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Janet Moore

University of Cincinnati College of Law, janet.moore@uc.edu

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FURTHER DEVELOPMENTS

COVENANT AND FEMINIST RECONSTRUCTIONS OF SUBJECTIVITY WITHIN THEORIES OF JUSTICE

JANET MOORE*

In this kingdom
the sun never sets;
under the pale oval
of the sky
there seems no way in
or out,
and though there is a sea here
there is no tide.

For the egg itself
is a moon
glowing faintly
in the galaxy of the barn,
safe but for the spoon's
ominous thunder,
the first delicate crack of lightning.

— Linda Pastan, "Egg"¹

"... the occupation is complete."

— Maxine Waters, D-California, describing
the movement of federal troops into South
Central Los Angeles²

On one reading, Linda Pastan's poem neatly expresses the endangered status of the liberal subject—the agent, actor, or protagonist of any moral drama. The autonomous, self-conscious, and self-constitutive subject has drawn heavy fire from feminist and other critical theorists, as well as structuralist, poststructuralist, and postmodern philosophers engaged in critiques of classical liberalism and its social contract theories. These various voices compose an "ominous thunder" roiling about *homo economicus*, fissuring and

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* J.D., M.A., Duke University.

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1. Linda Pastan, *Egg*, in *The Five Stages of Grief* 5 (W. W. Norton, 1978).

2. Don Terry, *Riots in Los Angeles: The Overview: Calm Endures with Grief in Los Angeles*, NY Times A1 col 6 (May 4, 1992) (quoting Maxine Waters, D-California).

even exploding the shell that separates and contains his tideless sea, his radical individuality.

Juxtaposed against the concrete conflict in South Central Los Angeles, these theoretical battles over the nature of subjectivity seem, like Pastan's isolated egg, merely to reflect light—a galaxy's safe remove from America's most recent urban firestorm. In contrast, Maxine Waters' words capture an aching schism in the *constitutional* subject—the purported “We the People” who covenanted to “ordain and establish” a political order. The acquittal of police officers who were videotaped beating Rodney King, the post-verdict riots, and their suppression by local, state, and federal police and military forces demonstrate the betrayal of that covenant: under welfare-state capitalism, democracy in the United States has yielded not equal liberty, but alienation so profound as to constitute *de facto* apartheid. Like lightning, Waters' words should crease the complacency of liberal America's “pale oval sky,” should shatter dreamless slumber “in this kingdom [whose] sun never sets.”

This essay traces connections between the fissures and fault lines scarring these respective subjects—first, the subject constructed within classical liberalism, and, second, the constitutional “subject,” the people of the United States. I trace these connections under the sometimes flickering light of the covenant paradigm. While evoking various meanings throughout its long history, covenant nevertheless steadily signifies a promissory relationship of transformative depth and power. Covenant's implications for intersubjective relations are described in John Winthrop's 1630 sermon to the Puritans aboard the *Arabella* in Massachusetts Bay: “Thus stands the cause betweene God and us. Wee are entered into Covenant with him for this worke For this end, wee must entertaine each other in brotherly Affeccion, wee must . . . make others Condicions our owne”³

Working with such covenant imagery, I contend that debates over the nature of subjectivity have broadly predictable, and arguably antiliberal, consequences for theories of justice and their practical applications.⁴ My thesis is twofold. First, I argue that covenant is a potent, if ambiguous, resource for reinterpretations of subjectivity. Second, I contend that a carefully constructed, covenant-based political ethic will demand respect for universal human dignity. Consequently, this ethic will require redress of those “defects—of access and power” that undermine meaningful participation in the reinterpretation and satisfaction of liberalism's own “substantive moral vision.”⁵ Thus, a covenant-based theory of justice will require that liberalism

3. John Winthrop, *A Modell of Christian Charity*, in 2 *Winthrop Papers* 294-95 (Massachusetts Historical Society, 1931) (sermon preached aboard the *Arabella*, Massachusetts Bay, 1630) (“*Christian Charity*”).

4. In this I differ from Professor Gardbaum. Contrast Stephen Gardbaum, *Law, Politics, and the Claims of Community*, 90 *Mich L Rev* 685 (1992), with Part III of this article.

5. *Id.* at 758, 760. Gardbaum insists that a liberalism freed by communitarian critiques of its atomism and subjectivism may nevertheless stand “firmly on the substantive moral vision of self-realization and autonomy.” *Id.* He is less clear, however, how such a vision, prioritizing “autonomy, choice, and the privacy of the moral life,” can systematically establish the conditions necessary for

surrender not only the myth of the atomistic individual, but, simultaneously, her untrammelled freedom to pursue her subjectively chosen ends. This will be particularly true when such "choices" maintain or exacerbate conditions of domination and exclusion, or the spiritual and political malaise that reciprocally feeds, and feeds upon, those conditions.⁶

* * *

This focus on contemporary interpretations of subjectivity and their ethical and political implications continues a discussion begun a decade ago in *Law and Contemporary Problems'* symposium on religion. In "The Pluralist Game," Francis Canavan quotes a "young professor at the Harvard Law School" as describing the dominant motif of modernity as "disintegration," rooted, on Canavan's interpretation, in the "increasingly successful struggle of the individual self to free itself from the constraint of social norms."⁷ Canavan challenges liberalism's claim to neutrality as between values subjectively chosen by these unconstrained individuals. In the pluralist game, he argues, liberalism deliberately stacks the deck in favor of maximizing individual freedom. This effects an "unrelenting subordination of all allegedly objective goods to the subjective good of individual preference."⁸

Postmodernity has only intensified the disintegration Canavan discusses. For example, structuralists and poststructuralists alike reject the very notion of a self-identical subject as at best unreliable, at worst contentless. They disagree, however, upon whether the socially constructed systems of meaning and practice to which "man" is ultimately reducible are either discernible or stable.⁹ On another front, postmodernists sing requiem for the metanarrative, the overarching interpretive construct providing criteria of truth and, consequently, of ethical self-definition.¹⁰ Finally, psychoanalytic theory

that vision's own fulfillment, much less for broad participation in its reinterpretation. Id. Compare notes 108-16 and accompanying text.

6. Compare Cornel West, *Learning to Talk About Race*, NY Times Magazine 24 (Aug 2, 1992).

7. Francis Canavan, *The Pluralist Game*, 44 L & Contemp Probs 23 (Spring 1981) ("*Pluralist Game*"), quoting Roberto Unger, *Knowledge and Politics* 26 (Free Press, 1975).

8. Canavan, *Pluralist Game* at 34 (cited in note 7).

9. For an excellent introduction to the interrelationship between prestructuralist, structuralist, and poststructuralist thought, see Peter Dews, *Logics of Disintegration* (Verso, 1987); see also Hubert L. Dreyfus & Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (U Chicago Press, 1983).

10. Examples of metanarrative include the Enlightenment faith in reason, the Hegelian notion of the dialectic, and Marxist dogma of class struggle yielding a workers' utopia. See Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* 37-41, 51, 60 (U Minn Press, 1984). As Nancy Fraser and Linda Nicholson point out, Lyotard rejects only the "meta" aspect of metanarrative, granting the need for interpretive frameworks but rejecting claims to stable, transcendent, or objective viewpoints. Nancy Fraser & Linda Nicholson, *Social Criticism without Philosophy: An Encounter between Postmodernism and Feminism*, in Andrew Ross, ed, *Universal Abandon?: The Politics of Postmodernism* 83, 86-90 (U Minn Press, 1988). Peter Dews suggests that in *The Postmodern Condition*, Lyotard already retreats from some of his earlier, more radical epistemological claims, pointing continental philosophy toward renewed reliance on Kant. Dews, *Logics of Disintegration* xvii (cited in note 9). For feminist discussions of postmodernism and its political implications, see Linda J. Nicholson, ed, *Feminism/Postmodernism* (Routledge, 1990).

shatters presumptions of a self-transparent ego and its independent generation of desire.¹¹

Yet evidently modern/postmodern disintegration has intensified to an intolerable extent. During the past decade, reintegration has become a dominant motif. For example, Roberto Unger, the "young professor" whom Canavan quoted, has since engaged in a reconstructive project, proposing a unified conception of human nature; he attempts to define "our shared identity as people."¹² And in Seyla Benhabib's feminist analysis of John Rawls' social contract theory, the dispute lies between interpretations of the subject as either an Hobbesist, isolated entity or, conversely, as a product of community, and embedded in relationship.¹³ Contextualized by such "disintegrationist" and "integrationist" movements, this essay continues to wrestle with the tensions inherent in the need for theories of justice to account for, and nurture, both solitude and solidarity, both freedom and equality.

I

UNVEILING THE SUBJECT: TWO FEMINIST CRITIQUES OF RAWLS' ORIGINAL POSITION

A comprehensive survey of these modern-postmodern "disintegrationist"- "integrationist" movements is beyond the scope of this work. In another paper,¹⁴ I have narrowed the focus, examining closely the critiques of John Rawls' social contract theory presented by Seyla Benhabib and Susan Moller Okin. That focus is appropriate for two reasons. First, Rawls' *A Theory of Justice*¹⁵ is widely recognized as the most brilliant recent contribution to liberalism's social contract theory. Second, Benhabib and Okin are exemplary for my purposes in that each addresses, from a feminist perspective, Rawls' premises regarding the nature of subjectivity. Here I summarize my understanding of Benhabib's and Okin's arguments in order to clarify the context within which I turn to covenant as a resource for reconstructing working definitions of subjectivity.

Rawls' famous original position is a hypothetical construct that erases participants' knowledge of the particularities of their lives. Behind the "veil of ignorance," social rank, physical attributes, idiosyncratic desires, goals and other "special psychological propensities" disappear.¹⁶ The original position also posits universal instrumental rationality, and disinterest in others' interests.¹⁷ Parties in this position are predicted to generate two distributive

11. See, for example, Luce Irigaray, *Speculum of the Other Woman* (Cornell U Press, 1985) (Gillian Gill, trans).

12. Roberto Mangabeira Unger, *Passion 3* (Free Press, 1984).

13. Seyla Benhabib, *The Generalized and the Concrete Other*, in Eva Feder Kittay & Diana T. Meyers, eds, *Women and Moral Theory* 154 (Rowman & Littlefield, 1987).

14. Janet Moore, *Unveiling the Subject: Benhabib and Okin on Rawls' Original Position* (manuscript submitted for publication).

15. John Rawls, *A Theory of Justice* (Harvard U Press, 1971).

16. *Id* at 12.

17. *Id* at 13-14.

principles, which, taken together, define justice as fairness. First, the parties will guarantee themselves maximum liberty consistent with the liberty of all others. Second, they will define just or fair material inequalities as those which benefit all, and especially the worst-off, in the society.¹⁸

In an essay strongly informed by Carol Gilligan's work on the psychology of moral development,¹⁹ Benhabib argues that John Rawls hamstringing the emancipatory potential of *A Theory of Justice* by adhering to a set of dichotomies that effectively erase women from the moral sphere. She traces these dichotomies to Thomas Hobbes, but views them as generally characteristic of classical liberalism and its social contract theories. This set of hierarchically ordered oppositions separates deontology (addressing law, right, or justice) from teleology (addressing ultimate goals and meanings, or the good); public from private; reason from feeling; ethics of right from ethics of care; masculine from feminine; and, finally, conceptions of the subject as either generalized (abstracted from all particularities, including relationships) or concrete (fully embodied, complex, and historical).

Benhabib tightly links Hobbes and Rawls, placing them respectively at the alpha and omega points in the development of social contract theory.²⁰ She also associates the two transitively. Arguing that Rawls shares with psychologist Lawrence Kohlberg Hobbesist biases toward deontology²¹ and

18. Id at 14-15. The second principle is nicknamed "the difference principle."

19. The springboard for Benhabib's discussion is the debate between psychologists Laurence Kohlberg and Carol Gilligan. Benhabib's view of the connection between Rawls and Kohlberg is described in the text accompanying notes 21-22. For Rawls' own exposition, see Rawls, *A Theory of Justice* at 453-96, especially §§ 70-72 and nn 6 & 8 (cited in note 15). Gilligan contrasts Kohlberg's "ethics of rights" with her own "ethics of care." In Iris Young's summary,

[t]he "ethic of rights" that Gilligan takes to be typical of masculine thinking emphasizes the separation of selves and the sense of fair play necessary to mediate the competition among such separated selves. The "ethic of care," on the other hand, which she takes to be typical of feminine thinking, emphasizes relatedness among persons and is an ethic of sympathy and affective attention to particular needs, rather than formal measuring of each according to universal rules. This ethic of care expresses the relatedness of the ideal of community as opposed to the atomistic formalism of liberal individualism.

Iris Marion Young, *The Ideal of Community and the Politics of Difference*, in Nicholson, ed, *Feminism/Postmodernism* 300, 306 (cited in note 10).

20. Benhabib, *The Generalized and the Concrete Other* at 158 (cited in note 13). For a similar treatment of Hobbes as the font of inevitably individualistic social contract theories, see Jean Hampton, *Hobbes and the Social Contract Tradition* 1, 11 & § 9.2 (Cambridge U Press, 1986) ("hoping to shed light on the general structure of all social contract arguments by analyzing and explaining Hobbes's contractarian argument" and concluding that social contract theories must presuppose "at least a moderate individualism"). See also Thomas Nagel, *Rawls on Justice*, in Norman Daniels, ed, *Reading Rawls* 1, 9 (Stanford U Press, 1989) (Rawls' "model contains a strong individualistic bias, which is further strengthened by the motivational assumptions of mutual disinterest and absence of envy").

