Self-determination, Non-domination, and Federalism

JACOB T. LEVY

This article summarizes the theory of federalism as non-domination Iris Marion Young began to develop in her final years, a theory of self-government that tried to recognize interconnectedness. Levy also poses an objection to that theory: non-domination cannot do the work Young needed of it, because it is a theory about the merits of decisions not about jurisdiction over them. The article concludes with an attempt to give Young the last word.

Beginning with Inclusion and Democracy,¹ and running through several articles including the last article she published before her death,² Iris Marion Young turned a part of her scholarly attention to the topic of federalism, one much neglected in normative political theory. She was particularly interested in federalism as it applied to multiethnic states, including settler states with indigenous minorities, and as potentially applicable to ethnonational conflicts across state boundaries, as in Israel and Palestine. She was concerned to build a theory of federalism around, as Philip Pettit (1997) has it, non-domination rather than non-interference. Drawing on her understandings of injustice and social connectedness, she argued that respect for each community’s ability to govern itself would require more active redressing of power imbalances than mere mutual non-interference could allow.

In this article, I attempt to synthesize, as Young did not have the chance to do, the theory of federalism she had been developing in disparate writings over the past several years, and suggest what was original and interesting about that theory. I also pose an objection to that theory—that non-domination is an idea in the wrong register to fit fully a theory of federalism’s foundations, because it defers decisions about jurisdiction until after deciding the merits of particular
disputes. By contrast, non-interference, even if it is inferior to non-domination as a general account of freedom, is superior as a jurisdictional decision rule. I conclude with an attempt to give Young the last word, to develop a response to the objection in the spirit of the theory as she had developed it.

**Young’s Theory of Self-determination**

Young’s turn to federalism was a natural growth from some of her earlier innovations. In particular, as among the major “first wave” theories of multiculturalism, Young’s concept of “differentiated citizenship” makes for a better fit with federalist institutions of governance than do, for instance, Will Kymlicka’s culturalism (1989) or Chandran Kukathas’s associationalism (2003). Federalism crucially is a form of differentiated citizenship, and the theories of uniformity Young critiqued were necessarily (if often implicitly) hostile to rules that ensure citizens have different rights and duties depending on their residence on either side of a provincial boundary. Other multiculturalist theorists were sometimes sympathetic to forms of self-determination or self-government for cultural minorities, but they perhaps faced a greater gap between their premises and that conclusion than Young did.

In *Justice and the Politics of Difference*, Young began her analysis of the rights of indigenous peoples, which was to be a central case for her later work on self-determination. She defended American Indian tribal self-government and advocated that it be further strengthened; “Justice in the form of unambiguous recognition of American Indian groups as full and equal members of American society requires, in my view, that the U.S. government relinquish the absolute power to alter or eliminate Indian rights. Even in the absence of full justice the case of Indians provides an important example of the combination of general and particular rights which, I have argued, is necessary for the equality of many oppressed or disadvantaged groups” (1989, 183). But she did not devote any particular analysis to the distinctiveness of self-government as a kind of differentiated right. The discussion of tribal rights is subsumed in a chapter that takes as its standard institutional recommendation some form of guaranteed representation for oppressed social groups, whether in formal government bodies such as legislatures, in left-leaning activist groups such as antinuclear associations, or in larger political groups such as the Democratic Party, with veto authority vesting in oppressed groups (or their representatives) on policies that particularly affected them. Indeed, she used Indian authority over land-use policy on reservations as the other example of a “group veto power regarding specific policies that affect a group directly, such as reproductive rights policy for women” (184). The text is ambiguous whether she meant that each tribe would exercise self-government over its own land use policy or that Indians as a national collective, like women as a national collective, would exercise
a unitary veto over policy. The standard model under consideration is one of a heterogeneous but still unified public that must make shared decisions and act through shared institutions, with the institutions reshaped to give greater voice to oppressed groups within that public.

