individual and autonomous, European thinkers deliberately excluded from
selfhood members of non-White societies that were organized around non-individualistic
norms").

15. Robin West, *Jurisprudence and Gender,* 55 U. CHI. L. REV. 1, 2-3 (1988).

16. *Id.* (noting that women are invariably "'connected' to life and to other human beings
during at least four recurrent and critical material experiences: the experience of pregnancy
itself; the invasive and 'connecting' experience of heterosexual penetration, which may lead to
pregnancy; and the monthly experience of menstruation, which represents the potential for
pregnancy; and the post-pregnancy experience of breast feeding").

action. At one time, the discussion of remedying discrimination in employment and education focused on women and people of color deserving to be treated just like everybody else. This begged the question: who is this "everybody else"? It is not unusual for blacks, Latinos, Asian Americans, women, and persons with disabilities to argue that they want to be treated like individuals. In other words, they want to be treated just like everybody else.

This exhortation is understandable given the history of these individuals being fused into a group and being stereotyped as the other. But responding by wanting to be just like everyone else does not really address the problem. In fact, this response can serve to reproduce problems. In my opinion, this unreflective desire to be like everyone else is an attempt to reclaim a destroyed social life by reconstructing it in the dominant group's language—the language of individuality.[17]

II. How Does the Ideology Structure the Relationship Between Dominant and Oppressed Groups?

A. Distributive Justice vs. Institutional Arrangements

The problem is not primarily one of categorization or even necessarily discrimination. Iris Young argues effectively that what we face is a problem of domination and oppression.[18] While it may be true that the lion's share of discourse on discrimination focuses on individual harms and victims, domination, oppression, and exploitation do not occur solely at the individual or interpersonal level, but also at the collective or systemic level.[19] It is apparent that oppression and

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17. *See generally* ALLEN, *supra* note 5 and discussion, *supra* pp. 2-3 (discussing the process of "racing" and subjection of the subordinate group to a "social death").

18. *See* YOUNG, *supra* note 1, at 3 (arguing—
    [T]hat instead of focusing on distribution, a conception of justice should begin with the concepts of domination and oppression. Such a shift brings out the issues of decisionmaking, division of labor, and culture that bear on social justice but are often ignored . . . . It also exhibits the importance of social group differences in structuring social relations and oppression . . . . I argue that where social group differences exist and some groups are privileged while others are oppressed, social justice requires explicitly acknowledging and attending to those group differences in order to undermine oppression.).

19. *See* john a. powell, *Whites Will Be Whites: The Failure to Interrogate Racial Privilege,* 34 U.S.F. L. REV. 419, 449 (2000) (quoting, among other cases that evince a refusal

domination occur at the systemic or collective level when noting that they are often sanctioned by the language, structure, institutions, and practices in a society.[20] Indeed, John Rawls suggested that if we want to know whether a society was just, we should not tarry too long on the individual attitudes people hold in that society. Instead, Rawls calls our attention to the institutional arrangements and structures in those societies.[21]

Remedies for domination and oppression have clearly not kept pace with theory about the topics themselves. One example of the troubling, lagging thinking in this regard surrounds the distributive formula for justice.[22] The rationale behind this form of justice is that society is unjust because power and resources are not fairly distributed among individuals. Under this theory, redistribution amongst individuals will cure the defects of the unjust society.[23] Again, there is an essential unit to this calculation, and that unit is the individual. Iris Young, along with others, suggests that the primary role for justice is not simply that of distribution, but is a much larger role.[24] Under this

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on the part of the Court to hear cases of systemic rather than individual discrimination, Justice Powell's opinion for the Court in *Wygant v. Jackson Board of Education,* where Justice Powell writes that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy . . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expansive."). 476 U.S. 267, 276 (1986) (holding it was impermissible under the Equal Protection Clause to retain minority teachers over nonminority teachers with more seniority in an attempt to provide more role models for minority schoolchildren).

20. *See generally* JOHN P. RAWLS, A THEORY OF JUSTICE 6-10 (1971).

21. *Id.*

22. *See, e.g.,* Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources,* 10 PHIL. & PUB. AFF. 283, 284 (1981) (arguing that "an equal division of resources presupposes an economic market of some form, mainly as an analytic device but also, to a certain extent, as an actual political institution"). *But see* Carlos A. Ball, *Autonomy, Justice, and Disability,* 47 U.C.L.A. L. REV. 599, 636 (arguing that "a focus on the distribution of primary goods and resources will fail to give us an accurate sense of the justness of different social arrangements because that focus ignores issues of conversion. Different individuals have different capabilities to convert goods . . . and resources into freedoms.").