21. Benhabib also links deontology with instrumental reason in the following manner: Because the good is subjectively chosen, reason serves a purely instrumental function; it carves a path toward the good, but cannot serve to justify any particular end. For a discussion of the distinctions between understandings of valuation as incommensurable, relative, or subjective, see, for example, Stephen Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 Harv L Rev 1350, 1355-61 (1991); compare Seyla Benhabib, *Afterword: Communicative Ethics and Current Controversies in Practical Philosophy*, in Seyla Benhabib & Fred Dallmayr, eds, *The Communicative Ethics Controversy* 355-56 (MIT Press, 1990) (distinguishing ethical rationalism, ethical cognitivism, ethical decisionism, and ethical emotivism, each of which increasingly limits the possibility of rational justification of value).

radical individualism,²² Benhabib claims that these biases dominate contemporary moral theory and prohibit full attentiveness to the complexity of the concrete other. In Benhabib's view, then, Rawls' abstraction entails real loss, as these veiled subjects "cannot be *individuated*. If all that belongs to them as embodied, affective, suffering creatures, their memory and history, their ties and relations to others, are to be subsumed under the phenomenal realm, then what we are left with is an empty mask that is everyone and no one."²³

I contend that Benhabib errs in tarring Rawls with the brush of Hobbesist individualism. Her reading discounts the broader context within which Rawls places his subjects, which is first and foremost a *social* order.²⁴ Her error results from an insufficiently critical reliance on the dichotomies described above. I concur with Susan Moller Okin that more nuanced and useful theories of justice require deconstruction of these oppositions.²⁵ Although she agrees with Benhabib that the original position fails to account for gender

22. This view of subjectivity is best captured in Hobbes' admonition to "consider men . . . like mushrooms, come to full maturity, without all kind of engagement to each other." Benhabib, *The Generalized and the Concrete Other* at 161 (cited in note 13), quoting Thomas Hobbes, *Philosophical Rudiments Concerning Government and Society*, in W. Molesworth, ed., *2 The English Works of Thomas Hobbes* 109 (Alders Foreign Books, 1966).

It is important to clarify the truly radical nature of Hobbes' individualism. Jean Hampton neatly articulates this prevailing interpretation of the Hobbesist subject as social because human, not human because social. Relationships are purely instrumental and artificially contrived "contracts between an inferior . . . and a superior . . . the latter providing protection for the former in exchange for obedience." Hobbes' bleak view extends even to the family, a move initially considered quite mad: "[Hobbes] might as well tell us in plain termes, that all the obligation which a child hath to his parent, is because he did not take him by the heeles and knock out his braines against the walls, so soon as he was born." Hampton, *Hobbes and the Social Contract Tradition* 10 (cited in note 20) (quoting Bishop Bramhall); see also George Shulman, *Hobbes, Puritans, and Promethean Politics*, 16 *Pol Theory* 426, 429 (1988) (in Hobbes' state of nature, "[s]ince there are no known fathers, the children (usually described as male) are totally in the power of mothers, who are described as indifferent, malevolent, or incapable of nourishing . . . those subject to mother love are likely to be 'invaded and killed by marauders,' or 'alienated,' 'sacrificed,' 'pawned,' or 'sold' by mothers.').

23. Benhabib, *The Generalized and the Concrete Other* at 166 (cited in note 13).

24. See, for example, Rawls, *A Theory of Justice* 3 (cited in note 15) ("[j]ustice is the first virtue of social institutions"); id at 525 n4 ("social union" requires "affection and friendship Only in a social union is the individual complete.').

25. Susan Moller Okin, *Reason and Feeling in Thinking About Justice*, 99 *Ethics* 229 (1989). The deconstructive method approaches singularity anticipating an underlying tension between that one and the not-one it simultaneously posits and submerges. Conversely, the method approaches oppositions expecting to "demonstrate the complicity of what the oppositional structure sought to keep apart." Samuel Weber, *Deconstruction Before the Name*, 13 *Cardozo L Rev* 1181, 1183 (1991). See also Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 *Harv L Rev* 985, 986-87 n5 (1990) (describing deconstruction in legal scholarship).

While Okin's deconstructive method is fruitful, she misinterprets Benhabib as "rejecting the goal[] of . . . universalizability." See Okin, 99 *Ethics* at 248 n36 (cited in this note). In fact, Benhabib is committed to a modified universalizability, which she describes as "interactive" as opposed to Rawls' "substitutional" type. Benhabib, *The Generalized and the Concrete Other* at 158 (cited in note 13). Her express invocation of Habermas' communicative ethics also strongly implicates Enlightenment values. See id at 168-71 and see generally *Afterword* (cited in note 21).

Benhabib's critique of Rawls may be problematized by her own commitment to universalist ethics. On challenging universalization and underlying notions of difference and equality, see, for example, Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell U Press, 1990); Young, *Politics of Difference* (cited in note 19). For a more detailed discussion of Benhabib's interactive universalism in comparison with several other feminist approaches including Okin's, see Part IIC.

as a relevant moral category,²⁶ Okin argues that *A Theory of Justice* is misconstrued as merely an instance of rational choice theory, which narrowly defines reason as a means to maximize individual self-interest. In fact, she claims, such rational choice *cannot* occur behind the veil. This is so, in her view, because Rawls erases two conditions necessary for pure rational choice: the contractors' knowledge of their own risk-aversity and their capacity to weigh probabilities. Rather than exemplifying rational choice theory, the veil of ignorance and the contractors' mutual disinterest together "*achieve[] the same purpose as benevolence. For this combination of conditions forces each person in the original position to take the good of others into account.*"²⁷ This claim is proved up by the generation of the difference principle, which requires contractors to adopt the subject-position of "the least advantaged representative man" in order to determine fair distributive rules.²⁸

Contrary to Benhabib, Okin argues that the original position does not lift contractors from concrete complexity to vacuous generality. Or it does so only as a byway to re-immersion in the concrete. That is, the original position assumes contractor omniscience as to the essential characteristics of all possible subject-positions. Forced to "make others Conditions [their] own," the contractors "cannot think from the position of *nobody* . . . ; they must think from the position of *everybody*, in the sense of *each in turn*."²⁹

Okin's thesis poses epistemological problems that threaten the essence of Rawls' theory—its universality. Insofar as knowledge of the other is general, it cannot engender substantial empathy and rebut the feminist critique. Insofar as knowledge of the other is concrete, it cannot encompass *innumerable* concrete others³⁰ and therefore fails to supply Rawls his requisite universality. I conclude, therefore, that neither Benhabib nor Okin successfully contends

26. Okin, 99 *Ethics* at 229 (cited in note 25). Okin claims, as do Benhabib and other feminist theorists, that the original position "makes the family opaque to claims of justice." See Deirdre English, *Justice Between Generations*, 21 *Phil Studies* 95 (1977), cited in Susan Moller Okin, *Justice and Gender*, 16 *Phil & Pub Affairs* 42, 49 n23 (1987); Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books, 1989); see also Benhabib, *The Generalized and the Concrete Other* at 160, 162-63 (cited in note 13); Taina Bien-Aime, *The Woman Behind the Blindfold: Toward a Feminist Reconstruction of Rawls' Theory of Justice*, 18 *Rev L & Soc Change* 1125 (1990-91).

The ease and elegance with which these critics incorporate gender as a relevant category for consideration within the original position undercuts their claims that Rawls' failure here is structural. Okin, for example, concludes that her neo-Rawlsian contractors would define a just world as ungendered. Justice as fairness would then entail comprehensive child care, equal entitlement to pay for wage-workers and domestic workers, and the right to parental leave. Thus Okin significantly alters Rawls' thoroughly unrepresentative "representative man." While Ben-Aime is far more attentive than Okin to the subsumption of distinctive subject-positions under a purported "women's standpoint," her own assessment of Rawls' theory is badly weakened by its uncritical reliance on Carol Pateman's totalizing arguments in *The Sexual Contract* (Stanford U Press, 1988). Contrast Okin's review of Pateman's work in Susan Moller Okin, *Feminism, the Individual, and Contract Theory*, 100 *Ethics* 658 (1989).

27. Okin, 99 *Ethics* at 243 (cited in note 25), citing Rawls, *A Theory of Justice* at 148 (cited in note 15) (emphasis added by Okin).

28. Okin, 99 *Ethics* at 245 (cited in note 25), citing Rawls, *A Theory of Justice* at 151 (cited in note 15).

29. Okin, 99 *Ethics* at 244 (cited in note 25).

30. Unless, perhaps, Okin replaces the hypothetical human contractors with the process God described in Charles Hartshorne, *The Divine Relativity: A Social Conception of God* (Yale U Press, 1976).

with oppositions between reason and feeling, between generality and particularity, and between individualism and relationship.

By casting her own views on subjectivity as non-Hobbesist, Benhabib focuses attention on the related, but not identical, opposition between the radically individuated man-as-mushroom and the intersubjectively constructed communitarian. Yet both Benhabib and Okin tend to subsume explicit analysis of the individualist/relationist dichotomy under their respective discussions of whether subjectivity is best construed as generalized or concrete, or as dominated by reason or feeling. For Benhabib, relationships are but one aspect (albeit a definitional aspect) of the concrete other's particularity. For Okin, relationships are the context within which reason and feeling cooperate.

But in clarifying the nature of subjectivity, the opposition between individualists and relationists is distinctive, and deserves careful consideration. Stephen Gardbaum, for example, describes the dispute as the "agency debate" and views it as one of three major fronts in the advance of communitarian theories.³¹ Part II tackles the dichotomy head-on. Seeking more nuanced explanations of subjectivity for the purposes of feminist analysis, I explore the history of the covenant paradigm as it has appeared in Judaism, Puritanism, and U.S. constitutionalism, testing its utility as a tool for reconstructing a subject torn between solitude and solidarity. Unlike Gardbaum, however, I view the three fronts of developing communitarian theories as readily interconnected. That is, claims about the nature of subjectivity have implications for metaethics and for the generation of first-order value claims.³² Thus, I also attempt in Part II to shake out the emancipatory elements of the covenant tradition. This task is necessary to clarify, in Part III, the optimal consequences that covenant-based interpretations of subjectivity may have for theories of justice and their practical applications. I conclude that covenant retains liberating potential, useful for those seeking to wrest from patterns of exclusion and domination the conditions necessary for "the collective activity of justice[, which] is the preeminent form of human flourishing."³³

II

COVENANT AS A RECONSTRUCTIVE TOOL

As discussed in Part I, Benhabib identifies two camps in the debate over the nature of subjectivity. She firmly plants a Hobbesist banner over one camp, signifying a commitment to drastic individualism. This faction perceives the subject as "mushroom," abstracted from all particularities and relationships. The troops appear exclusively male. Of their Genesis, they say "in the beginning man was alone."³⁴

31. Gardbaum, 90 Mich L Rev at 701-02 (cited in note 4).

32. See notes 4-6 and accompanying text.

33. Rawls, *A Theory of Justice* at 529 (cited in note 15).

34. Benhabib, *The Generalized and the Concrete Other* at 161 (cited in note 13).

The second camp bears no single, readily identifiable banner, although among the multiple insignia Carol Gilligan's flies highest. This faction perceives the subject as embedded in, and constituted by, its relationships. The troops here appear predominantly female (although fellow travelers like Michael Sandel huddle around the fire). In the beginning, for them, is the "nurturance . . . and bonding" of the "mother, . . . sister, . . . [and] wife."³⁵

Benhabib herself points to a *via media* between these opposing camps. That path begins with her admittedly "brief historical genealogy of social contract theories."³⁶ In one sentence, she not only names Hobbes as progenitor of modern social contract theory (thus, as discussed in Part I, implicitly tainting all who follow), but also describes Hobbes' milieu as post-Aristotelian and post-Christian.³⁷ The latter characterization is mistaken, and can be corrected by recalling Hobbes' reliance on covenant imagery in his construction of social contract theory.

Far from being post-Christian, late seventeenth-century England was marked by remarkably ferocious battles over the appropriate relationship between religion and politics. Intellectuals had far more than passing interest in Biblical theology. Covenant theology and eschatology were especially *chic*. It is thus unsurprising that Hobbes focused intensely on the meaning and history of covenant in Books II and III of *Leviathan*. In this respect, his work appears the "most radical formulation" of divine and civil sovereignty marked by "subtle interrelationship between religious and political discourse on God and the state."³⁸

As discussed below, covenant embodies the creation of mutual commitment as people come together in a relationship, which becomes constitutive of their identities and so inherently valuable. This is in counterpoint to the Hobbesist image of subjectivity within the social contract, in which the relationship between isolated individuals is merely incidental, a means to the end of maximizing self-interest through exchange. Covenant also provides for a more substantive view of individuation and relationship within subjectivity than that heretofore offered by the feminist-relationist

35. Id at 162-63.

36. Id at 160.

37. Benhabib characterizes Hobbes' time as marked by the "dissolution of the Aristotelian-Christian world view." Id at 159. The hyphen is ambiguous. She may mean to modify "Christian" with "Aristotelian," limiting the dissolution to the influence of Thomist Catholicism (although even so, "dissolution" seems too strong a description). Her discussion of the decline of teleology and the rise of modernity, culminating "in a disenchanted universe," could support such a reading. She also recognizes that the privatization distinctive to modernity was initially sought by social contract theorists to serve religious liberty, extending thereafter to the secular realm. This recognition implicitly limits the "dissolution" to medieval Catholicism in the wake of the Reformation.

On the other hand, Benhabib may intend the hyphen to perform a more sweeping relegation of Aristotelianism and Christianity, as two distinct ideologies, to the ashpits of history. This reading is supported by the broad terms in which she sketches the disenchantment of the universe, implying a thoroughgoing secularization. It is weakened by her use of the singular noun.