In Inclusion and Democracy, Young came to characterize group representation that took the form of reserved seats in a legislature as a “last resort” (2000a, 150), preferring other means of encouraging the representation of oppressed groups in legislatures and government agencies. Without the mechanism of reserved seats it is not quite clear whether veto power for such groups remains a viable option; who could exercise it? In her reconsideration of representation, Young explicitly “bracketed . . . the specification that disadvantaged groups should have veto power over decisions about issues that most affect them” (144n27), not deciding whether that specification was affected by the revision in her other institutional views. To the best of my knowledge, she did not return to that question in later writings.

With group representation “deferred,” she devoted a new level of attention to self-government, self-determination, and federalism, institutions that differ in an important way from guaranteed representation or group vetoes. They rest on the thought that at least some political decisions don’t have to be shared or unitary at all. Parceling out jurisdiction to subunits (whether geographically defined or not, culturally differentiated or not) logically subsumes the idea of a group veto: within the subunit’s jurisdiction, no policy may be made of which the subunit disapproves. But it goes well beyond a veto, allowing the group to set, not just prevent, policy unilaterally. And it does so in a way that may sometimes defuse opposition from the rest of the relevant public—since the subunit only has authority to set policy over itself, the rest of the public has the authority to set a different policy.

Accordingly and appropriately, Young came to treat questions of self-determination and federalism as presenting distinct theoretical questions from those of representation. Her earlier critique of undifferentiated citizenship provided a foundation for thinking self-government rights at least permissible. Self-government, like group representation, is ruled out entirely by any model of undifferentiated citizenship that places great importance on the formal and legal identity of each member’s membership. So Young had an available point of departure for thinking that some groups might have the right to govern themselves. But as we shall see, she did not consider her arguments about differentiated citizenship sufficient to justify group self-government, and was indeed fairly cautious about self-determination.

The core of her initial position is laid out in the following passage.

I propose that a principle of self-determination for peoples should be interpreted along the lines of relational autonomy or
non-domination, rather than simply as independence or non-interference. . . . Because a people stands in interdependent relations with others, however, a people cannot ignore the claims and interests of those others when the former’s actions potentially affect the latter. In so far as outsiders are affected by the activities of self-determining people, those others have a legitimate claim to have their interests and needs taken into account even though they are outside the government jurisdiction. Conversely, outsiders should recognize that when they themselves affect a people, the latter can legitimately claim that they should have their interests taken into account in so far as they may be adversely affected. In so far as their activities affect one another, peoples are in relationship and ought to negotiate the terms and effects of the relationship.1 (2000a, 259)

She built on these thoughts and developed an account of self-determination as non-domination. Unlike its contrast concept, self-determination as non-interference, self-determination as non-domination could allow affected outsiders to have a voice in the decisions of a self-governing group; outsiders to override those decisions to protect potentially oppressed group members such as women in patriarchal cultures; and intergroup or interjurisdiction demands for resources.

The prima facie principle of non-interference in the internal jurisdiction of a self-determining unit may be suspended, then, in order that the common decisions of units be enacted to prevent domination of one of the units by another. Non-interference is also suspended, moreover, in order to prevent some members of a self-determining unit from dominating members internally. The autonomous units that potentially can harm one another by engaging in their own self-regarding activities should participate in a process that decides when such intervention to prevent domination is called for. Promoting self-determination as non-domination, finally, requires providing positive support for units that are weak or poorly resourced, to a level that enables them meaningfully to pursue their way of life, autonomy, and ability to interact with and negotiate with other self-determining units. (2006, 66)

Young’s paradigmatic case was self-government among indigenous peoples, especially (though not only) American Indians.4 She held that “if we conceptualize a concept of self-determination which responds to the situation and claim of indigenous people, such a concept might serve as a better general
paradigm of self-determination” (2006, 63). She was centrally concerned to establish, first, that Indian tribes could be meaningfully “sovereign” without the implication that they would, could, or should establish independent Westphalian states; and second, that recognizing them as sovereign in this manner would not mean the end of obligations to them from the surrounding settler state (for example, the United States). She also aimed to show that recognizing sovereignty in indigenous peoples would not require the balkanization of the world into ever smaller, more homogenous, or more threatening to local minorities mini-states.

She explicitly ties the development of this model of self-determination to earlier treatments of both global justice and the just governance of metropolitan urban areas. The latter aims to show that administrative separation can be a tool of domination and perpetuation of privilege, as when wealthy suburbanites in what is really a shared metropolitan economy administratively segment off their tax base as if the suburb were an independent social world.