23. One example of which is the distribution of jobs under an affirmative action program. *See, e.g.,* Cheryl I. Harris, *Whiteness as Property,* 106 HARV. L. REV. 1709, 1781 (1993) (citing RONALD J. FISCUS, THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION 8-9 (Stephen L. Wasby ed., 1992) (stating that "the case for affirmative action often is premised on the need to compensate minorities for harms done to them in the past—a discussion that admits of interpretations consistent with both compensatory and distributive justice claims").

24. *See generally* YOUNG, *supra* note 1, at 15-38 (arguing that the distributive paradigm is problematic in that:

paradigm, justice requires calling institutions into being, naming those institutions, and, indeed, constructing the language itself, giving those institutions meaning.[25]

There is a theory in terms of individuality that I would like to describe for a few moments. The theory starts from the premise that "society" is an artificial concept. Under this paradigm, society is simply an aggregate of individuals. The theory can also be captured in the common expression, "the whole is *equal to* the sum of its parts." The converse of this notion is the theoretical disaggregate. It says that if you take things apart, you are able to analyze and fully understand the whole. This perspective is one of reductionism.

A counter theory suggests that the whole is *greater than* the sum of its parts. Moreover, this theory suggests that when you bring people together something happens that *cannot be reduced* to the individual constituent parts. In other words, there may be something different about the whole beyond just the individuals. This theory suggests that the group can be more than the aggregate of individuals. The veracity or falsity of individuality, or whether individuality springs from some sort of process, some sort of constituted collective process, is one of the huge debates worth having today. Such a debate could be constituted as the platform for the kind of transformation of justice that Iris Young envisions.[26]

First, it tends to focus thinking about social justice on the allocation of material goods . . . , ignor[ing] the social structure and institutional context that often help determine distributive patterns . . . . [And s]econd when extended to nonmaterial goods and resources, the logic of distribution misrepresents them.).

25. *See, e.g.,*YOUNG, *supra* note 1, at 40-41 (discussing the notion that one needs to name an institution in order to avoid ignoring its total effect on society. For example, "oppression" is a concept which traditionally meant "the exercise of tyranny by a ruling group." However, as Young points out, "[i]n its new usage, oppression designates the disadvantage and injustice some people suffer not because a tyrannical power coerces them, but because of everyday practices of a well-intentioned liberal society . . . . [It also means in the structural sense] "structural features of bureaucratic hierarchies and market mechanisms...." Says Young, "we cannot eliminate this structural oppression by getting rid of the rulers or making some new laws, because oppressions are systematically reproduced in major economic, political, and cultural institutions.").

26. *See generally* YOUNG, *supra* note 1.

B. Individuality: Too High a Price to Pay?

I will turn now again to the implications of these conflicting notions of individualism, society, and justice for racial minorities, other subordinated groups, and dominant groups.   How does individualism operate on race and gender today? The answer from the individualist camp is that race and gender do not exist.[27] We are all just individuals.   Any characteristic that does not reflect that individuality is simply an accident.[28] In other words, any marker of gender, race, or sexuality around which meaning is constructed socially is largely irrelevant.

In a way individuality, even as it purports to take into account our distinctness, makes us all the same in fundamental ways. We are all rational, autonomous people and therefore we should all be treated the same. The focus on discrimination is consistent with the idea of individuality and the idea that we are all the same in some important ways. Thus, individuality becomes a model for assimilation. We are all exactly alike.   One therefore cannot claim to have not received equal treatment unless one can claim this sameness. But what are the consequences of embracing this stance for subordinated and marginalized groups?

One of my noble white friends talks about the fact that, when he was a kid, he was nervous around black people. His parents would tell him there was no need to be nervous around black people because "they are just like you." After that, whenever he would see a black person, he would point to them and he would say, "just like Jimmy, just like Jimmy." In this way, Jimmy had become the norm. In other words, "Jimmy" had become the thing against which everybody else was measured. In order to be "just like Jimmy" you would have to sometimes shed important differences. Those differences would have to be ignored or denied. And what happens to those who are not just like Jimmy?

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27. *See, e.g.*, YOUNG, *supra* note 1, at 157 (noting that—
We seek a society in which differences of race, sex, religion, and ethnicity
no longer make a difference to people's rights and opportunities. People
should be treated as individuals, not as members of groups; their life
options and rewards should be based solely on their individual
achievement.).