38. David Nicholls, *Images of God and the State: Political Analogy and Religious Discourse*, 42 *Theol Studies* 195, 196, 201 (1981). Elsewhere I explore in more detail covenant's role in Hobbes' *Leviathan*. See Janet Moore, *Covenant and Subjectivity in Hobbes' Leviathan* (manuscript submitted for publication).

camp. In their (perhaps justifiable) preoccupation with defining subjectivity primarily as non-Hobbesist, these critics have left their own constructions vague. As a consequence, we see subjectivity dissolving into relationship. As between the individualist and relationist camps, covenant affords a substantive conception of the subject as both "individual-in-community"³⁹ and, more profoundly, as "community-in-individual."

Clearly, covenant cannot be relied upon uncritically in reconstructing working definitions of subjectivity. While I anticipate and address some possible reactions to covenant-based theories of subjectivity in Part III, two concerns deserve earlier discussion. The first concern is whether covenant is inherently exclusive or parochial: Must covenant create the infidel? Historically, chosenness leaves someone out. Gentiles, unredeemed sinners, women, blacks, and the unpropertied have been, and to varying degrees continue to be locked out of the obligations and benefits of these, perhaps the deepest of promissory relationships. That exclusivity, and the insider's self-righteousness, can be deadly. The manifest destiny of America's "chosen people" was bought, for example, with the dislocation and genocide of the Native American. The Palestinian is exiled from Zion; the practicing homosexual and lesbian are banned from the church; the urban poor are quarantined in ghettos. It seems that covenant, in the very act of constituting members, ostracizes outsiders.

Yet covenant is not unitary; it is not *sui generis*, nor is its meaning frozen. It is historical, emerging in a context of philosophical, theological, and political ethics that celebrate *universal* human dignity. Thus, covenant is not inherently parochial. A covenant is defined not by the number of its members, nor even by the substance of their mutual promise, but by the transforming nature of membership. Consequently, just as covenant can help to redefine subjectivity, encompassing both individuality and relationship, so too can covenant retain its paradigmatic power while simultaneously grounding a politics of inclusion. For example, under the right conditions, a document such as the United Nations Declaration of Human Rights⁴⁰ could obtain covenant stature.

The second concern is that covenant seems repressive. A major attraction of the Hobbesist social contract lies in its pure instrumentality, its mythopoetic creation by equals needing one another only to refrain from interfering with the independent pursuit of subjectively chosen projects. Covenant, in contrast, is literally more than is bargained for. Covenant creates individual-in-community and, as that relationship becomes constitutive of subjective identity, community-in-individual.

39. See John Spencer, *Meland's Alternative in Ethics*, 6 *Process Studies* 153 (1976). Space constraints forbid discussion of the process philosophy of Alfred North Whitehead and his successors, to which my thinking here is heavily indebted. See, for example, Alfred North Whitehead, *Process and Reality: An Essay in Cosmology* (Free Press, 1978) (David Ray Griffin and Donald W. Sherburne, eds); *Modes of Thought* (Free Press, 1966); and *Adventures of Ideas* (Free Press, 1961).

40. United Nations, *International Declaration of Human Rights*, in Dusan J. Djonovich, ed, 2 *United Nations Resolutions* 135-41 (Oceana Publications, 1973).

This intersubjective constitution of the self draws fire from all points along the political spectrum. Classical liberals resist the adulteration of pure individualism, and any weakening in its guarantee of privatized value. Moderate liberals bemoan the loss of critical distance, assuming that elements of personal identity are immune from self-reflection.⁴¹ Leftists worry that enforced unity suppresses diversity.⁴² Fundamentally, the shared concern is that community compromises autonomy.⁴³

These apprehensions are significant, and will be addressed in more detail in Part III. Yet to reject covenant at the outset on the grounds that intersubjectivity constrains liberty is to kill just one of a virtual army of messengers, all of whom bear similar tidings. Covenant clearly signifies the social construction of identity (although its message is both complex—that is, irreducible to one theme—and distinctive). So, too, with literary and linguistic, psychoanalytic and sociological, structuralist and poststructuralist, postmodern, feminist, and other critical theories, each of which is uniquely shaped by its disciplinary context.

Two points are noteworthy here. First, to clarify the intersubjective constitution of personality is not to invent, but simply to reveal “always already” effective limitations on liberty. For example, this Part’s substantive discussion of covenant traditions points to paradigmatic inequalities between covenant partners. These inequalities, and the inevitable restrictions (or reinterpretations) of freedom they entail, are built into the historical genesis of social arrangements.⁴⁴ The myth of the social contract, with its hypothetical presupposition of equal parties, obscures those inequalities and silences any voices that might protest what is in fact a contract of adhesion. The covenant model makes plain that we are born into limited freedom because we are born into particularity.

The second point flows from the first. We are born into limited *freedom*. Antiobjectivism and antiatomism do not necessarily entail antihumanism; they entail the contextualization, not the erasure, of rationality and liberty. Recognizing the intersubjective constitution of personality does not leave us “with nothingness,” but instead liberates “our affirmative ability to speak about human things in a human voice.”⁴⁵ Granting that this “human voice” must in fact be plural, Steven Winter points to the crucial role imagination plays in self-reflection, which is critical to the exercise of freedom:

41. See, for example, Stephen Macedo, *Liberal Virtues* 244 (Clarendon Press, 1990) (“Allegiances strongly ‘constitutive’ of personal identity are placed entirely beyond the reach of critical reflection.”).

42. See, for example, Young, *Politics of Difference* (cited in note 19).

43. But see Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 *Yale L J* 1, 84-85 (1989) (expressing the opposite concern that discursive community, which “exists only in the present,” is irreconcilable with law, which “represents authority . . . [for which] discourse has stopped”).

44. I am grateful to Garrett Epps for clarifying this point.

45. Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 *U Penn L Rev* 291, 378 (1986).

One final point about situatedness. What is situated is an embodied human with a cognitive capacity. What humans are situated "in" is not some reified entity that looks like a box or container. Rather, we are situated in a real physical and social environment that is always in flux and always contingent. We constantly use our imaginative capacities to recast what we find and reconstruct our context in a variety of ways.⁴⁶

Thus, covenant is not inherently repressive because covenant is like any context fluid, not static. To the contrary, covenant demands that members continually exercise their capacities to maintain, to reinterpret, or to shatter their bonds—to keep covenant, to change it, or to break it.

This section follows the covenant paradigm as it has appeared in the Jewish, Puritan, and U.S. constitutional traditions. This introductory material should help to acquaint the unfamiliar—including the theologically illiterate who could locate Hobbes in anything approaching a post-Christian milieu—with the depth and complexity of the covenant paradigm. As described in the sections below, covenant bears significant reconstructive potential for interpretations of subjectivity within theories of justice. Feminists and other critical theorists should attend particularly to extracting the paradigm's emancipatory focus on equality and the common good. More specifically, covenant offers possibilities for recontextualizing, and thus redefining, self-actualization through decisionmaking and action. For example, covenant strongly implies a theology of participation through work.⁴⁷ Spelled out clearly, covenant-informed theories may justify, in a new and compelling way, the urgency of affording meaningful opportunities for such participation in and for the relevant community. Thus, covenant may bring back to earth—back to the violence, despair, and regeneration of South Central Los Angeles—those theoretical battles over the meaning of subjectivity described above.

A. The Judaic Covenant Tradition

Jon Levenson argues impatiently against the tendency of Jewish and Christian Biblical scholarship after the 1950s to adopt uncritically Martin Buber's existentialist covenant theology. He objects that while focussing on covenant, or *berith*, "theologians spoke stirringly about 'dialogue' and 'relationship'" but were inattentive to *halakhah*, the normative demands of

46. Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 *Stanford L Rev* 639, 664 (1990).

47. See generally Dorothy Sölle, *To Work and to Love: A Theology of Creation* (Fortress Press, 1984); see also Dietrich Bonhoeffer, *Life Together* 94 (Harper, 1954) ("A community which allows unemployed members to exist within it will perish because of them. It will be well, therefore, if every member receives a definite task to perform . . . that this person will know in hours of doubt that he or she, too, is not useless and unusable.").

Seyla Benhabib concludes that to reject the objectivist philosophy of the subject, characteristic through Hegel and Marx, in favor of an intersubjectivist communicative ethics, entails a rejection of work as an organizing metaphor for human activity in favor of dialogue or argumentation. Against this wholesale rejection, I argue that covenant provides for an emancipatory, hence neither objectivist nor totalizing, reinterpretation of work consistent with presuppositions of intersubjectivity. Contrast Seyla Benhabib, *Critique, Norm, and Utopia: A Study of the Foundations of Critical Theory* 133-43 (Columbia U Press, 1986).

divine law.⁴⁸ To Levenson, this grafting of existentialism onto Judaism was doomed to bear little fruit, for the resulting “covenant theology . . . did not lead its audience into the texts that are the lifeblood of Jewish existence.”⁴⁹

Yet Levenson does not abandon Jewish covenantal theology. Indeed, he could not, for covenant is, if not *the*, at least *a* central organizing image of Judaism. *Berith* punctuates the Hebrew scriptures. Drawing upon these abundant textual examples, one scholar concludes that covenant is

a general obligation between two parties confirmed either by an oath, a solemn meal, a sacrifice, or by some other dramatic act In the Bible covenants are established between individuals, between states or their representatives, between kings and their subjects, and also between husbands and wives A covenant can be entered into either by equal partners sharing mutual obligations and benefits, or by unequal partners in which the power and authority is asymmetrical as are the responsibilities, obligations and rewards Of all the covenants in the Bible the central one is that between God and Israel.⁵⁰

The symbols or tokens of the latter covenant vary. “The Sabbath is the sign of Creation; the rainbow is the sign of the renewal of mankind after the Flood; and the circumcision of the beginning of the Jewish people and the Hebrew nation.”⁵¹

Israel’s covenant with God spans many stages and falls roughly into two categories or forms, each traced through its structural similarities to a particular form of political treaty in the ancient Near East.⁵² It is precisely this translation of a political bond between states into a theological bond between God and his chosen people that Levenson finds “one of the revolutionary developments in human history, one that reverberates continuously throughout Jewish experience.”⁵³

God’s covenants with Abraham and David exhibit the first, “conditionless,”⁵⁴ “promissory,”⁵⁵ or “grant”⁵⁶ form. They are fashioned after royal gift treaties, in which the suzerain, or stronger king, rewards a loyal vassal, who is a lesser ruler. The gift—usually of land—is accompanied by the

48. Jon Levenson, *Covenant and Commandment*, 21 Tradition 42, 43 (1983).

49. Id.

50. Steven T. Katz, *Jewish Ideas and Concepts* 156 (Keter Books, 1977).

51. Id.

52. Id at 157-62; Levenson, 21 Tradition at 46, 49-50 (cited in note 48); Jakób Jocz, *The Covenant: A Theology of Human Destiny* 22 (Eerdmans, 1968); Norman L. Grover, *Contracts, Covenants, and Creative Interchange*, in John A. Broyer & William S. Minor, eds, *Creative Interchange* 291, 293-295 (Southern Ill U Press, 1982).

53. Levenson, 21 Tradition at 46 (cited in note 48); see also Martin P. Golding, *Community, Covenant, and Reason* 12, 17-29 (PhD dissertation, Columbia U, 1959) (stressing Israel’s radical particularity as a community, or *corpus mysticum*, created in the act of covenant with God, and the intense reciprocity of the covenant relationship “beautifully expressed in a midrashic homily”:

R. Simon b. Yokhai inquired of R. Elazar b. R. Yose: Is it possible that you heard from your father the interpretation of the verse “The crown with which his mother crowned him”? (Cant. 3:11). He replied: A king had an only daughter, whom he loved very much, and he called her “my daughter.” And his love enlarged to the extent that he called her “my sister.” And it enlarged further until he called her “my mother.” So God greatly loved Israel.

54. Jocz, *The Covenant* at 24 (cited in note 52).

55. Katz, *Jewish Ideas and Concepts* at 159 (cited in note 50).

56. Levenson, 21 Tradition at 49 (cited in note 48).

suzerain's vow to support the vassal in his rulership over his newly acquired territory. Nothing is required of the vassal in return. The formulaic curses accompanying the treaty are "directed not at the vassal, but at those who would attempt a *coup* against his and his descendants' regime."⁵⁷ The unconditional nature of this covenant is distinctive. The errant promisee will be punished, but the covenant itself is irrevocable.⁵⁸

In contrast to the "gift"-form covenants with Abraham and David, the Sinaitic covenant follows the six-part formula of a treaty in which the suzerain acquires the vassal and his loyalty. Although the covenant as expressed in Exodus and Deuteronomy does not follow the formula precisely, most of the elements can be located among the various relevant texts. Levenson finds the formula most clearly followed in Joshua 24, which reiterates God's covenant with Israel:

Verse 6 contains the preamble; it identifies the suzerain as "Lord, God of Israel." There follows a long historical prologue, really a resume of Israel's sacred history . . . [next] come the stipulations, what God . . . asks from the beneficiaries of his grace. After the people have sworn to accept the obligations of covenant, we see the provisions for deposition of the text Then, "witnesses" to the treaty are invoked. The last item in the formulary of covenant . . . [are] the blessings and curses⁵⁹

The blessings, of course, shower upon the faithful covenant partner; curses rain upon the infidel.