Small political jurisdictions, however, in today’s world often function to separate people administratively whose actions nevertheless profoundly affect one another, and who dwell in environments and structural processes that institutionally and causally relate them. . . . The scope of a polity . . . ought to coincide with the scope of the obligations of justice which people have in relation to one another because their lives are intertwined in social, economic, and communicative relations that tie their fates. (2000a, 228–29)

I think the model of American urban politics and attempts by wealthy suburbanites to draw boundaries in ways meant to immunize them from responsibility for the metropolitan areas from which they benefit was never far from Young’s mind in her work on self-determination. She discussed it even in the context of a possible federal order in Israel and Palestine (2006, 69). If the rights of indigenous peoples served her as a paradigmatic case of a justified group claim to be able to order its own affairs, American metropolitan government served her as a paradigmatic case of boundaries and non-interference rights being invoked in violation of a real interconnectedness that demands shared decision making.

The existing state structure and its model of sovereignty was a key intellectual problem, both because it created barriers to global justice and because it prevented appropriate self-determination of peoples within states; Young saw nothing to be gained by just replicating the state system at smaller and more ethnically homogenous levels. Rather, she aimed to pluralize states domestically, and to soften the hard boundaries among them internationally. Ultimately her vision of appropriate shared governance, subsidiarity, and self-
government without sovereignty was meant to extend from the local to the
global level (2006, 33–34, 76). She held out the hope that self-determination
for those peoples who had a just claim to it would find a more secure as well
as a better-justified home in such a system than in one centered on traditional
sovereignty.

These are difficult balls to keep in the air at the same time. The arguments
against suburban self-determination, in a causally interrelated urban social
world, and the arguments for global redistribution and against the traditional
conception of sovereignty at the level of states in an interconnected global
economy, are in real tension with the traditional demands for self-government
for indigenous peoples or other minorities. Young consistently takes the side
of inclusion, negotiation, and interconnectedness against the side of autarkic
sovereignty or non-interference. When our social, political, and economic
actions affect one another—and they always do, even when formal borders
lie between us—she holds that we ought to have shared decision-making
authority over them.

Young discussed two cases in a sufficiently sustained way to help us see
how she thought self-determination as non-domination might play out in the
world. First was the conflict between the Skull Valley Band of Goshutes and
the state of Utah over whether the former may decide to lease out part of their
reservation (which is surrounded by Utah) as a repository for nuclear waste.5
Young observes that the Goshutes have a legal right to make such a decision
without consulting the state of Utah, but suggests that the legal right is more
than can be morally justified because the decision implicates the health and
safety of the non-Goshute citizens of Utah. The reality of interconnectedness
means that outsiders must be heard and negotiated with; the legitimate right
of self-determination in the Goshute means that the decision may not simply
be taken out of their hands and placed into those of Utah’s government. Young
takes this as an important illustration of the idea that self-determination as
non-interference would leave tribes with too much authority and not enough
solicitude for the interests of affected outsiders. The legitimate demand of the
Goshute to be able to self-determine in matters of culture, land use, and so on
does not extend to actions that might affect the health and safety of outsiders.
“ Outsiders” are “affected” and therefore “have a legitimate claim to have their
interests and needs taken into account” (2000a, 259).

The other case is, as she refers to it, “Palestine/Israel.” Here she offers self-
determination as non-domination as a rival to two received ways of thinking
about resolution of the conflict. One is a unified, binational, officially secular
state, which she says would fail to give due acknowledgement to either people’s
legitimate aspirations for self-determination, and would introduce short-term
vulnerability among Palestinians and long-term vulnerability among Jews to
unjust domination. The other is self-determination as non-interference—a
conventional two-state solution. The latter is the more interesting contrast for purposes of understanding her theory.