28. *Id.*

In his important book of essays, *The Price of the Ticket,* James Baldwin talked about the price of inclusion or the cost of belonging in American society.[29] Baldwin asked, "what do you have to give up in order to gain membership in society?" For Baldwin, the price of the ticket was too high if it meant giving up everything that made him who he was.[30] Furthermore, I argue that to accept the language of individuality, to accept a reductionist or assimilationist perspective, and to deny important differences, is also too high a price to pay.

III. CAN A SOLUTION BE FOUND AMONG COMMUNITARIAN IDEOLOGY?

A. Communitarianism and the Right to Privacy

What, then, is an alternative to this ideology of individualism? One solution that has grown in strength of support is the solution of community. One premise for a communitarian ideology is that though we are individuals, we are not free standing, separate, autonomous, possessive individuals, we do desire a relationship—a community.[31] A subscriber to communitarian theory "believes in the process of collective, deliberative dialogue amongst the community of all citizens towards a conception of the common good."[32] However, I argue that the ideology of community is as limited and prone to assimilation and the dissolution of important differences as is the ideology of individuality. Why?

Communitarianism, particularly as conceived of by Michael Sandel, Alasdair MacIntyre, and others, is really just the flip side of individualism.[33] The notion that undergirds it is one of homogeneity

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29. JAMES BALDWIN, THE PRICE OF THE TICKET: COLLECTED NONFICTION 1948-1985 (1985).

30. *See generally id. at xx.*

31. *See* Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics,* 133 U. PA. L. REV. 291, 324 (1985) (discussing MacIntyre's project of rejecting autonomy while desiring community and noting that MacIntyre often comes "close to denying the value of autonomy altogether." A denial, says Cornell, that "should not be allowed to obscure the difficulties of achieving a modern reconciliation between the individual and the community without diminishing the values of autonomy and equality.").

32. *See* Sheila Foster, *Community and Identity in a Postmodern World,* 7 BERKELEY WOMEN'S L.J. 181, 184-185 (1992) (book review) (reviewing Martha Minow's MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1992)).

33. *Compare* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 3 (1996) (arguing that there are two fears that "lie at the heart of democracy's discontent. One is the fear that, individually and collectively, we are losing

or sameness. Like individualism, communitarianism holds that people in a given community are all the same in some sort of collective sense, rather than in an individual-based sense, and therefore anyone who is different than the community does not belong to that community.[34] I argue that a community can only be forged if members are completely transparent to each other, can completely know each other, and therefore are able to fuse together into a collective. And yet, because the self evades these types of knowledge and solidity, communitarianism fails for the same reasons that individualism fails.

On one hand, we have the assimilated individual. On the other hand, we have the assimilated community. In individualism, when women, gays, or people of color stand in relationship to either the notion of the individual or the community, they stand outside the boundaries.[35] They are beyond the margins because they do not reflect the values that are being advanced by that concept of individuality—the values of the rational, free-standing, separate and autonomous person or community, of the human being that Robin West would reject.[36] And in community, when women, gays, or people of color do not reflect the kind of homogeneous values that have become synonymous with that community, they stand outside the margins too.[37]

The lack of homogeneity and marginalization is perceptible not only in philosophical spheres or in legal terms, but in very concrete terms. For example, in the law, both individualism and communitarianism reflect a sense of privacy, that is a sense of the possibility and the valor of autonomy. Individualism asserts the privacy of the person, and communitarianism asserts the privacy of the

control of the forces that govern our lives. The other is the sense that, from family to neighborhood to nation, the moral fabric of community is unraveling around us. These two fears—for the loss of self-government and the erosion of community—together define the anxiety of the age."), *with* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 30-34 (American ed., 1981) (concluding that "[t]hus the society in which we live is one in which bureaucracy and individualism are partners as well as antagonists."), *and* Glen O. Robinson, *Communities,* 83 VA. L. REV. 269, 294 (1997) (calling community the converse of individual autonomy).

34. Note that some view communitarianism as a strain of individualism. *See, e.g.,* Stephen A. Gardbaum, *Law, Politics, and the Claims of Community,* 90 MICH. L. REV. 685, 701-707 (1991).

35. *See* discussion of individualism, *supra* pp. 2-5.

36. *See* West, *supra* note 15, at 2-3; *see also* discussion *supra* p. 4 & n.17.

37. *See* Foster, *supra* note 32, at 187 (noting community's propensity to presuppose "similarity on some level amongst those constituting the community").

group. Through both these frames, privacy becomes the dominant societal value. In other words, through both individuality and community, we are promised a retreat from all those things that are not like us. The individual is offered a retreat into his or her own space. The community is offered a retreat into its own social space in opposition to the rest of the world.