The sign of the Sinaitic covenant is the Decalogue. It symbolizes the universal quality of God's relation with Israel. It manifests the obligations of the chosen people to witness, through obedience to divine law, to the world around them. This is the formal condition of loyalty required by the suzerain to secure his protection of the vassal. In Levenson's words,

What creates Israel is Torah, adherence to the order of things that manifests the suzerainty of the God of Israel Sinai speaks to us of our obligations, of the society we must become, of the world we must build. Its keynote is choice, the choice of obedience or faithlessness, of prosperity or adversity, of the Land or exile, of life or death.⁶⁰

The distinction between the Sinaitic covenant and the six-part treaty upon which it is modeled is God's unwillingness to break the covenant, even when the chosen people turn their backs upon their covenantal obligations: "Yet even then . . . I will not reject them or spurn them so as to destroy them, annulling my covenant with them: for I the Lord am their God."⁶¹ In this

57. Id at 50.

58. Id; Katz, *Jewish Ideas and Concepts* at 159 (cited in note 50); Jocz, *The Covenant* at 24 (cited in note 52).

59. Levenson, 21 *Tradition* at 44-46 (cited in note 48).

60. Id at 46.

61. Katz, *Jewish Ideas and Concepts* at 163-67 (cited in note 50); Jocz, *The Covenant* at 37 (cited in note 52); see also James B. Torrance, *The Covenant Concept in Scottish Theology and Politics and its Legacy*, 34 *Scottish J Theol* 225, 230 (1978) (Biblical covenants are such that "the indicatives of grace are always prior to the obligations of law and human obedience . . . legalism puts it the other way round. 'If you keep the law, God will love you!' The covenant has been turned into a contract, and God's grace made conditional on men's obedience.").

respect, both the “gift” form and the six-part “treaty” form of covenant are, finally, unconditional.

Thus far the covenant image may seem inimical to liberalism’s twin norms or ordering principles of equality and liberty. Of what relevance to life in a constitutional democracy is a paradigm patterned after ancient feudal hierarchies? And, while God was evidently free to offer *torah* to any of the world’s peoples,⁶² where is the freedom in being chosen by an all-powerful divine suzerain? In terms of contract law, God’s covenant with Israel smacks of officious intermeddling. Could the chosen people reject the offer? Is the choice between “obedience or faithlessness . . . prosperity or adversity . . . the Land or exile . . . life or death” any choice at all?

On one interpretation, the covenant paradigm reverberates with

the inevitable paradox that derives from faith both in God’s sovereignty and man’s freedom It is obvious that [this contradiction] . . . ultimately leads to the second contradiction, namely that the covenant is both conditional and unconditional. Seen from God’s side it is the latter; seen from the human side it is the former . . . if covenant depends upon man’s loyalty, then God has chosen the wrong partner.⁶³

Covenant in this view depends upon *hesed*, God’s unremitting grace. Covenant, then, is a gift, enabling people to order their lives in right relationship with God, with one another and with the natural world of which they are created members. Prophetic and rabbinic writings are blunt in describing the plague and blessing inherent in the freedom to choose to maintain the relationship or to reject it.

Here I wish to emphasize the manner in which the covenant relationship becomes constitutive of the partners’ identities.

This is perhaps classically expressed by R. Simeon ben Yohai: “Like as when a man who brings together two ships, and binds them together with ropes and cords, and builds a palace upon them; while the ships are lashed together, the palace stands, when they drift apart, it cannot stand. So only when Israel does God’s will is his heavenly palace secure”⁶⁴

Within the context of this covenantal relationship, then, every decision is a moral decision, an opportunity to renew covenant by performing *mitsvot*, an opportunity to be seized or spurned.

B. The Puritan Covenant Tradition

Robin Lovin finds that Biblical scholarship’s focus on the rediscovered formulae of suzerainty treaties, as manifest in covenants of the Hebrew Bible, obscures covenant theology’s historical role of affirming human freedom and equality.⁶⁵ In the Puritan tradition, that freedom was rooted in the individual

62. Lev. 26:44.

63. Jocz, *The Covenant* 39 (cited in note 52). See also David Novak, *Natural Law, Halakhah and the Covenant*, 7 *Jewish L Ann* 43, 59-62 (1988) (distinguishing God’s sovereign freedom of initiating covenant from the finite human freedom of response, and arguing generally that covenant is consistent with a modestly defined natural law theory).

64. Jocz, *The Covenant* at 39 (cited in note 52).

65. Robin Lovin, *Equality and Covenant Theology*, 2 *J L & Rel* 241 (1984); see also Ralph Barton Perry, *Puritanism and Democracy* 192-97 (Vanguard Press, 1944) (“The deepest bond between

conversion experience, in which God's saving grace broke the bonds of sin, liberating the redeemed to do God's will. Equality, too, was concomitant with salvation, as covenant was manifest in the Incarnation:

If we consider it, it is an exceeding great mercy, when we think with ourselves, he is in heaven, and we are on earth; he the glorious God, we dust and ashes . . . and yet he is willing to enter into covenant, which implies a kind of equality with us. As when Jonathan and David made a covenant, though there was a difference (the one was a king's son) yet notwithstanding, when the covenant of friendship was made, there did arise a kind of equality between them.⁶⁶

Lovin finds in sermons such as this a revolutionary egalitarianism ripe for translation into social and political reality.⁶⁷

He takes issue, however, with the prevailing interpretation that by 1776 "the political influence of the [Puritan] covenant had been secularized into a theory of social contract."⁶⁸ He seeks to revitalize the concern for the common good, which was central to the Puritan covenant community, and which serves to balance the "contractarian notion of 'mutually disinterested' persons who join forces to further their individual aims more effectively."⁶⁹ On Lovin's interpretation, the salvation experience enabled the redeemed Puritan to expand the focus of concern beyond herself by increasing her comprehension of the requirements of life in covenant with God. This new understanding provides what Jonathan Edwards describes as a "more extensive and comprehensive view [of things] clearly in their whole nature, and the extent of their connections in the universality of things."⁷⁰

The quality and intentionality of this covenant relationship is given voice in John Winthrop's "A Modell of Christian Charity." He presented this sermon to the members of the Massachusetts Bay Colony aboard the *Arabella* in 1630:

Thus stands the cause betweene God and us. Wee are entered into Covenant with him for this worke, wee have taken out a Commission, the Lord hath give us leave to draw our owne Articles Now if the Lord shall please to heare us, and bring us in peace to the place wee desire, then hath hee ratified this Covenant and sealed our Commission [and] will expect a strickt performance of the Articles contained in it For this end, wee must be knitt together in this worke as one man, wee must entertaine

puritanism and democracy was their common respect for the human individual irrespective of his place in any ecclesiastical, political, social, economic, or other institution.").

66. John Preston, *The New Covenant or the Saint's Portion* 331 (London, 1682) (spelling modernized in Lovin, 2 J L & Rel at 251-52 (cited in note 65)).

67. *Id.*

68. *Id.* at 241-42; see also Richard Niebuhr, *The Idea of Covenant and American Democracy*, 23 *Church History* 126, 134 (1954):

Contract always implies limited, covenant unlimited commitment; contract is entered into for the sake of mutual advantages; covenant implies the presence of a cause to which all advantages may need to be sacrificed. The tendency of the covenant idea to degenerate into the limited contract idea is evident in all the later religious and social history.

69. Lovin, 2 J L & Rel at 241 (cited in note 65).

70. Jonathan Edwards, in William K. Frankena, ed, *The Nature of True Virtue* 2 (U Mich Press, 1960), quoted in Robin Lovin, *Covenantal Relationships and Political Legitimacy*, 60 J Rel 1, 6 (1980). Compare Benhabib, *Afterword* at 360-64 (cited in note 21) (discussing the Kantian "enlarged mentality" and its requirement of dialogic "'interpretive' and 'narrative' skills"); Okin, 99 *Ethics* 229 (cited in note 25); and Katharine T. Bartlett, *Feminist Legal Methods*, 103 *Harv L Rev* 829, 880-88 (1990) (discussing "positionality" as a feminist methodology); and see Part IIIC.

each other in brotherly Affection, wee must be willing to abridge our selves of our superfluities, for the supply of others necessities, wee must uphold a familiar Commerce together in all meekness, gentleness, patience and liberallity, wee must delight in each other, make others Conditions our owne, rejoyce together, mourne together, labour and suffer together, allwayes having before our eyes our Commission and Community in the worke, our Community as members of the same body⁷¹

Here is a resource for a depth of intrinsically valuable relationship that stands in sharp contrast to the vacuous instrumentality of the social contract caricatured by Benhabib. Winthrop's sermon reverberates with the normative pull toward a richer solidarity expressed in Rawls' discussion of the social union.⁷²

In sharp contrast to Winthrop's and Lovin's portraits, however, Michael Walzer presents Puritan covenant communities as wracked with anxiety—bordering on and breaking into panic—provoked by predestinarianism. In this view, Puritanism was a “revolutionary ideology,”⁷³ a fanatical response to the social and political upheavals of the sixteenth and seventeenth centuries. The concern of the elect to “keepe God's Commandements and his Ordinance, and his lawes, and the Articles of our Covenant with him” translated into an unremitting and rigorous examination of self and other. This was the heart of Puritan self-control. It was exercised to ward off Satan, whose predatory tactics were abundantly evident in the wilderness seething about the “Citty upon a Hill,”⁷⁴ and who besieged each soul in its private pilgrimage.

Walzer seems not to grasp the possibility of an “internal covenant.”⁷⁵ He does not imagine that after conversion the predestination doctrine might engender more humility than anxiety. He focusses instead upon the chill rigor of the “external covenant,” the oft-caricatured “ducking stool and scarlet letter.” Lovin, conversely, may gloss over the grimmer aspects of life in the Puritan covenant community in his eagerness to lift up the tradition's beneficial aspects. He is perhaps a bit smug in dismissing concerns, such as Walzer's, over the repression of autonomous individuality:

We must not in our thinking reduce human community to a mere starting point for freedom. In the covenantal understanding, freedom occurs when the self-transcending individual imagination actually does transcend the self and strikes a response in another If the political community of the covenant never quite achieves the privacy and individuality of goals that characterizes liberalism, this may be because persons in covenant are never reduced to the poverty of motives from which liberal political construction proceeds.⁷⁶

71. Winthrop, *Christian Charity* (cited in note 3).

72. See note 24 and accompanying text.

73. Michael Walzer, *Puritanism as a Revolutionary Ideology*, in Stanley N. Katz & Stanley I. Kutler, eds, *New Perspectives on the American Past* 3-36 (Little, Brown, 1969).

74. Winthrop, *Christian Charity* (cited in note 3).

75. The idea of internal and external covenants originates with Karl Barth, *Church Dogmatics* (Harper, 1962). See also Robert N. Bellah, *The Broken Covenant: American Civil Religion in a Time of Trial* 142 (Seaburg Press, 1975); Lovin, 60 J Rel at 2-3 (cited in note 70).

76. Lovin, 60 J Rel at 10 (cited in note 70).

It is likely that an accurate account of covenant, as experienced in the context of Puritanism, lies somewhere between Lovin's and Walzer's. Interestingly, these scholars share a dim view of Weber's thesis that capitalism has its tap root in Puritanism.⁷⁷ Specifically, Walzer supports Lovin's emphasis on the disparate roots of covenant and contract, since contract requires notions of individualism, subjective value, trust, and good faith in bargaining that completely confounded Puritan interpretations of human nature.

Lovin grants that Puritans necessarily rejected classical liberalism's anthropology, and "not because it thought we are better than the security-seeking, desire-driven creatures Hobbes described, but because it thought we are worse."⁷⁸ Nevertheless, within the covenant community itself, Lovin discerns a source of social and political equality beyond the negative pole of depravity and the positive pole of redemption. This potential lies in the theology of work as participation in and for the community:

where in contract theory the similarity of persons in their powers confers equal value on their projects, in covenant theology the fact that differentiated vocations all contribute to the common good requires an equal regard for the persons who perform them Entry into the covenant sets aside ordinary criteria of success and failure, which measure wealth and status against the achievements of other persons generally. The covenantal standard is instead fidelity to my particular task within the commonwealth, mastery of its skills, enjoyment of its unique satisfactions, and offering its daily performance to God⁷⁹

As it appears within Puritanism, then, covenant shares at least two major characteristics with Judaic notions of covenant. The first, akin to *hesed*, is a deep awareness of human dependence on divine grace, the "good not our own." The second, akin to *mitsvot*, is the possibility that a freely chosen relationship can become so constitutive of one's identity as to transform action from banal to meaningful and even sacral.

C. Covenant in the U.S. Constitutional Tradition

As the colonies grew, the theocentricity of the covenant paradigm faded. Or, perhaps more accurately, the covenant's boundaries expanded to embrace a nation. The vastness of New Canaan thwarted the Puritan's solemn intention to extend theocracy; that liberty which the covenant community had fully intended to keep for itself was grudgingly granted to neighboring heretics: Catholics, Quakers, Baptists, Jews.⁸⁰

Yet as theocracy faded, it was precisely concern over the classical liberal's "poverty of motives" that fueled the debate between federalists and

77. Contrast Gardbaum, 90 Mich L Rev at 726 and n153 (cited in note 4) (claiming that "one can believe that the individual is not the source of the good and also that the good is not necessarily pursued in common; in fact, this combination is quite familiar for it is a central tenet of Protestantism"). Gardbaum's claim is contradicted by the centrality of covenant theology within many branches of Protestantism.

78. Lovin, 2 J L & Rel at 245 (cited in note 65).

79. Id at 253.

80. See Sidney Mead, *The Lively Experiment* (Harper & Row, 1976).

antifederalists during the transition from the Articles of Confederation to the Constitution. In this debate, the Puritan surely stood dismayed between federalist and antifederalist, going the former one better in his dour evaluation of the human capacity for virtue, yet sharing the latter's concern for a common striving toward the public good.⁸¹ The federalists sought to channel the citizen's inevitable self-interest by playing faction against faction within the confines of a "well-ordered constitution."⁸² Government was to serve as referee, securing competing private interests from mutual interference. Because the bond between the states created by the Articles of Confederation proved too frail for the job, a more robust, centralized power was required.