Young maintains that a two-state solution is inappropriate for the region, both because of the interpenetration and intermixture of the Jewish and Arab populations, and because of the power imbalance between them. At the time Young wrote—in the wake of the breakdown of the Oslo-Madrid peace process, the failure of the so-called “road map” to restart that process, and the second intifada—Israel was planning (but had not yet carried out) its unilateral withdrawal from the Gaza Strip. Many Israelis were looking toward that policy as a possible precedent for a similar withdrawal from unilaterally determined portions of the West Bank, bounded by a security fence that Israel had built. The future seemed likely to hold an especially stark case of self-determination as non-interference, with an especially stark absence of negotiation or engagement: a two-state solution in which Israel simply ceased to occupy most of the occupied territories and washed its hands of their fate, while setting its own rules and terms for the disengagement.

Young, unsurprisingly, held that the Palestinian right to self-determination would be violated by such a turn of events. She argued instead for a federated arrangement in which Israel and Palestine, fragmented into many polities, existed in a federative arrangement combining cultural self-government and political autonomy with negotiation and shared responsibility over resources. She hoped that horizontal ties among the federated units could allow for effective cooperation even on issues where politics at the center might reach an impasse. On her account, Israel owes Palestinians self-determination, but not the kind of self-determination that it would grant unilaterally by building a fence, making its own decisions about the Jordan River watershed, and shutting off Palestinian access to the Israeli labor market. True self-determination, she suggests, is not mere separation; a refusal to acknowledge coexistence and negotiate together could lead to a very dominating kind of non-interference. Finally, Young notes that her model of self-determination is ultimately incompatible with a Westphalian world. Even an Israel/Palestine governed in a non-dominating federative way would be situated in a Middle East, and ultimately a global order, that ought to be reconfigured in similar ways.

In Defense of Non-interference

American Indian tribal governments, like the United States government and the governments of the several states, may not be sued at law without their consent, under the doctrine of sovereign immunity. Young identifies a threat to tribal sovereign immunity as an effort to “cripple Indian sovereignty,” one that “shows how thin the line may be between self-government and subjection” (2006, 44). But this is surprising on its face, in light of her theoretical
commitments. Sovereign immunity—the right of those polities deemed sovereign not to be sued for damages without their consent—is, par excellence, a non-interference right, a denial of relational autonomy. It asserts a right of the polity to harm others without legal consequence, to commit delicts without penalty. Now, this is problematic even on a conventional account of non-interference, because the wrongs that the polity may commit are interferences with other agents, whether insiders or outsiders.

But it is vastly more problematic for any account of relational autonomy, or any theory that emphasizes the duty to negotiate over areas of mutual concern. The polity with sovereign immunity may simply refuse; across a certain range of action, it has an absolute right of non-interference. Young is entirely right to think that sovereign immunity is a necessary shield for tribes in the current American legal system, but this shows that sometimes a self-determining agent needs the right to say “no,” even unreasonably, even in the face of genuine entanglements with others. Similarly, Young objects to the Indian Gaming Reform Act’s requirement that tribes negotiate with states about on-reservation gambling, though again it is immediately puzzling. In these cases her (in my view, sound) instincts about what counts as fairness for Indian tribes seems to trump her official commitment to replacing non-interference with non-domination. Her judgment that making Indian tribes negotiate in each case over what rights they have would be a sure way to leave them with none outweighs her principled commitment to negotiation—even when, as in the case of sovereign immunity, the tribes’ non-interference rights will only be exercised when some other actors can plausibly claim that the tribes’ actions have harmed them. I mean to endorse Young’s instincts about the case, against her stated theory.

I think that Young is quite right to critique the equation of the right of self-determination with the status of international sovereignty. In the first place, it is very possible for a polity to “self-determine” to remain in a larger polity rather than seceding, as Puerto Rico and Quebec have done on numerous occasions. Second, as she notes, self-determination as (only) sovereignty rests on a kind of illusion—a Westphalian fantasy of autarky. No state has ever been so self-determining as to be immune to economic facts that are partly determined in other parts of the world; this is not novel to the era of globalization. Neither can any state in the state system bootstrap its way out of the fact that it is a system. Taiwan cannot self-determine its way into being a fully sovereign state because it is not recognized as such by sovereign states, which in turn are recognized by other such states. Self-determination cannot mean complete immunity from any influence beyond one’s borders; or if it does, then there are no self-determining polities.