B. Individuals and Communities Are Connected with Each Other

Along with enshrining the value of privacy and its inherent right of exclusion, the notions of communitarianism and individualism can also blind us to the connections and relationships between, within, and among persons and communities.[38] Furthermore, the promise to retreat from those things not like us is really a promise available only to the dominant group. This promise for the dominant class is reflected and concretized in our society at a multitude of sites. For example, one way retreat is available to the dominant group is in the arrangement of political and geographical space in this nation.[39]

I am now the Marvin J. Sonosky Chair of Law and Social Policy at the University of Minnesota. Most of you have not heard of Marvin Sonosky directly, but all of you have heard of him indirectly. Sonosky is significant to this discussion because he represented Native Americans in their legal action to reclaim the Black Hills from the federal government.[40] We have all heard of General Custer, and how he was charged with protecting Native Americans on their lands in the Black Hills. But when gold was found there, Custer and others arranged to force the Native Americans off the sacred land so it could be mined for gold. And of course, we have heard of Custer's last

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38. Iris Young captures the exclusionary nature of community, writing that:
    This ideal [of community] expresses a desire for the fusion of subjects with one another which in practice operates to exclude those with whom the group does not identify. The ideal of community denies and represses social difference, the fact that the polity cannot be thought of as a unity in which all participants share a common experience and common values. YOUNG, *supra* note 1, at 227.
    39. *See* john a. powell, *Achieving Racial Justice: What's Sprawl Got to Do with It?*, POVERTY & RACE, Sept.–Oct. 1999, at 2-5 [hereinafter *Achieving Racial Justice*].
    40. Tracy N. Zlock, *The Native American Tribe as a Client: An Ethical Analysis*, 10 GEO. J. LEGAL ETHICS 159, 163 (1996) (noting that Sonosky replaced another attorney, Ralph Case, who mistakenly told the Sioux that if they signed a monetary settlement with the government, they would lose the protections of other treaties they had signed with the government and lose their ability to assert their right to title to the Black Hills).

stand. Though in general education we are not told so, that stand was really the result of Custer's greed and about his breaking the law. The fight engaged in by the Native Americans to recover the Black Hills continues to this day.[41] Sonosky was the lawyer who eventually won a settlement on behalf of the Native Americans, a judgment of $105,000,000.[42] Dennis Banks and others at Wounded Knee said, "no, we don't want the money; we want the Black Hills."[43] The struggle was never about money.[44] The struggle was about getting the land back.[45]

I teach property law at the University of Minnesota. I always begin the course with the *Johnson v. M'Intosh*. *Johnson* is a case that deals with the taking of land from Native Americans in the early 1800s.[46] A lot of my students, who are overwhelmingly white, sort of muse: "why are we studying Native Americans?" "This is supposed to be a property course," they complain. "What does property have to do with Native American history?," they wonder. My response is always this—"this is not only Native American history; this is your history."

Johnson v. M'Intosh does answer questions about how the European settlers got this land from the Native Americans, but more importantly it shows that there is a relationship *between* us and the Native Americans. So when we talk about the appropriation of the land we are talking about something that *all of us* in this country engaged in, not something that Native Americans engaged in by themselves. These connections extend to whites and blacks as well.

From time to time, I hear from other African Americans that because of slavery and of being forced to work the land as farmers, blacks do not like to get involved in land issues. However, as I argued was the case with Native Americans, blacks' relationship to the land did not occur in isolation of their relationship to whites. It was not the land that enslaved black folks; it was white folks. So, if there is some discomfort about African Americans' owning land, one might want to

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41. *Id.* at 159-60, 163-66.

42. *See id.* at 159 (citing *United States v. Sioux Nation of Indians*, 448 U.S. 371, 423-24 (1980) (requiring the federal government to compensate the Sioux tribe for the taking of Black Hills land).

43. *See id.* at 159, 165-66 (describing the refusal of the Sioux tribe to accept the monetary settlement).

44. *Id.*

45. *Id.*

46. *Johnson v. M'Intosh*, 21 U.S. 543 (1823) (refusing to uphold land titles held by Native Americans and upholding titles to land acquired by conquest).

look at what this means in terms of blacks' and whites' relationship with each other, rather than looking only at blacks' relationship to the land itself.

C. Race and Nation Are Also Intertwined

I take the position that one must look at the connections within groups from the understanding that the ideology of individualism is, and always has been, inextricably tied up with race. The bond between race, racializing, racial construction, and individualism has critically influenced, and perhaps even pre-figured, the history of our nation.[47] In *Making Race and Nation*, Anthony Marx described the role of race making, and showed how this role was critical to an understanding of the development of our nation.[48] Noted Marx:

> Nationhood was institutionalized on the basis of race; the political production of race and the political production of nationhood were linked. Even changing structures of the state, whether more or less centralized or corporatist, were shaped by the deals elites made about race in pursuit of nation-state consolidation.[49]

Marx made clear that race was not an additive to the development of this nation.[50] In other words, racing was not an afterthought or by-product. Its development occurred simultaneously with the making of this nation. In this way, race and nation were inextricably linked.