Proper constitutional interpretation requires careful attention to the covenant tradition out of which the final document emerged, stretching the founding era to encompass the decades between 1765 and 1805. Like Lovin, Donald Lutz traces an explicit dedication to the common good throughout this tradition.⁸³ Lutz refutes the thesis that the Founders incorporated a Hobbesist individualism of the "rugged frontier" variety into their drafting of the Constitution. Rather, he views their context as thoroughly communitarian:

the vast majority of Americans were, by the 1770s, safe and secure in a town or community At no time since 1776 has more than 10 percent of the American population lived on what we know as a frontier. Most of the communities then in existence, containing most of the people, had been in existence for a century or more. The frontier was on the other side of the mountains, but life on this side was settled and sophisticated . . . community allow[ed] its members to provide "their mutual assistance toward their own perfection."⁸⁴

Within this context, the antifederalists sought in the classical republican tradition to disperse power to the most local level practicable, because only in

81. From another perspective, the Federalists held the optimistic, and the anti-federalists the pessimistic view of human nature. See John D. Lewis, *Anti-Federalists vs. Federalists* 23-24, 36-38 (Chandler, 1967).

82. Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va L Rev 543, 546 (1986), quoting John Adams in John P. Diggins, *The Last Soul of American Politics: Virtues, Self-Interest and the Foundations of Liberalism* 70-71 (Basic Books, 1984).

83. Donald Lutz, *The Origins of American Constitutionalism* 25, 27, 28 (La State U Press, 1988) (citing as exemplary the Mayflower Compact of 1620, which intended to further the community's "better Ordering and Preservation . . . and . . . [the framing of] . . . just and equal Laws"; a 1630 Boston church covenant, committing the people to live "in mutual love, & respect for each other"; and the Providence Agreement of 1637, promising obedience to "all such orders and agreements as shall be made for the public good of the body." See also John Witte, *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 Emory L J 41 (1990).

84. Lutz, *The Origins of American Constitutionalism* at 71-73 (cited in note 83) (citing Agricola [pseud.], [untitled essay], Massachusetts Spy (Boston, Oct 22, 1772); see also Niebuhr, 23 Church History at 133 (cited in note 68):

One must not read into the seventeenth century . . . the individualism that characterized the later revival periods In the covenant conception the essence of freedom does not lie in the liberty of choice among goods, but in the ability to commit oneself for the future . . . an in the terrible liberty of being able to become a breaker of the promise, a traitor to the cause

Contrast Grover, *Contracts, Covenants, and Creative Interchange* at 301 (cited in note 52) (construing the Constitution as an "external covenant . . . embraced on the basis of mutual self-interest . . . explicit[ly] [founded on] Hobbesian and Lockean social contract theory").

an intimate polity could each citizen fulfill his social, political nature through maximal participation in public affairs. That participation in turn was the means for "the attainment of virtue, and happiness among ourselves," which was the purpose of government.⁸⁵

Moreover, the antifederalists were keenly concerned with the implications of concentrated government for a class-based society. In particular, they feared underrepresentation of the middle class and intensification of disparities in power and wealth as the Constitution actualized its "Aristocratic Tendency."⁸⁶ The ferocious Centinel vented his anxieties thus: "View this Collosus attempting to grasp the commerce of America View his towering aspect, he would have no bowels of compassion for the oppressed, he would *overlook* all their sufferings."⁸⁷

Of course, neither federalists nor antifederalists extended their concerns for liberty and equality universally. The Constitution explicitly excepted slaves from its protections.⁸⁸ The status of women was not even deemed noteworthy until 1868, when their disenfranchisement was encribed in the apportionment clause of the Fourteenth Amendment.⁸⁹ As in the Jewish and Puritan covenant traditions, then, covenant within the U.S. constitutional tradition reads ambiguously. This covenant signifies a celebration of human dignity and deliberate exclusion from that celebration; it expresses firm guarantees of equal liberty and their explicit repression.

In the continuing contest to interpret this text, one siezes with relief upon W. B. Allen's extended exegesis of *Federalist* 51. On behalf of the Federalist case, Allen cites Publius' assertion that "justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." Allen argues that

more impoverished versions of Madisonianism—typically presented as the doctrine of a multiplicity of interests within an extended republic—fail systematically to express

85. *Brutus*, January 3, 1788, in *The Anti-Federalist* 145, 146 (U Chicago Press, 1985) (Herbert J. Storing, ed; abridgement by Murray Dry). Of course, such fulfillment was restricted to the landholding male minority. The recent enactment of the 27th Amendment two hundred years after its approval by Congress could rejuvenate its antifederalist companion, which requires the election of at least one Representative for every fifty thousand persons. As William Van Alstyne notes, the House might then have to accommodate at least 5,000 members. William W. Van Alstyne, *What Do You Think About the 27th Amendment?*, *Duke Law Magazine* 13, 14 n1 (Summer 1992).

86. Herbert J. Storing, *What the Anti-Federalists Were For*, in Herbert J. Storing, ed, 1 *The Complete Anti-Federalist* 48 (U Chicago Press, 1981); see also Lewis, *Anti-Federalists vs. Federalists* at 21-23 (cited in note 81); Ralph Ketcham, ed, *The Anti-Federalist Papers and the Constitutional Convention Debates* 16-20 (Mentor, 1986). Critiques of the Constitution's failure to attend to substantive equality between economic classes include, for example, James B. Sterba, *The U.S. Constitution: A Fundamentally Flawed Document*, in Christopher B. Grey, ed, *Philosophical Reflections on the United States Constitution: A Collection of Bicentennial Essays* 134 (Mellen, 1989); Arthur S. Miller, *The Secret Constitution and the Need for Constitutional Change* (Greenwood, 1987).

87. Centinel, Letter VIII (Philadelphia) *Independent Gazette* in W. B. Allen, Gordon Lloyd & Margie Lloyd, eds, *The Essential Antifederalist* 254 (U Press of America, 1985).

88. U.S. Const art I, § 2, cl 3; id § 9, cl 1; id art IV, § 2, cl 3; see also *Dred Scott v. Sandford*, 19 Haw 393 (1857).

89. U.S. Const amend XIV, § 2, cl 2. The disenfranchisement of women remained in effect through the enactment of the fifteenth amendment two years later and for a half-century thereafter. See id amend XIX.

the correct foundations of Madison's founding principle because they fail to take seriously *Federalist 51's* invocation of justice. The operative analogy throughout is that justice inheres as fully in the arguments of *The Federalist* as piety inheres in the *Torah*, although neither is frequently mentioned in either.⁹⁰

For in place of the covenant centered upon *torah*, entered at birth and renewed freely through obedience to *halakhah*; instead of the covenant centered upon the incarnation of God in Jesus, entered through conversion; the covenant of the new nation centered upon the Constitution, to be entered through the rational recognition of classical liberalism's twin principles of individual liberty and juridical equality. Thus the covenant paradigm remained effective as

in the end the Roman archetypes proved less profound and less lasting than the biblical ones, for Latin culture was more confined to the elite than biblical culture. The great image for the founding of the nation was Exodus, not Aeneid. Even the classicist Jefferson proposed a picture of Moses leading Israel across the Red Sea for the Great Seal of the United States. And in his second inaugural address he said, "I need, too, the favor of that Being in whose hands we are, who led our forefathers, as Israel of old, from their native land, and planted them in country flowing with all the necessaries and comforts of life; who has covered our infancy with his providence, and our riper years with his wisdom and power."⁹¹

Robert Bellah describes America's self-image as a chosen people, and the various prophets of the new civil religion, who denounced their failures to keep the covenant. He points to Lincoln's Second Inaugural Address as "perhaps the greatest expression of the theme of covenant and judgment in the entire course of American history:"

Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled up by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord are true and righteous altogether."⁹²

The continued vitality of the covenant paradigm, and the interweaving of sacred imagery and civil religion to subvert oppression, were demonstrated many decades later by Martin Luther King in his letter to the white clergymen of Birmingham:

We will reach the goal of freedom in Birmingham and all over the nation, because the goal of America is freedom. Abused and scorned though we may be, our destiny is tied up with America's destiny. Before the pilgrims landed at Plymouth we were here. Before the pen of Jefferson etched the majestic words of the Declaration of Independence across the pages of history, we were here . . . We will win our freedom because the sacred heritage of our nation and the eternal will of God are embodied in our echoing demands.⁹³

90. W. B. Allen, *Justice and the General Good: Federalist 51*, in Charles R. Kesler, ed, *Saving the Revolution: The Federalist Papers and the American Founding* 131, 132 (Free Press, 1987).

91. Bellah, *The Broken Covenant* at 24-25 (cited in note 75).

92. Id at 53-54.

93. Martin Luther King, Jr., *Letter from the Birmingham City Jail*, reprinted in James M. Washington, ed, *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* 289, 301 (Harper & Row, 1986). More recently still, Democratic presidential nominee Bill Clinton has urged voters to create (under his leadership) a "New Covenant." See Karen DeWitt, *In Their Own Words, Clinton's Policy Trademark: "New Covenant,"* NY Times A15 col 2 (July 17, 1992). Evangelists Pat Robertson

This survey of covenant imagery is intended to demonstrate the paradigm's historically deep roots, as well as its complex and ambiguous meanings. Charles Davis writes that

[t]radition can be and often has been a Babylonian captivity, because it has served as a pretext for the imposition and continuance of heteronomous authority. But it is also the irreplaceable repository of experiences too rich for discursive reason adequately to objectify and lay hold of.⁹⁴

The dimension of covenant I have sought especially to "lay hold of" is the possibility it presents that a relationship may have such depth and significance as to become constitutive of subjective identity, and consequently to inform all aspects of decisionmaking and action with that relationality. Feminists and other critical theorists may do well to appropriate and mold the deeply rooted covenant emphases on equality and the common good to energize their critiques. Particularly when closely bound with concerns for social justice embodied in liberation theologies⁹⁵ or their secular counterparts, covenant offers a powerful paradigm for transformation of the prevailing order.

III

SOME CRITICISMS AND CONSEQUENCES OF COVENANT-BASED THINKING

The turn to covenant to shape theories of subjectivity will evoke disparate responses. The self-consciously secular may dismiss covenant as meaningless, that is, irrelevant and inaccessible. Part II attempts to meet that challenge, but undoubtedly the paradigm's distinctive character will ensure that it lacks universal appeal.⁹⁶ Others may grasp covenant's meaning, but reject its historical ties, for example, to systems of patriarchal domination. For these, the turn to covenant is likely to appear reactionary. But to reject covenant on such grounds is to fall prey to the genetic fallacy, to indulge in an *ad hominem* attack that surrenders to history (and to the genuinely reactionary) any utility the paradigm offers today.

Another objection to covenant-informed theories is their limited scope of applicability. But my claims for covenant are modest. I do not intend to

and Jerry Falwell challenge Clinton's use of covenant imagery. See Ari L. Goldman, *Religion Notes*, NY Times § 1, at 9 col 1 (July 25, 1992) (Robertson describing Clinton's speech as "extremely dangerous . . . pseudo-Christianity").

94. Charles Davis, *Theology and Political Society* 103 (Cambridge U Press, 1978).

95. See, for example, José Míguez Bonino, *Toward a Christian Political Ethics* (Fortress Press, 1983); Mary Daly, *Beyond God the Father: Toward a Philosophy of Women's Liberation* (Beacon Press, 1985); Gustavo Gutierrez, *A Theology of Liberation* (Orbis, 1973); Rosemary Radford Reuther, *Sexism and God-Talk* (Beacon Press, 1983); Cornel West, *Prophesy Deliverance! An Afro-American Revolutionary Christianity* (Westminster Press, 1982).

96. On the other hand, a peculiar strength of covenant imagery may be its broader accessibility, beyond the walls of académe, relative to an unmodified feminism or a highly abstract discourse-based ethics (the latter of which occasionally obscures Wittgenstein's observation that "words are deeds"). Ludwig von Wittgenstein, *Culture and Value* 46e (G. W. Von Wright, ed; Peter Winch, trans) (U Chicago Press, 1980); see also John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* 16 (Cambridge U Press, 1949); Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 Nw L Rev 54 (1989); compare note 47 and accompanying text.

follow Unger in trying to sketch some identifiable essence of human nature,⁹⁷ nor to argue that covenant can undergird a grand unified ethical theory. Rather, I seek to highlight covenant's utility for (plural) reconstructions of subjectivity within (plural) theories of justice.

I readily concede, then, that not all associations are characterized by covenant's transforming depth of commitment. Membership in a local gun club is unlikely to have significance equivalent to marriage (although such transvaluations certainly occur). Admittedly, no social bond may be consciously experienced as covenantal. Conversely, however, persons can locate themselves simultaneously within multiple covenants.⁹⁸ One's actions can be informed simultaneously by memberships in a family or household, a neighborhood, a community of worship, a political association, a nation, and even a biosphere.⁹⁹

Yet if covenant could be grounded in various associations, does it lack distinctive substance? Is membership in the Ku Klux Klan as potentially covenantal as membership in Greenpeace? It seems so, if covenant is reduced to the single theme "relationship constitutes identity." Yet clearly covenant's significance is complex. Ruthless abstraction of covenant's implications for the debate over subjectivity from other essential elements—such as its emphases on equality and the common good—does violence to the paradigm. Moreover, I present covenant within the context of a specific, feminist critique, committed to a vision of justice as universal dignity that reveals, and seeks to revolutionize, patterns of exclusion and domination. Within this context, I claim that the U.S. Constitution retains paradigmatic covenantal—and emancipatory—potential, and call for renewed dedication to its realization. And, within this context, KKK members would bear an insurmountable burden in defining their commitments as covenantal.