Yet self-determination as non-interference does not require either that sociologically false autarky, or Westphalian international sovereignty. Even in the international sphere, it would be very strange if sovereignty as non-interference
had ever rested on a dream of autarky; Westphalian sovereignty arose as an international legal norm in a Europe characterized by very deep commercial, financial, intellectual, and cultural interpenetration. More important, non-interference, whether in today’s international sphere or domestically within a federation, is always a constrained and limited rule. An actor has rights of non-interference within certain domains or subject to certain constraints. Consider the status of states in the American federation today. Non-interference is the right way to describe their authority when they are acting within their legally defined areas of exclusive authority. Neither the federal government nor other states may interfere in their legislative choices. When a state legalizes or prohibits gambling, raises or lowers its legal ages for drinking or marriage or sexual consent, or alters its domestic land-use laws or electoral rules, it simply acts. Other states have no say, even if there are spillover effects: different drinking ages between neighboring states affects drunk-driving patterns at the border between them; one state’s liberal fireworks or firearms laws can completely undermine a neighboring state’s attempt to regulate those objects; a casino placed near the state border could drain away the neighboring state’s lottery revenue. In none of these cases does the spillover effect give the neighboring state a right to interfere. In most of these cases, the federal government has no say either. That does not make the states internationally sovereign bodies; their right of non-interference in the exercise of their authority is constrained by the scope of that authority, notably excluding foreign or military policy. And the federal government has considerable (not limitless) power to define and redefine the scope of state authority. Yet non-interference remains the way to understand the decisions made within that scope; the lack of Westphalian independence and the social reality of interconnectedness coexist with non-interference as a decision rule.

In other words, all the power of Young’s critiques of autarky, Westphalianism, and the neglect of outsiders (for example 2006, 26–32, 63–66) fails to impugn self-determination as non-interference as such, or as an aspiration for indigenous peoples in particular. Indigenous peoples, for example, could have authority like that of U.S. states—they could act without interference within a defined sphere, without becoming internationally sovereign. The model of self-determination as non-interference is not all or nothing. Young briefly (2006, 33) mentioned that, in her view, the critique of non-interference at the international level also fully applied to non-interference claims made by lower levels of government. Yet she went on to treat the sheer implausibility of international statehood for indigenous peoples as an objection to non-interference as a way of understanding their claims (2006, 58–63), a serious non sequitur.

A trilogy of Supreme Court cases, culminating in John Marshall’s 1832 opinion in Worcester v. Georgia, defined American Indian tribes as “domestic dependent nations.” They had become domestic and dependent by some
combination of voluntary treaty, conquest, and sheer sociological fact that the courts of the settler society could not call into question without questioning their own foundations; they no longer had international personality and could not conduct independent foreign policies. But within its remaining sphere, “The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves.”

Marshall’s jurisprudence leaves us with an understanding of tribes as self-determining because they had an original right of non-interference, a right that has been suppressed in part. The juridical suppression is not a matter of moral right but of political fact, and may not be contested in the courts of the conquering state. This seems to me about right even today. Indian tribes will not be independent Westphalian states, but that is a brute political fact. Young seeks to reshape the concept of self-determination to accommodate it—to be able to say that indigenous peoples can be self-determining even though they cannot and will not become independent states, which is a morally undesirable category anyway. I think we are better served to characterize the tribes as having rights of non-interference that are permanently suppressed at their outer edge than to reshape the normative concept of self-determination to fit the status quo.

But even without that rejoinder, I do not think the Westphalian objection to non-interference is quite right. The objection, however, does force us to distinguish between the scope and the degree of self-determination. A people (or any body) may have a very limited scope within which to make decisions, but unbounded discretion over those decisions within that scope. Alternatively, it may have a limited, partial voice over all decisions but determinate authority over none. Young objects to multiplying the number of bodies in the world that have unlimited scope of sovereignty—sovereignty that extends all the way to the right to questions of war and peace. She also objects to decision-making authority being exercised in an excessively unilateral and discretionary way; this is the objection to which I have responded above in considering the Goshute case. These two objections are distinct. One can accept unbounded discretionary authority over a given range of decisions without accepting that the authority extends to all decisions, such as the decision to secede or to go to war. The softness or rigidity of boundaries around decision-making authority is a separate question from how much decision-making territory the boundaries include. Like American states, Indian tribes might be sovereign (that is, self-determining as non-interference) within bounds that fall short of independence and foreign policy. Keeping the sovereignty within those bounds does not require that tribes (or states) be deprived of the ability to make their own decisions within them—even when those decisions affect outsiders.
While self-determination as non-interference does not correctly map the social world onto the jurisdictional world—it treats as internal or self-regarding actions that are not—it has real advantages nevertheless.\(^9\)  