Federalism is another example of the intertwining of race and americanism. We have all heard of the great American experiment with federalism. However, even given our years of education, most of us do not realize that in many ways federalism was about the fight by the southern states to remain relatively autonomous so that they could continue to enslave blacks.[51] So even the whole structure of this nation—federalism—was a racialized process. This racialization created such an imbalance, such a fragile and unstable nation-state,

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47. *See generally* ANTHONY W. MARX, MAKING RACE AND NATION (1998).
48. *Id.*
49. *Id.* at 25.
50. *Id.* at 4-6, 10-15.
51. *Id.* at 13-14, 60, 120.

that in some ways the Civil War was necessary for us to become a nation and not just a federation of states.[52]

D. Exclusion Is Also a Racialized Process

Notions of individuality and community and the idea of race emerge repeatedly in this nation's history. In each episode of history, autonomy—a seemingly neutral objective—has taken on life as an exclusionary practice. Take the notion of who gets control over who gets to vote. I argue that enfranchisement is the core characteristic and right of an autonomous individual operating within a democratic society. As a nation, other than membership in the ranks of those who were systematically exploited and dominated, we initially expressly excluded certain people from political membership.[53] We defined "autonomy" with all of its associated rights as maleness, whiteness, and ownership in property. We defined lack of autonomy as "other" with all of the associated lack of rights as femaleness, blackness, and economic non-holding. Therefore, I argue that enfranchisement and citizenship have been racialized and oppositional notions for decades.

As disenfranchised populations grew in political strength and began to demand participation and voice, in order to reproduce exclusion via autonomy, society subtly devised a reconfiguration of its political and spatial boundaries.[54] Under the law, cities were creatures of the state, existing at the pleasure of the legislature.[55] The nature of local governments began to change precisely at the time that blacks and others started making demands for membership, demands for political and jurisdictional space, such as homeownership and political power within the metropolitan region.[56]

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52. *Id.* at 120-127.

53. *See, e.g., id.* at 218 (citing J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH 212 (1974) (noting that "[s]ubjected to poll taxes, property requirement for voting, and violence, black voting declined precipitously [after reconstruction was abandoned], falling for instance in Georgia's presidential election from 55 percent in 1876 to five percent in 1904").

54. *See, e.g.,* Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act,* 102 YALE L. J. 105, 155-56 (1992); *see also* discussion *infra* note 57 and accompanying text.

55. *See, e.g., Hunter v. City of Pittsburgh,* 207 U.S. 161, 178-179 (1907) (noting that cities exist at the pleasure of the state government).

56. *See Achieving Racial Justice, supra* note 39, at 4-5 (citing *Milliken v. Bradley,* 418 U.S. 717 (1974) (overturning the district court's order requiring interdistrict desegregation of Detroit and 53 surrounding suburbs)).

There was a southern response and a northern response to these demands. In the South, as blacks moved into the central city and off the farms, local governments responded by expanding the jurisdictional boundaries so that blacks would never have political control or an effective voice in terms of running their own lives or the life of the city.[57] Consequently, county governments in the South became increasingly important.[58]

The northern response was just the opposite. The northern response to black and other minority group migration into the cities was to abandon the city, and instead move to the suburbs.[59] In those suburbs, whites were able to create their own homogeneous, separate, autonomous communities, which were protected by the laws.[60] And although people at the time were more explicit in their expression of racism than they are today, seldom did they say that homogeneity was defined along the axis of whiteness.[61] Suburbs were created out of the idea of exclusion. Suburbs were created out of a desire to create homogeneous communities, that is communities that excluded groups defined as racial others.[62] Thus, the process of exclusion and isolation in metropolitan space was also a racialized process.

To make this happen though, local governments were able to pull in the federal government to fund the building and maintenance of

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57. See, e.g., Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act,* 102 YALE L. J. 105, 132-33 (1992) (noting that in an effort

> [T]o negate black voting power, Richmond County [Georgia]'s legislative delegation addressed the question of whether to eliminate the City of Augusta [sic] by consolidating it with Richmond County, or instead to enlarge the city by annexing adjoining suburbs . . . . This consolidation, designed to avert black control of city government, would abolish the city an independent legal entity and replace it with a new solidly white political subdivision.).