From still another perspective, covenant may seem redundant in reconstructing theories of subjectivity. As J. M. Balkin notes, "[t]he social construction of the individual is so often proclaimed these days that it must by now seem widely accepted."¹⁰⁰ In this view, covenant might offer little to add to or distinguish from critiques offered, for example, by structuralists, poststructuralists, and postmodernists. Balkin points out, however, that few scholars, particularly in legal theory, take the claim of intersubjectivity seriously enough to trace out its implications. Moreover, covenant offers a substantive vision different both from the "anti-humanist effacement of the subject" consequent to some structuralist and poststructuralist critiques, and from the "naivete of radical subjectivism" plaguing liberal theory.¹⁰¹

97. See note 12 and accompanying text.

98. Compare Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *Women's Rights L Rep* 7 (1989).

99. See, for example, John B. Cobb, *The Liberation of Life: From the Cell to the Community* (Cambridge U Press, 1981).

100. J. M. Balkin, *Ideology as Constraint*, 43 *Stan L Rev* 1133 (1991) (review of Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton, 1990)).

101. *Id.* at 1168.

But to flesh out this substantive vision is to confront perhaps the most compelling criticism of covenant-based constructions of subjectivity: They may fail to account for, and nurture, solitude. The covenant subject, conceived simultaneously as individual-in-community and as community-in-individual, may simply subsume individuality in community. This criticism is levelled at communitarian approaches generally and hearkens back to Canavan's assertion, described in the introduction, that the essence of modernity is the individual's shrugging off the shackles of social expectation.

Those who view this development as not only genuine, but salutary, are likely to perceive covenant as little more than constraint. For example, Stephen Macedo worries that a communitarian ethos will compromise one's "right to lead either a silly or a serious life To spend [one's] free time either watching TV and drinking beer or cultivating 'higher' pleasures."¹⁰² Iris Marion Young poses a similar objection from the left wing of the political spectrum. She asserts that feminist communitarians sacrifice diversity, "the concrete political vision of inexhaustible heterogeneity," in their desire for "social wholeness and identification."¹⁰³

Again, I readily concede that the specific implications I draw from covenant traditions are arguably antiliberal in several respects. First, covenant makes plain that we are born into contexts that circumscribe our liberty. This emphasis contrasts with that of Macedo, for example, who clings to a paradigmatic, but largely discredited, vision of the liberal subject as independently pursuing freely chosen ends. Psychoanalytic theory calls into question the image of a centered, self-transparent consciousness capable of such radical freedom.¹⁰⁴ Extensive scholarship in other disciplines reveals the social construction of desire itself.¹⁰⁵ Covenant-based interpretations of subjectivity cohere better with this contemporary view than with the unmodified liberalism they oppose.

Moreover, covenant highlights a concern for equality and the common good, which imposes an ethical restraint on (or clarifies an ethical context for) one's choices. Although her criticism of Benhabib and other feminists seems overstated, Young aptly questions for whom the common good is held to be "common," and cautions against the subsumption of distinctive voices in revising that definition. Certainly the plurality of good lives from which, for

102. Macedo, *Liberal Virtues* at 232 (cited in note 41).

103. Young, *Politics of Difference* at 301-302 (cited in note 19). While Young's concern is apt, compare notes 25 and 42-47 and accompanying texts, she offers her own totalizing approach, insisting on an urban model for politics within which residents live "among strangers with whom they are not in community." Id at 303. Moreover, Young may have built a straw man (or woman) of her communitarian opponents. She concedes in the end that "it may be a matter of stipulation" whether the name "community" is given to the polity she promotes. Id at 320. Thus, on comparing Young's politics of difference with the feminist methodologies discussed in Part IIIC, one might well wonder, "What's the difference?"

104. See, for example, Irigaray, *Speculum* (cited in note 11).

105. See, for example, Michel Foucault, *The History of Sexuality: Volume I/An Introduction* (Vintage Books, 1980), and *Discipline and Punish: The Birth of the Prison* (Vintage, 1979) (Alan Sheridan trans); Balkin, 43 *Stanford L Rev* at 1148-49 (cited in note 100); Nancy Fraser, *Talking About Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies*, 99 *Ethics* 291 (1989).

example, Benhabib's ethical agent may choose—ranging from Mother Teresa to a Warsaw ghetto resistance fighter—seems not to encompass Macedo's TV-watching beer-drinker.¹⁰⁶ And it seems clear that within a covenant relationship dedicated to universal human dignity, lifestyles of conspicuous consumption in the face of global deprivation are not ethically viable. Covenant creates, or reveals, an ethical context for every decision—from the rarified level of Imelda Marcos' indulgence in footwear, to the more mundane choice either to breakfast on Post Toasties or to continue fasting, in order to fund a donation to Oxfam.

Thus, covenant clearly, and distinctively, signifies the restrictions on liberty inherent in the social construction of identity. Yet the paradigm also highlights what Neibuhr called "the terrible freedom" of keeping or breaking covenant.¹⁰⁷ Consequently, covenant provides space for the meaningful exercise of individuality and liberty. In the following section, I explore what sort of individual freedom can be manifest within covenant and how it may be exercised. I do so in two ways. First, I contrast the implications of covenant-based thinking with Stephen Gardbaum's defense of liberalism against various types of communitarian critique. Second, I compare this covenant-based approach to the methods of several contemporary feminist theorists.

A. Can Liberalism Survive Antiatomism?

In *Law, Politics, and the Claims of Community*, Stephen Gardbaum responds to three critiques of liberalism, all of which he subsumes under the label "communitarian."¹⁰⁸ These critiques focus, first, on the nature of subjectivity; second, on the method of generating ethical norms; and, third, on the relative value of substantive norms. Gardbaum claims that there is no necessary connection between the outcomes in these three separate debates and, moreover, that liberalism can coexist with "communitarian" outcomes in all but the last. In other words, Gardbaum's liberalism is threatened not by a "communitarian" subject, that is, one constituted intersubjectively; nor by the corporate creation of norms, or "metaethical communitarianism;" but only by a claim about the priority of a substantive good.

Thus, for Gardbaum's liberalism, the "ominous thunder" of communitarianism is the claim that life is best lived in community. His thesis rests on a sharp distinction between the source and content of values. Liberalism can coexist with socially constructed individuals living with socially constructed values, so long as these values do not threaten subjective

106. Benhabib concurs with the privatization of value to the extent that as moderns we have to live with varieties of goodness. Whether the good life is to be fulfilled as an African famine relief fighter, a Warsaw ghetto resistant, a Mother Teresa, or a Rosa Luxemburg ethical theory cannot prejudice I regard neither the plurality and variety of goodness with which we have to live in a disenchanted universe nor the loss of certainty in moral theory to be a cause of distress.

Benhabib, *Afterword* at 350 (cited in note 21).

107. Niebuhr, 23 *Church History* at 134 (cited in note 68).

108. Gardbaum, 90 *Mich L Rev* at 685 (cited in note 4).

preference; they must make no "first order claims about what is valuable."¹⁰⁹ Despite his claims to the contrary, then, Gardbaum confirms Canavan's argument: liberalism's ultimate meaning lies in the privatization of value, the untrammled freedom to select one's own ends. In Pastan's words, "there seems no way in/or out/and though there is a sea here/there is no tide."

I challenge Gardbaum's claim that interpretations of subjectivity have no necessary consequences for the generation of substantive political and ethical values. In contrast, I view the outcome in the antiatomism debate as tightly linked to the metaethical debate, and both of these, within a feminist-covenantal context, as having predictable and ambiguously antiliberal implications. I contend that Gardbaum's thesis depends upon two strategic errors. First, it understates the significance of the intersubjective construction of personality. Second, it silences distinctive voices, such as feminist critiques, among the various forms of critical theory by subsuming them under communitarianism. Only by diluting the force of antiatomist critiques and abstracting them from their explicitly political contexts can Gardbaum's liberalism survive the communitarian challenge unscathed.

Gardbaum's understatement of the assault upon the liberal subject is evident from the outset, when he defines postmodernism in opposition to romantic antimodernism and identifies Richard Rorty and Jurgen Habermas as postmodernism's spokesmen.¹¹⁰ With these moves, he deflects the fiercest fire postmodernism aims at the liberal subject, and can confidently conclude that the antiatomism thesis "means no more and no less than . . . that, had we been brought up in a different society from the one we were in fact brought up in, we would now be different people."¹¹¹

Gardbaum begins by reducing postmodernism (a complex, ill-defined collection of perspectives) to (1) skepticism about human rationality and (2) antifoundationalism and antiobjectivism.¹¹² The definition is both over- and underinclusive. With respect to the first criterion, there is nothing

109. *Id.* at 689.

110. *Id.* at 689, 694.

111. *Id.* at 704.

112. *Id.* at 689. It is only fair to note that even one of the foremost expositors of postmodernity hesitated to fix it through description "in a moment in which the very conception of historical periodization has come to seem most problematical indeed." Fredric Jameson, *Postmodernism, or the Cultural Logic of Late Capitalism*, 146 *New Left Rev* 53, 55 (1984).

The genealogy of postmodernism points to the arts. As an aesthetic trend in the visual arts (including architecture and film), literature, and music, postmodernism celebrates the representation-in-itself: the flattened image or pastiche of surfaces with no explicit reference to any substance beneath or external significance. Jameson views these disparate expressions as sharing a common rejection of the hierarchical divide

between high culture and so-called mass or commercial culture The postmodernisms have in fact been fascinated precisely by this whole "degraded" landscape of schlock and kitsch, of TV series and Readers' Digest culture, of advertising and motels, of the late show and the grade-B Hollywood film, of so-called paraliterature with its airport paperback categories of the gothic and the romance, the popular biography, the murder mystery and science-fiction or fantasy novel

Id. at 54. Perhaps the purest embodiment of postmodernity is the music video, which dances gleefully on the grave of the modern distinction between high culture, or performance, and mass culture, or commodity advertising.

distinctively postmodern about skepticism;¹¹³ moreover, as Gardbaum himself notes, Habermas does not fit this definiens.¹¹⁴ With respect to the second criterion, Gardbaum fails to communicate the most radical, antihumanist challenges to the liberal interpretation of subjectivity posed by the combined force of the poststructuralist/postmodern/critical theory movements.¹¹⁵ Most significantly, Gardbaum fails to account for the social construction of desire, and the decentering of the self-transparent, self-identical subject he needs to retain liberalism's distinctive privatization of value.¹¹⁶

Gardbaum's second strategic error is the abstraction of antiatomistic arguments from their distinctively and explicitly political contexts. Feminist theories, for example, and the oppositional politics they intend to serve, focus upon the identification and dismantling of gender-based forms of domination. Other analyses target hierarchies based on race, class, or sexual orientation, and a growing body of scholarship attends to the complex ways in which these social structures concatenate.¹¹⁷ Within the context of oppositional political commitments, liberalism's sanctification of subjective preference is perceived frequently and often accurately as a strategy for justifying continued patterns of exclusion and domination. The re-revisions of justice inherent in these political projects collide headlong with Gardbaum's insistence on privatization of value. They cannot comfortably coexist.

Despite these problems in his analysis, Gardbaum correctly insists that participants in one or more of the three types of communitarian critique must argue for, rather than assume, the implications of the outcome in one debate for the outcome in another. For example, proponents of the antiatomism thesis must justify the conclusion that values are produced collectively. Similarly, participants in either of these debates must independently establish claims for elevating certain substantive values over others. I address this challenge in the next section.

113. See, for example, Ecclesiastes 1:17 ("So I applied my mind to understand wisdom and knowledge, madness and folly, and I came to see that this too is chasing the wind."); Plato, *Theaetetus* 161d, in Edith Hamilton & Huntington Cairns, eds, *Plato: The Collected Dialogues* 867 (Pantheon Books, 1961) (refuting Sophist claims); David Hume, *A Treatise of Human Nature (Book I)* §§ 2-3 (Clarendon Press, 2d ed 1978).

114. Gardbaum, 90 Mich L Rev at 685 (cited in note 4) (describing Habermas as "The Guardian of Rationality").

115. See, for example, Donna Haraway, *A Manifesto for Cyborgs: Science, Technology and Socialist Feminism in the 1980s*, in Nicholson, ed, *Feminism/Postmodernism* at 190 (cited in note 10); Balkin, 43 Stanford L Rev 1168 (cited in note 100); Fraser & Nicholson, *Social Criticism without Philosophy* at 87 (cited in note 10) (Lyotard's postmodernism "casts critique as strictly local, *ad hoc*, and ameliorative, thus supposing a political diagnosis according to which there are no large-scale, systematic problems which resist local, *ad hoc*, ameliorative initiatives.").

116. See notes 104-05.

117. See, for example, Bell Hooks, *Feminist Theory from Margin to Center* (South End Press, 1984); Judy Scales-Trenton, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 Harvard CR-CL L Rev 9 (1989); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 Cal L Rev 775 (1991).

B. "To Make Others Condiciones Our Owne:" Metaethical and Substantive Implications of a Covenant-Based Theory of the Subject

I have already outlined some broad implications of covenant. First, covenant implies a view of subjectivity that overcomes the opposition between Hobbesist atomism and as yet inexplicitly defined feminist-relationist interpretations. Covenant creates individuality-in-community and, as that depth of relationship becomes constitutive of personal identity, community-in-individuality.