In general, institutionalized decision rules cannot function if, in order to know who has the authority to decide a particular question, the merits of the question must first be decided (Raz 1979, 1980; Waldron 1999). The prior determination of the merits of the question must vest in some agent, and we need rules to determine that agent. No procedure can rely, all the way down, on settling the question of who is right in order to decide the question of who may decide who is right. But this is what self-determination as non-domination calls for. In place of the rigid jurisdictional rules allocating decision-making authority in self-determination as non-interference, it offers direct determination of the merits. It asks some (crucially) unspecified actor to decide whether a polity’s decision creates domination over others (or implicates them in our network of interrelations), in order to decide whether the decision may be left to the polity or must be negotiated in shared institutional settings with those others. In other words, that outside actor must pass judgment on all proposed actions taken by the self-determining polity, in order to decide whether the polity may act unilaterally.

Notice that this implies Young was on a sounder footing with her (partially renounced) support for group representation than with her (neither renounced nor retained) proposal for group vetoes. The group veto, as she described it, requires a determination that some particular proposal is properly within the domain of one oppressed group’s decision-making authority. It requires that someone be able to decide, authoritatively, that abortion is relevantly a women’s issue. But this just is to decide the merits; if abortion is in that sense a women’s issue—and not, for example, a women’s-and-fetuses’ issue—then of course it must be legal. Or consider a proposal to regulate how a minority religion may treat women members. Deciding which oppressed group, the religion or women, has the right to wield a veto requires deciding the moral substance of the question. What agency will do that? May that determination itself be subject to group vetoes? If so, how does one know which groups, at that level? Group representation presents no such paradoxes. It is mechanical, not substantive, in its setup, and relies on the altered makeup of decision makers to have a subsequent effect on substantive outcomes.

Non-domination might be the right moral description of freedom as a value. That does not make it a useful jurisdictional rule.\(^10\) Rules about jurisdiction and self-government concern who gets to decide the merits of a question. Non-domination as a jurisdictional rule requires getting things backward: deciding the merits prior to deciding the authority. (See Young’s description of her imagined procedure at 2006, 34, and notice that, despite her stated opposition to a world state, there is no real check offered on every jurisdictional dispute being appealed all the way up to the global level of governance.)
This in practice means that authority is lodged in whatever body will be called upon to resolve the question of whether insiders are threatening to dominate outsiders, vice versa, or neither. The apparent authority just to decide whether outsiders get a voice in the decision becomes the authority to make the decision. Moreover, this does not in practice mean that domination will be eliminated; some level of government will have the authority simply to decide, or to decide that it has the authority to decide. “We are not final because we are infallible, but we are infallible only because we are final,” Justice Robert Jackson noted of the authority wielded by the U.S. Supreme Court in *Brown v. Allen* (1953, 540). If every political system has such moments, federalism as non-interference swallows the implication that sometimes it should be fallible lower levels of government that are final.

Self-determination as non-interference leaves us with two stages: the stage at which the self-determining insiders make their decision, and the stage at which they negotiate with outsiders who wish to alter the decision (discussed below). Self-determination as non-domination also seems to leave us with two stages: the decision by some third party over whose interests are sufficiently at stake to give them a say in the decision, and then the deliberations by whatever set of actors that third party puts around the table. But in reality the two collapse into each other in ways that not only slow and complicate decision making but also privilege those best able to influence the third party—likely to be those who were already the politically most powerful and best organized.