58. *Id.*

59. See, e.g., DENNIS R. JUDD, THE POLITICS OF AMERICAN CITIES: PRIVATE POWER AND PUBLIC POLICY 236, 240 (1979).

60. *Id.*

61. See Michael Schill & Susan Wachter, *The Spatial Bias of Federal Housing Law and Policy,* 143 U. PA. L. REV. 1285, 1310 (1995) (citing JUDD, *supra* note 59, at 281).

62. See *The Multiple Self, supra* note 8, at 1516 (citing Martha Mahoney, *Segregation, Whiteness, and Transformation,* 143 U. PA. L. REV. 1659, 1659 (1995) (noting that "[s]egregation is the product of notions of black inferiority and white superiority, manifested geographically through the exclusion of blacks from more privileged white neighborhoods and the concentration of blacks into subordinated neighborhoods stigmatized by both race and poverty").

the suburbs.[63] The federal government put language in its official guidelines that made it clear that in order to participate in this process you needed to be white.[64] For example, the Federal Housing Administration (FHA) dictated that in order to get FHA funds you had to do it in such a way that you were creating a racially homogeneous community.[65] It was actually worse than that because the creation of homogeneous communities would suggest that blacks too could participate, as long as they created a virtually all-black community. However, the manuals stated that:

> The valuator should investigate areas surrounding the location to determine whether or not incompatible racial and social groups are present, to the end that an intelligent prediction may be made regarding the possibility or probability of the location being invaded by such groups . . . . If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes.[66]

I and others have argued that what the federal government really meant was to create an all-white community, and so the federal purse was opened to create these separate communities from which blacks and other people of color were excluded.[67]

The timing and the scale of this process was and continues to be highly significant. In 1950, about sixty percent of people living in metropolitan areas were living in only about 190 jurisdictions across the country.[68] By 1990, seventy percent of the population was living

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63. *See generally* john a. powell, *How Government Tax and Housing Policies Have Racially Segregated America, in* TAXING AMERICA 90-91 (Karen B. Brown & Mary Louise Fellows, eds., 1996).

64. *Id.*

65. *Id.*

66. *See* CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 231 (1955) (quoting Federal Housing Administration Underwriting Manual §233 (1936), §937 (1938)).

67. *See, e.g., Achieving Racial Justice, supra* note 39, at 3; GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 130-32 (1999) (citing DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 1-114 (1993)).

68. *See* DAVID RUSK, INSIDE GAME OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA 66-67 (1999).

in more than 9,000 separate jurisdictions.[69]   The country had fragmented, and this fragmentation along spatial lines was increasingly fought over the battle of who was defined as the "community." The line went, "we have a right to our own community, and 'those' people do not fit in because they do not belong to our community."[70] Thus, the idea of sameness, which is individuality expressed at the community level, was very much racialized, inscribed into law, and remains a persistent problem today.

IV. HOW CAN WE TRANSFORM THE NATURE OF THIS RELATIONSHIP AND THIS LANGUAGE?

A. *Intersubjectivity and the Fragmented, Fluid Self*

As we have seen in examining our nation's history, both the idea of individuality and the idea of community are ones of assimilation and sameness. However, I argue that the challenges for liberals and progressives are to create a movement and a sense of justice that does not simply adopt the dominant language of individualism. But neither can they simply adopt the language of community. The dominant ideology has to be adapted and interrogated in such a way that promotes what we really are about. I would like to make a few suggestions.

First, we are not simply individuals. We are not simply separate from each other. In fact, the idea that we are not constituted together through some process seems to me to be hopelessly flawed. The term I like to use for the self is that it is intersubjective. That is, we come into being in our relationships with one another. But we are not just intersubjective. We also are intrasubjective, meaning that even internally there are many different sites inside of us. We are not unitary. We are fragmented inside. We are fluid inside, and what is called to the front (made visible to others) depends oftentimes on

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69. *Id.* at 67.

70. *See generally* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 4 (1999) (discussing community and exclusion and highlighting "the role that the legal system has played in fostering the suburbanization of America" and other aspects of urban life, like "unequal distribution of city services").

circumstances, on institutions, on relationships, and on what remains invisible.[71]

I argue that because we never become completely transparent to each other or even to ourselves, we do not become fused in the communitarian sense. We never become the other, but neither are we totally separated from the other. We are not infinitely strangers, nor are we ever collapsed into one. Both of those dangers—of regarding others as complete strangers, as in individualism, or as completely the same as we are, as in the communitarian ideal—have to be challenged.