Implicit in this view of subjectivity is a commitment to the social generation of norms—what Gardbaum calls "metaethical communitarianism." Interestingly, although he challenges at the outset the presumption of a necessary connection between the antiatomism thesis and any particular metaethical stance, Gardbaum nowhere justifies that claim. This is so in part, surely, because his major concern is to save liberalism's privatization of value from the strong communitarian's claim that life is best lived in community. But Gardbaum's failure to substantiate the alleged divorce between antiatomism and metaethics may also be rooted in the difficulty, even impossibility, of the task.

For where subjectivity is a social construct, and norms are an empirical element of subjectivity, by definition norms are folded into social construction. Since no Hobbesist, isolated individuals remain to generate values independently, one seeks in vain a nonsocial location for metaethics; as Gertrude Stein said of Oakland, "there is no there there."

But as the covenant model points up, intersubjectivity is symmetrical. Subjectivity is at once individuality-in-community and community-in-individuality; society constitutes individuals, and individuals constitute society. Thus, while Gardbaum's interpretation of intersubjectivity is at best thin and clearly not exhaustive, it is nevertheless useful when expanded in the following way. Intersubjectivity means minimally "that, had we been brought up in a different society . . . we would now be different people."¹¹⁸ It also means that, had we been brought up in a different society, that society would generate different norms due to our distinctive mode of participating in the metaethical process.

Critics like Iris Young might challenge the latter assertion as glib, citing the historical subordination of, for example, racial minorities, the poor, women, gays, and lesbians within a culture normalizing racism, class bias, sexism, and heterosexism.¹¹⁹ Of course, this developing chorus of diverse critiques demonstrates empirically that norm generation is not monological but can be responsive, even if only to an egregiously limited and unforgivably tardy extent, to pushes and pulls from societies' constitutive members. Still, Young might hear Winthrop's sermon to the Puritans aboard

118. Gardbaum, 90 Mich L Rev at 704 (cited in note 4).

119. Young, *Politics of Difference* at 310-12 (cited in note 19).

the Arabella, with the requirement that covenant members “be knitt together . . . as one man,”¹²⁰ as paradigmatically bad news. Similarly, the U.S. Constitution feigned to speak for “We, the people,” while deliberately excluding most people from its protections. On this reading, revival of covenant imagery threatens to strangle nascent critiques before they are fully heard, subsuming diversity in the totalizing monotone of the dominant discourse.

But this interpretation of covenant does not follow necessarily; indeed, it is precisely the meaning of normative constructs, such as covenant, that are ultimately at issue. Because values are the social creations of socially constituted entities, the contest shifts from procedure to substance, from metaethics to first order claims and their practical implications.

And an emancipatory reading of covenant is not only possible, but compelling. Winthrop demands, for example, that solidarity entail a willingness “to abridge ourselves of our superfluities, for the supply of others necessities, wee must uphold a familiar Commerce together in all meekness, gentleness, patience and liberallity”¹²¹ The U.S. Constitution binds us to “establish Justice,” to “promote the General Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.” The covenant traditions I have described are fairly mined for their emphases on universal human dignity, and for their implied demands for substantive guarantees of the conditions necessary to express that dignity through meaningful participation in its ongoing reinterpretation, pursuit, and satisfaction.

Thus, the demand that we “make others Condiciones our owne” need not entail the suppression of diversity. To the contrary, it opens possibilities for one’s own transformation through the imaginative participation in another’s life-world.¹²² Young is correct to note our limited abilities to know ourselves and others. Yet to overemphasize these limitations is to deny some empirical realities of intersubjectivity, such as the capacities for sympathy (feeling like another) and even, occasionally, empathy (feeling with another). Young’s view of subjectivity and intersubjectivity returns us to the Hobbesist isolation of Pastan’s egg, floating at a safe remove from the rusting tools, the snarled barbed-wire, and muck of the barn below.¹²³

In using covenant to reconstruct working definitions of subjectivity, I contend that rich intersubjective knowledge is possible and that such knowledge can transform participating subjects. The medium for such knowledge is narrative, the telling of our stories. Narrative happens under

120. Winthrop, *Christian Charity* (cited in note 3).

121. *Id.*

122. See, for example, Sandra Day O’Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 *Stan L Rev* 1217 (1992).

123. Compare Cornell, 133 *U Penn L Rev* at 370 (cited in note 45) (“Those who assert prior to entering the conversation that there are no generalizable interests are relying on an ahistorical, monological view of human nature and the individual subject. They are, in short, just objectivists in disguise.”).

Particularly given Young’s political commitments, her approach also brings to mind the powerful poetry of Carolyn Forché, who urges us to

conditions ranging from relative intimacy (as within a family, deep friendship, or religious community) to institutional formality (such as the courtroom). The content ranges accordingly, from tales of idiosyncratic origins, joys, and sorrows to grievances of broad generality but high intensity of feeling (hunger, cold, pain, even procedural or substantive unfairness).

As an example of the relationship between intersubjectivity, metaethics, and first order value claims, I return to the constitutional subject, the "We the people" constituted in the Preamble. It is when we recognize that we are members of one another that our de facto apartheid scars us most deeply, for we experience covenant betrayed. A covenantal "familiar Commerce" would enable us to begin dismantling our de facto apartheid, healing these deep wounds, attempting, in Rodney King's words, to "get along,"¹²⁴ even, perhaps, to "delight in one another . . . rejoyce together, mourne together, labour and suffer together."¹²⁵

This latent, covenantal vision of universal human dignity cannot be satisfied by classical liberalism's purely procedural guarantees of equality, nor by the welfare state's neglect of the wealth of human potential wasting in the streets. Covenant demands substantive guarantees of universal participation in the ongoing redefinition, pursuit, and realization of its vision. Participation means the opportunity to speak and be heard, to meaningfully influence substantive outcomes. This in turn requires a resurrection of a robust system of public education, the creation of meaningful work opportunities, and the satisfaction of conditions necessary for fulfilling those opportunities, such as affordable health care and child care, and family leave policies.¹²⁶ Of course, covenantal dedication to universal human dignity implicates global policies as well.¹²⁷

everywhere and always
go after that which is lost.
There is a cyclone fence between
ourselves and the slaughter and behind it
we hover in a calm protected world like
netted fish, exactly like netted fish.
It is either the beginning or the end
of the world, and the choice is ourselves
or nothing.

Carolyn Forché, *Ourselves or Nothing*, in Carolyn Forché, *The Country Between Us* 55, 59 (Harper & Row, 1981).

124. Alicia Di Rado, *Voices from the Community*, LA Times, *Nuestro Tiempo* ed, 5 col 1 (May 21, 1992).

125. Winthrop, *Christian Charity* (cited in note 3).

126. See, for example, Family and Medical Leave Act of 1991, § 5. In 1990 and 1992, Congress failed to override presidential vetoes of the Act. See also Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 Harv L Rev 7 (1969).

127. See, for example, *Haitian Centers Council, Inc. v McNary*, 1992 US App LEXIS 17372, *57 (2d Cir. 1992) (holding Executive Order 12,807, which allows the U.S. Coast Guard to intercept and return refugees in international waters, to violate § 243(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(1)) (stay granted, 1992 U.S. Lexis 4766) (cert granted *McNary v Haitian Centers Council, Inc.*, 1992 US Lexis 5557 (Oct 5, 1992)); contrast *U.S. v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (forcible abduction of Mexican national under authority of U.S. officials held not to be barred by U.S.-Mexico extradition treaty).

A covenant-informed ethics thus may yield first-order value claims, whose satisfaction will inevitably clash with liberalism's privatization of value. The insistence on substantive guarantees of the conditions necessary to realize and protect universal human dignity compromises the freedom of each person to pursue untrammelled his subjectively chosen ends. If, as Gardbaum implies (despite his claims to the contrary), subjective preference is liberalism's defining criterion, it cannot meaningfully coexist with a covenantal commitment to making equality and autonomous self-realization universally viable options.¹²⁸

C. Four Feminist Methodologies

This covenantal view of subjectivity, norm generation, and substantive first-order value claims shares similarities with the feminist approaches of philosophers Seyla Benhabib and Susan Moller Okin, and legal theorists Katharine Bartlett and Drucilla Cornell. In this section, I will briefly describe the methodologies of these four feminist thinkers, and trace connections and conflicts between their conclusions and those implied by a covenant-based analysis.

1. *Seyla Benhabib's Interactive Universalism.* Part II argued that Benhabib's affiliation of Rawls with Hobbes on the nature of subjectivity is mistaken, and agreed with Okin that uncritical reliance on a constellation of sharply drawn dichotomies ill serves feminist theory. Yet Okin's deconstruction of oppositions between reason and feeling, on one hand, and ethics of rights/ethics of care on the other, fails to answer Benhabib's critique that the Rawlsian subject loses all theoretical utility in its vacuous generality. That is, in becoming everybody, the contractors behind the veil become nobody; and morally relevant reciprocity cannot exist between ciphers.

Benhabib abandons Rawls' substitutionalist universalism, which erases all concrete differences between subjects. Her alternative is interactive universalism, and derives from Habermas' communicative ethics. This method defines argumentation as the paradigmatic social exercise of reason. Ideally, dialogue produces consensus, or agreement based solely on the force of the better argument.¹²⁹

Interactive universalism insists on the fullest possible knowledge of "moral agents about each other, their history, the particulars of their society, its structure and future."¹³⁰ The universalism in her method consists in the

128. Contrast Gardbaum, 90 Mich L Rev at 759-60 (cited in note 4).

129. Benhabib recognizes that the notion of consent is problematic. See, for example, Benhabib, *Afterword* at 345 (cited in note 21) ("Consent alone can never be a criterion of anything, neither of truth nor of moral validity We must interpret consent not as an end-goal but as a process for the cooperative generation of truth or validity."). Compare notes 161-65 and accompanying text.

130. Benhabib, *The Generalized and the Concrete Other* at 169 (cited in note 13).

demand that all parties have equal capacities for, and access to, the dialogic processes through which consensus is created.¹³¹

2. *Susan Moller Okin: Consider Each in Turn.* As noted above, Susan Moller Okin fails fully to deconstruct Benhabib's successful use of the generalized/concrete dichotomy in her critique of Rawls. Nevertheless, in creatively responding to the oppositions between reason and feeling, on one hand, and ethics of right versus ethics of care on the other, Okin creates her own neo-Rawlsian methodology, and provides an effective standpoint for feminist critique. Evidence of this is Okin's agreement with Benhabib that Rawls erases the domestic sphere from critical ethical analysis.¹³²

Okin's insistence that moral agents inform their decisionmaking by "think[ing] from the position of *everybody*, in the sense of *each in turn*"¹³³ is very much like Benhabib's interactive universalism.¹³⁴ Rather than abstracting "from all contingencies of human life," Okin's each-in-turn method is "much closer to an appreciation and concern for social and other human differences."¹³⁵ Her version of the original position requires an imaginative, empathetic appreciation of each person's distinctive "identities, aims, and attachments," so much so that we accord them value "equal . . . with our own."¹³⁶ Evidently it is through this neoRawlsian formulation of the Golden Rule that Okin retains universality within her theory.

3. *Katharine Bartlett's Positionality Method.* Katharine Bartlett's encyclopedic *Feminist Legal Methods*¹³⁷ describes seven feminist approaches to law. Feminists might "do" law by asking the woman question, by engaging in feminist practical reasoning, or by participating in consciousness-raising. Feminists might "know" in law by adopting one of four stances:

131. See Benhabib, *Critique, Norm, and Utopia* at ch 8 (cited in note 47). See also *id* at 285 (citations omitted):

The four conditions of the ideal speech situation are: first, each participant must have an equal chance to initiate and to continue communication; second, each must have an equal chance to make assertions, recommendations, and explanations, and to challenge justifications Third, all must have equal chances as actors to express their wishes, feelings, and intentions; and fourth, the speakers must act *as if* in contexts of action there is an equal distribution of chances "to order and resist orders, to promise and to refuse, to be accountable for one's conduct and to demand accountability from others." [The first two stipulations] refer[] to *speech acts* alone and to conditions governing their employment, [and the last two] require[] a suspension of situations of untruthfulness and duplicity on the one hand, and of inequality and subordination on the other.

132. But see note 26. Okin rightly points out that Rawls focuses on the family as the primary source of moral education, and notes the irony of his failure to ensure that this learning lab itself exemplifies justice. Okin, *Justice, Gender, and the Family* at 17-23 (cited in note 26).

133. Okin, 99 *Ethics* at 244 (cited in note 25).

134. Benhabib, *The Generalized and the Concrete Other* at 168-171 & n33 (cited in note 13).

135. Okin, 99 *Ethics* at 245 (cited in note 25).

136. *Id* at 246.