The jurisdictional muddle will be multiplied by Young’s hope to pluralize the levels of self-government. “The scope of a polity . . . ought to coincide with the scope of the obligations of justice which people have in relation to one another because their lives are intertwined in social, economic, and communicative relations that tie their fates” (2000a, 228–29). An isomorphism between moral and jurisdictional decisions is an explicit aim of the system. This is quite different from federalism as it is practiced in the world, in which authority is almost always divided between two levels of government, a center and a permanent group of provinces or states. Moral deliberation about “the scope of the obligations of justice” takes place within a stably existing jurisdiction. Taking Young’s dictum seriously would require the proliferation of levels of government (an implication she embraces), and decisions (by whom?) about “the scope of obligations of justice” in order to know which polity, which level of government, was the right one in which to conduct those deliberations.

The people of Utah whose health may be implicated by the decision of the Goshute Indians to provide a site for radioactive waste could equally have their health affected if a neighboring state placed such a site close to the border; and such legal complications as arise around the Goshutes’ decision would not arise at all for the neighboring state. In short, states have broad rights of non-
interference from other states, and some rights of non-interference as against
the federal government.

Now, a right of non-interference does not mean that there will be no interac-
tion. Freedom as non-interference is not the autarkic or atomistic theory it is
sometimes caricatured as. Rather, non-interference means that negotiation
follows, rather than precedes, the initial allocation of rights. The sovereign
state that can unilaterally say “no” may be persuaded, induced, or negotiat-
ed with to say “yes” instead. If the legal rights of the Goshute tribe were clearer
and residents of Utah had no reason to think they could force the tribe to reject
the radioactive waste, this would not leave Utah without a voice. It would
rather mean that Utah would have to find ways to persuade the tribe to forego
an action that it had a right to perform. The obvious kind of persuasion would
be money or services provided in kind, though the negotiation need not in
principle be limited to bargaining.

Young contrasts non-interference with situations in which the interests
of outsiders are taken into account. But this is a mistake. Noninterference
as a jurisdictional rule does not mean that no negotiations will take place or
that the interests of affected outsiders will be ignored. It only sets the terms
on which the negotiation will take place, and places the burden on affected
outsiders to persuade or induce the rights holders not to exercise their rights
in a particular way.

In this case, there was no obstacle to the negotiations, save that the Gos-
hutes’ unclear legal position meant that Utah thought it could get the benefit
of having no waste site for free. A more robust non-interference kind of self-
determination, one akin to the right of a neighboring state to store waste near
a border, might have meant that the dispute was settled years earlier, with the
interests of the people of Utah taken into account by the Utah government’s
payments to the Goshute to forego the waste.

Interstate non-interference means that such disputes must move directly
into negotiations, with the outside state trying to persuade or induce the
decision-making state to decide one way rather than another. Years are not
spent in litigation when the legal allocation of rights is clear. The lack of
negotiation in this case, the failure of the Goshute to incorporate the inter-
est of Utah citizens into their decision making, was not a result of an excess
of non-interference. Rather, it was a result of the fact that the Goshute’s
non-interference rights were not clearly identified—so that Utah thought it
could override them entirely, and the Goshute had to focus their efforts on
preventing this.

A conception of self-determination such as Young’s that lacks such legal
rigidity and clarity, one that emphasizes negotiation over the question “who
holds the rights?” rather than negotiation over how rights holders shall exer-
cise their rights, unavoidably tends to multiply initial power imbalances. The
obligation, say, to pay the Goshute to refrain from a particular exercise of their rights at least puts some test of sincerity on the desire of the people and government of Utah to control what happens on the reservation. It also places some upper limit on the frequency with which they will do so. But if every use of reservation land that might have some effect on non-tribe members—which is to say almost every use of reservation land, given that reservations are often small and close to non-Indian populations, and given the expansive understanding of interconnectedness suggested in Young’s discussion of relational autonomy—is subject to negotiation over who gets to decide, then the more-populous and more-powerful surrounding states could negotiate tribal governments to death. The only reason the Indian Gaming Reform Act’s unwieldy imposition of a duty to negotiate with the states hasn’t killed the tribal gambling industry altogether is because a non-interference right has been judicially imposed as a baseline: any category of gambling that is permitted anywhere in the state may not be prohibited on reservations.