B. Autonomy: The Myth of the Free-Standing Individual

Where can these dangers be addressed? Iris Young has suggested that "city space" is largely a space where we can come together as strangers, in terms of constituting public life, in terms of making justice, and in regard to politics.[72] In the city, meaning is created among strangers that meet and intersect, at all levels. However, at each level, politics also attach.

I have gone to a number of black and Latino communities around the country where they have argued, first of all, that they are a community. But probably more importantly, they argue that they want to be a community, where autonomy and self-determination is their right. It is clear that autonomy is the language of the private.[73] It is also the language of sovereignty. In other words, autonomy suggests that you can exclude all others. After having been excluded, it is not surprising that African Americans and Latinos would think that the way to control their community is also to exclude. But the goal should

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71. *See generally The Multiple Self, supra* note 8.

72. Young offers the alternative of what she terms "city life"—"a vision of social relations affirming group difference" not limited to the city proper, but inclusive of the metropolitan area. YOUNG, *supra* note 1, at 227. "City life" is, in her words:

> [T]he being together of strangers. In the city, persons and groups interact within spaces and institutions they all experience themselves as belonging to, but without those interactions dissolving into unity or commonness. City life is composed of clusters of people with affinities—families, social group networks, voluntary associations, neighborhood networks, a vast array of small "communities." *Id.* at 237.

73. *See, e.g.,* Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form'*, 100 COLUMB. L. REV. 94, 94, (2000) (describing the notion of private autonomy and arguing that each one of the valid legal norms (including private, public, and international law) are a product of what Kennedy calls the "conflicting considerations" of formal, substantive, and institutional "policy questions").

not be the right to exclude. Autonomy is a false goal. The idea of self-determination is a false goal. And so in my opinion, autonomy, which could be described as the myth of the free-standing individual, is not desirable nor is it normatively appropriate.

Moreover, adopting these false goals and this inadequate language cannot resolve our problems, and in fact, might actively promote divisiveness. Consider again the relationship between the public city and the private suburbs. What happens if each suburb is allowed to be autonomous? The Court did this in the *Milliken* decision.[74] The Court basically said, "Detroit, you can try to solve your problems of segregated schools, but you cannot do so by interfering with the rights of these autonomous suburbs." Because there was no way to try to resolve or adjust its segregation problems (after all, the problem was the existence of those very same autonomous suburbs) this statement by the Court is paradoxical. The suburbs imposed segregation upon Detroit—economically, racially, and fiscally.[75] And in my opinion, without engaging the involvement of the suburbs, Detroit cannot solve its own problems.

And yet, when community groups and people on the left get involved in these issues, they oftentimes use the same language of obtaining autonomy and sovereignty for their individual community.[76] Ironically, this could be the same autonomy and sovereignty that will preclude solutions to their problems, because by conceptualizing themselves as autonomous, they could exclude the group that may well be the cause of and solution to their problems. Is there an alternative language and an alternative voice? I argue that the language of empowerment and intersubjectivity, not autonomy, is the appropriate substitute.

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74. *Milliken v. Bradley*, 418 U.S. 717 (1974) (overturning the district court's order requiring interdistrict desegregation of Detroit and 53 surrounding suburbs).

75. PAUL DIMOND, BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION 81-83 (1985) (describing how white flight created segregation in Detroit).

76. *See* FRUG, *supra* note 70, at 138-39 (describing an example of one way to push for community in low-income African American neighborhoods by noting: "[a]s in the suburbs, policing the boundaries of the black neighborhood—and of voluntary associations, and, in some areas, of city blocks—helps residents reassure themselves that the people they encounter will conform to the fictional unity often associated with the word 'community'").

C. Empowerment vs. Distributive Justice

Empowerment is the right to participate with an effective voice in decision-making and in rulemaking.[77] Empowerment requires calling institutions into being—not just for yourself, but for all society.[78] This is because, in our political and public space, it is not just about us, but about our relationship to the other.[79] Empowerment is about involving both those that we would call brothers and sisters and about those that we would call strangers. And so, in a sense, empowerment calls for an expanded view of relationships. Empowerment says we ought to consider cultivating our relationships with strangers. Empowerment calls for a community that is not completely exclusive. Empowerment calls for a recognition that this life process is not simply about getting goods, about getting another seat in the law school, about getting a job, or about making money, but this is also about constituting who we are as human beings.