137. 103 *Harv L. Rev* at 829 (cited in note 70).

rationalism/empiricism, standpoint epistemology, postmodernism, or (Bartlett's synthesis of the three) positionality.¹³⁸

Of these seven approaches to law, both feminist practical reasoning and positionality bear strong similarities to Benhabib's interactive universalism and Okin's each-in-turn methodology. Feminist practical reasoning, for Bartlett, is a reformation of Aristotelian *phronesis*. It involves the integration of principled, deductive thinking with empathetic, imaginative attention to the historical, concrete complexity within which legal conflicts are inevitably imbedded.¹³⁹ By attending especially to "forms of injustice that otherwise go unnoticed and unaddressed," feminist practical reasoning demands "the examination of all perspectives, including those that a court might ultimately reject."¹⁴⁰ Because it is only within such a widening perspective that relevance is redefined, broadly contextual reasoning is a prerequisite for legal change.¹⁴¹

Positionality recognizes that truths are empirically grounded in the local, that is, in "particular involvements and relationships."¹⁴² This stance therefore accepts the partiality of knowledge, which leads in turn to two imperatives. First, positionality requires not merely tolerance or openness toward diversity, but an affirmative commitment to seeking out perspectives different from one's own.¹⁴³ Second, positionality entails an equally aggressive self-criticism, in order to avoid conflating one's own perspective with the distinct views of others.¹⁴⁴ Finally, Bartlett presents positionality as a form of partial, transitory objectivity. It is nonrelativist in its acceptance of the binding nature of socially created norms within the confines of the relevant metaethical community. But precisely because those values are contingently generated, they cannot be construed as either fixed or universal.¹⁴⁵

4. *Drucilla Cornell's Hegelian Dialogism.* Drucilla Cornell accepts much of the prevailing critique of the liberal subject, but finds that decentered, intersubjectively constituted personality "does not dissolve . . . totally in an

138. Id at 880-86. The similarity between Okin's methodology and Bartlett's is also noted in Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L Rev at 1415, 1464 n178 (1991); Linda Hirschman links Bartlett's method to Aristotelian *phronesis* in *The Book of "A,"* 70 Tex L Rev 971, 974-79 (1992). Benhabib's theory traces back to *phronesis* as well via Gadamer and Hegel. See Benhabib, *Critique, Norm, and Utopia* at 84 (cited in note 47); Benhabib, *Afterword* at 330-34 (cited in note 21).

139. Bartlett, 103 Harv L Rev at 849-63 (cited in note 70).

140. Id at 861, 863.

141. Id at 863 ("The shift from *Plessy v. Ferguson* to *Brown v. Board of Education*, for example, rested upon the expansion of the 'legally relevant' in race discrimination cases to include the actual experiences of black Americans and the inferiority implicit in segregation." (citations omitted)).

142. Id at 880.

143. Id at 881-83. This extends to appreciating "the position of men whose social conditioning leads them to interpret the actions of some women as 'inviting' rather than discouraging sexual encounter" when advocating redefinition of rape laws. Id at 882.

144. Id at 883.

145. Id at 885.

all-encompassing community.”¹⁴⁶ She strives to rebuild ethical theory upon the changed understanding of the subject and its relationship to its constitutive context. Dissatisfied with the neoAristotelian approaches in Alasdair MacIntyre’s *After Virtue* and Roberto Unger’s *Passion*, Cornell proposes that a Hegelian dialogic universalism best accommodates both meaningful autonomy and “the kind of community life necessary if value judgments are to carry normative weight.”¹⁴⁷

Cornell’s approach, like Benhabib’s, branches from Habermas’ communicative ethics.¹⁴⁸ Unlike Benhabib, however, Cornell relies directly and heavily on Habermas’ Hegelian roots. Thus, individual consciousness is “a delicate interactive achievement,” produced in the dialectic interaction between self and other. Again, identity is an intersubjective construct, the consequence of knowing “oneself as a self by being mirrored in the eyes of others.”¹⁴⁹ The tension built into this process of identity formation saves the subject from subsumption in community; “difference from the other is at the same time a relationship to the other.”¹⁵⁰

Hegelian subjectivity emerges within, and is therefore constituted by, a “linguistic life-world that embodies a set of traditions and a community.”¹⁵¹ Habermas helps Cornell to spell out in some detail the metaethical stance implicit in a dialogic community: “[U]niversality . . . mean[s] that each of us is to be recognized as a participant in the conversation; each voice is to count and no one is to be silenced in the name of a substantive universal that denounces what is different as not being really human.”¹⁵²

Through her reliance on the Hegelian dialectic, Cornell avoids Benhabib’s entanglement in dichotomies. She thus recasts as polarities the sharp oppositions first, between universality and particularity (Benhabib’s “generalized and concrete”), and, second, between sameness and difference. Universality is grounded in equal participation in the dialogic community; but that participation is exercised only in particular, concrete contexts. Dialogue also requires the simultaneous recognition of the other’s sameness (his or her instantiation of universal, equal participation in dialogue) and difference (since “[t]o assimilate the other is to end the conversation”).¹⁵³ As a regulative ideal, then, Cornell’s dialogism is both a means to identify common goods (“generalizable interests”) and a normative push toward realizing the conditions necessary for genuinely reciprocal participation.¹⁵⁴

5. *Connections and Conflicts.* Gardbaum’s categories are useful for organizing a comparison and contrast of the approaches described above. I examine

146. Cornell, 133 U Pa L Rev at 299 (cited in note 45).

147. Id at 358.

148. Id at 366-72.

149. Id at 361.

150. Id at 364 n361.

151. Id at 361.

152. Id at 368; compare notes 161-65 and accompanying text.

153. Cornell, 133 U Pa L Rev at 369 (cited in note 45).

154. Id at 370, 375.

first, the respective views on the nature of subjectivity; second, the metaethics or methodologies; and third, the substantive or first-order value claims. I concur with Gardbaum that the more compelling, and complete, arguments attend explicitly to all three elements.

Of the five models sketched above, Bartlett's and Okin's define least explicitly their working notions of subjectivity. For example, I interpret covenant as offering resources for a new take on intersubjectivity, by grounding it in deep commitment or promissory obligation that, as a relationship, becomes constitutive of identity. Freedom is located in the "elbow room" created by covenant, within which actions are contextualized as making, keeping, breaking, or reinterpreting covenant. This view of the subject entails both individuality-in-community and community-in-individuality.

The covenantal model is perhaps most similar to Cornell's dialogism, in that both reject reliance on sharp dichotomies and seek instead to deconstruct such oppositions. And, like the covenant approach, Cornell explicitly advocates an intersubjective anthropology. Both methods find the major challenge in reconstructing ethics to be the formulation of a compelling account of the relationship between individual and community, which neither sacrifices the benefits of liberalism's autonomy nor falls into its atomistic or objectivist fallacies.

Benhabib's acceptance of the Hegelian critique, as expanded by Habermas, also links her methodology closely with Cornell's. Significantly, for the covenant model, for Cornell, and for Benhabib, premises regarding the intersubjective construction of personality segue smoothly into metaethics. The commitment at the heart of covenantal relationship is the locus of ceaseless, and by definition, ethical, activity: covenant is constantly affirmed, broken, redefined. The covenant emphasis on narrative, like Cornell's dialogism and Benhabib's interactive universalism, posits the simultaneity of subjective and normative construction. That is, both individual agents and the value-systems within which they emerge are communicative products. We are constituted by our dialogic communities, yet able to change those communities, and ourselves, through communicative action. Finally, these stances resonate with the primary values of equality and the common good inherent in the covenant tradition.¹⁵⁵

Okin's each-in-turn method and Bartlett's positionality approach are more ambiguous regarding their working interpretations of subjectivity. Of the five models presented here, Okin's appears most deeply rooted in liberal feminism. She is least attentive to postmodernism's radical critiques of the liberal subject. Her reformation of Rawls' original position, for example, consists primarily in reinserting the affect that Rawls deliberately abstracts away. On the other hand, Okin fully recognizes that emotions and values are socially mediated. She zeroes in on the nuclear family as the locus of that

155. Compare notes 161-65 and accompanying text with text accompanying note 152.

mediation, however, and spends most of her critical energy expanding Rawls' theory of justice to encompass gender relations.

Bartlett's view of subjectivity, although better articulated than Okin's, remains ambiguous. Bartlett shares with Okin and the others an explicit recognition that knowledge is socially mediated. She notes that "individual and community [are] . . . necessarily interdependent."¹⁵⁶ Yet her focus throughout the discussion of positionality remains quite closely on singular epistemological processes. Each individual is irrevocably trapped within his or her drastically particular perspective.¹⁵⁷ Transcendence is impossible, but through "self-discipline," one may attain a broader view.¹⁵⁸ The foremost end in sight appears to be "self-knowledge," since "the source of community is its diversity."¹⁵⁹ To the extent that Bartlett retains any notion of universality, then, it seems synonymous with Iris Young's "inexhaustible heterogeneity."¹⁶⁰

Bartlett's failure to explicate a working interpretation of subjectivity leaves us to wrestle with an implied view of the subject as primarily a (Cartesian?) individuated knower. Thus, it is unclear whether the subject is frozen or freed by positionality. This result is problematic, particularly given the epistemology and substantive value claims that Bartlett advocates. For, like the other methodologies, Bartlett rejects the veil of ignorance, supposing that greater knowledge, not lesser, yields the more liberating result. With Benhabib and Cornell, Bartlett explicitly assumes that truths are partial and changeable due to the finite nature of concrete existence. Thus, each places optimal value on broad, authentic intersubjective communication.

Practically, then, each of these feminist approaches assumes some significant level of communicative skill, and a willingness not only to speak but also to hear diverse points of view. Each also requires the capacity for empathy. This presumes the abilities first, to abstract from the concrete particularities of one's own subject-position and second, to reimmerse in the concrete by experiencing another's subject-position to some meaningful extent. This is the gift of "mak[ing] others Condiciones our owne."

With a further expansion of her epistemology, preferably through a clearer articulation of her views on subjectivity, Bartlett could begin to help answer the difficult questions that remain for each of these feminist approaches regarding the generation of moral feeling. How do we identify the broadest range of positions different from our own? Under what conditions are those differences communicable? How does such communication affect speakers and listeners?

156. Bartlett, 103 Harvard L Rev at 886 (cited in note 70).

157. Id at 882.

158. Id at 881.

159. Id at 886, citing Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 Harv L Rev 4, 32 (1986). This thesis implies that we must be committed to coalition politics.

160. Young, *Politics of Difference* at 301 (cited in note 19).

On the other hand, Bartlett's method provides a crucial contribution to feminist analysis. This contribution lies in her insistence that a commitment to ongoing self-criticism is imperative to balance, at least partially, the human tendency to conflate one's own highly particular truths into universals.¹⁶¹ Related to this is Bartlett's rejection of consensus as positionality's goal, which distinguishes her from Benhabib's strongly Habermasian approach.¹⁶² The concern, to which Bartlett and Iris Young devote special attention, is the tendency of enforced unity to suppress diversity.

Both Benhabib and Cornell recognize the criticism as apt. Benhabib responds in part by shifting the context of communicative ethics from juridical-procedural to democratic-participatory, in order to emphasize the plurality of competing voices joining in the communicative process.¹⁶³ Cornell responds by contextualizing Habermas' theory as a critique of decisionism, in order to emphasize the real possibility of shared interests.¹⁶⁴ From a covenant perspective, similarities have already been noted between positionality's methodological commitments to self-criticism and to seeking out diverse perspectives, and Biblical emphases on humility, and on a radical depth and breadth of compassion that includes even the oppressor.¹⁶⁵ Arguably, however, none of these responses can fully allay Bartlett's concern. To the contrary, these approaches should incorporate positionality's dual demands for self-criticism and deliberate attention to diversity.

Thus reformulated, each method can provide for more effective integration of the general and concrete, of universality and difference, of community and individuality. In this sense, each approach resonates with the process of legal reasoning, with its commitment to the construction of general rules and the careful application of those rules to particular factual settings. Yet these methodologies do not share law's loyalty to precedent. To the contrary, feminist critiques demand the identification and dismantling of gendered hierarchies.

When feminists heed the call, articulated both by Bartlett and by covenant traditions, to celebrate and nurture universal human dignity, our task expands to encompass the identification and revolution of all forms of exclusion and domination. These commitments inevitably collide with liberalism's privatization of value. Such collisions are also opportunities for ethical

161. There is a powerful resonance between her thesis and Gutierrez' assertion that liberation theology must view the Kingdom of God as an "ever-receding horizon," to check the human tendency to equate the *status quo*—whether revolutionary or reactionary—with true justice. Gutierrez, *A Theology of Liberation* at 174, 238 (cited in note 95). Although Bartlett refers to God's unique capacity for self-criticism, she does not conclude that the human capacity for self-criticism may depend as much on grace as on works. See Bartlett, 103 Harv L Rev 883 & n244 (cited in note 70).

162. Contrast Benhabib, *The Generalized and the Concrete Other* at 169 (cited in note 13), with Bartlett, 103 Harv L Rev at 883 (cited in note 70) ("Positionality is not a strategy of process and compromise that seeks to reconcile all competing interests."); but see note 129.

163. Benhabib, *Critique, Norm, and Utopia* at 285-88, 309-316, 405-06 n77 (cited in note 47); see also Benhabib, *Afterword* at 345 (cited in note 21).

164. Cornell, 133 U Pa L Rev at 369-70 (cited in note 45).

165. See notes 143, 161 and accompanying text.

reconstruction and are, therefore, like Pastan's egg, ambiguous. In its lovely solitude, the egg reflects a light bathing it from without. Yet it also promises new life. Broken, it looks like the sun. We determine whether each "delicate crack of lightning" signifies our devouring or our nourishing one another.

CONCLUSION

Inspired by feminist critiques of Rawls' social contract theory, this essay sought to derive from the covenant paradigm a means to overcome the opposition between individualists and relationists over the meaning of subjectivity. I have begun to trace some implications of covenant-informed views of subjectivity for metaethics/methodology and for substantive, first-order value claims. Obviously, one cannot fabricate a total theory of covenant alone. Nor, given its ambiguity, can it be stitched piecemeal into existing theories. Nevertheless, the paradigm retains distinctive emancipatory potential. In complement with feminist critiques, and colored by insights from communicative or dialogic ethics, covenant may yet contribute usefully to theories of justice, particularly by regenerating our commitments to celebrate and nurture universal human dignity.