The sole focus on fair distribution should be supplanted by a transformation of who we are as humans. This transformation is an element of empowerment.[80] This transformation is a constituted as well as an instrumental process. It affects not only what we have, but also who we are as a people. This is a vision that is very different than the one that is the dominant vision in liberalism and the dominant vision in society because it presupposes that our relationship with each other is constituted and yet unclear. We never have full access to each other, and yet we are not fully strangers. It suggests that the institutional arrangements themselves are part of the discourse. It suggests that the gatekeepers, whether they are the SATs or the bar exam, are part of the public discourse that we as empowered citizens can discuss and help decide.

CONCLUSION

I will close by writing briefly about what this discussion means in terms of regionalism.[81] I have argued that, in some ways, the most

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77. YOUNG, *supra* note 1, at 251.
78. *See* discussion *supra* pp. 6-7 and note 25.
79. YOUNG, *supra* note 1, at 237-38.
80. *See* YOUNG, *supra* note 1, at 248-56.
81. For a discussion of the metropolitan region as a potential site for redressing spatial inequalities, *See* Sheryll Cashin, *Localism, Self-Interest, and the Tyranny of the Favored*

important frustration to the goals of the civil rights community since 1954 has been our geographical space.[82] People ultimately end up fighting over a narrow band of decisions when living in a geographical space that gets set up in relatively autonomous jurisdictions.[83] In my opinion, people living in autonomous jurisdictions do not get to decide where capital is spent. They do not get to decide investment strategies. They do not get to determine relationships with other countries.

However, what they do get to decide are the important local issues involving education, housing, and law enforcement. But even here, because they oftentimes are in competition with each other for business relocations, they have to fight with the suburbs for resources.[84] "Do not move to the suburbs of Maryland. Move to Baltimore, and we will give you more than they will give you." Yet, neither the suburbanites nor the city dwellers claim to have control over the capital needed to pay for those promises. And so, in that fragmented context, I believe you cannot achieve the goals of civil rights because those goals, as I understand them, are basically about participation in the decision-making and structuring of society. But society is not structured simply at the neighborhood level, and it is not structured simply at the city level.

Instead, I would suggest that the regional level is a much more appropriate level to talk about the control over resources like schools, transportation, and allocation of tax dollars. This does not mean that

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Quarter: Addressing the Barriers to New Regionalism, 88 GEO. L.J. 1985 (2000) (arguing that our nation's ideological commitment to decentralized local government has helped to create the phenomenon of the favored quarter. "Favored quarters" are high-growth suburbs that contain about one-quarter of the regional population, but capture a larger share of the region's public infrastructure investment and job growth.); Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173 (1996) (arguing that local governments are powerless, but that it may be impossible for them to achieve autonomy from larger polities); and Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN L. REV. 1115 (1996) (acknowledging that hands-on political participation is more likely to occur in smaller polities, than in large ones, but concluding that regional governance offers a more promising way to achieve fairness).

82. *See generally Achieving Racial Justice, supra* note 39, at 2-5 (arguing that "spatial arrangement has been the single most effective tool for maintaining black subordination since the repeal of Jim Crow laws").

83. *Id.*

84. *See, e.g.*, Greg Leroy & Tyson Slocum, *Another Way Sprawl Happens: Economic Development Subsidies in a Twin Cities Suburb* (January, 2000) (report written under the auspices of Good Job First, which is a project of the Institute of Taxation and Economic Policy) (on file with the author, john a. powell) (describing the use of municipal subsidies to trigger the relocation of businesses within metropolitan regions).

every decision should be made by a whole region, and it certainly does not mean that I am advocating the southern model of having larger and larger jurisdictional bodies so that blacks', Latinos', and others' voices and power are constantly diluted.[85] What this kind of regionalism means is finding an appropriate balance between accessing regional resources and empowering local voices. What it means is recognizing that localities, whether neighborhoods or cities, exist in relationship to the wider community. What it means is thinking of the suburbs not as exclusive enclaves where the residents and officials try to capture all the high-income housing, try to absorb all the high-income jobs, and try to exclude all people with need.[86] What it means is reclaiming public space for all.

I will close with a quotation from James Baldwin: "we are all androgynous, not only because we are all born of a woman impregnated by the seed of a man but because each of us, helplessly and forever, contains the other—male in female, female in male, white in black, and black in white . . . . [M]any of my countrymen appear to find this fact exceedingly inconvenient and even unfair, and so, very often, do I. But none of us can do anything about it."[87]

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85. *See* john a. powell, *Addressing Regional Dilemmas for Minority Communities, in* REFLECTIONS ON REGIONALISM 230-32 (Bruce Katz, ed., 2000) (discussing the concern over political power dilution).

86. *See generally* Sheryll Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism,* 88 GEO. L. J. 1985 (2000).

87. *See* BALDWIN, *supra* note 29, at 690.