Here Young could object: this seems to envision a system in which the presumption is that the Goshute (or any self-determining insiders) may make bad or selfish decisions unilaterally, and Utah (or any affected outsiders) must persuade or pay to get them to refrain. To which my answer is: yes, it does. But by the time a conflict arises between insiders and outsiders, the negotiation over who has the right to decide is likely to be insincere shadowboxing at best. With an important dispute over substance on the table, each side will make grandiose claims about how important the issue is to them and how relatively unimportant it really is to the other, or how dominated they are and how powerful the other party is. Some other body (say, U.S. federal courts) will have to decide the jurisdictional issue by, in effect, deciding the substantive issue. If the effect on outsiders is deemed too large, then outsiders will be given a voice or a veto; if the effect on outsiders is deemed minimal enough, then they will not. Or, if the emphasis is in the other direction: if preserving decision-making autonomy over this question is deemed central to keeping the self-determining people free of domination by outsiders, then the decision will be left to them; if not, not. Either way, the negotiation over jurisdictional authority on a case-by-case basis requires someone, typically not the ostensibly self-determining people, to decide the merits of a question before pretending to decide whether the self-determining people gets to decide it.

Nothing in the above tells us how to allocate the rights—whether it should be that the Goshute have the right to store waste, and Utah has to pay them not to, or that Utah has the right to prevent waste storage, and the Goshute have to pay it not to do so. That is a decision to be made on a number of grounds including distributive ones. But it tells us that outsiders can have their interests taken into account and negotiations can take place, after the rights have been allocated in the preferred way. Noninterference is not autarky.
These concerns with self-determination as non-domination apply multiple times over to the final case with which Young concerned herself: Israel and Palestine. Again, the moral force of Young’s argument is clear. Israel and the territory of any future Palestinian state not only lie cheek by jowl but intersect, since Gaza and the West Bank are separated by Israel proper. The watershed of the Jordan River is an unavoidably shared natural resource; the city of Jerusalem is a central symbolic resource to both. In a future two-state solution, neither state would be morally justified in setting, say, environmental policy as if it inhabited an isolated island. Autarky is sociologically unavailable for either, and so, on Young’s account, it seems that sovereignty as non-interference is morally and ought to be legally unavailable for either.

Especially after the second intifada, however, this is a counsel of despair; it means that there will be no peaceful self-determination at all. It seems to me that, at best and if we are all very lucky, then the two sides might be able to negotiate a one-time separation and division of authority, with prodding, carrots, and sticks from other diplomatic powers. Given a clear allocation of rights, they might subsequently be able to bargain in overtly self-interested ways about such things as water rights. But trust between the two sides has been far too shattered for any framework that requires constant negotiation over who has the right to make decisions in the first place. Here, Westphalian sovereignty as non-interference is the desirable end state. Again, this does not mean that the two sides will necessarily ignore the interests of the others. It means only that, over each decision, it will be clear who has the authority to make it and who must persuade or induce them to make it one way rather than another. No federal or quasi-federal arrangement between the two is feasible for many years to come.

A Provisional Last Word

In conclusion, I hope to suggest a rejoinder to the objections offered above. I am trying to imagine what Young might have argued, to offer responses in her intellectual spirit. These are my words, not hers; but they are meant to further develop her theory of federalism, not mine. It might be that in the end, Young would have denied the force of the objections, but I proceed as if the objections do have force and suggest ways that Young’s theory could incorporate them and move beyond them.

Self-determination as non-domination remains available as a critical standard for the analysis of power relations within federations even if it is unavailable as a decision rule. Moreover, self-determination as non-interference itself consists of social and political practices that must be negotiated and enacted, and non-domination describes a governing norm for those negotiations. Noninterference is a rule that follows an initial allocation of decision-making
authority—between international states, between American federal states, between those states and Indian tribal governments, between Israel and Palestine. That allocation is itself a set of political decisions, made by bodies that have de facto or de jure authority over them. A constitutional convention, a treaty negotiation, a Congressional statute delineating tribal authority, a set of United Nations resolutions, a court decision—at some point, authority over some decisions was lodged in one self-determining body, authority over others in another.

Young’s theory could accept all of my objections to non-domination as a jurisdictional rule, but refocus attention on this prior stage. Given the social reality of interconnectedness, there is no natural immutable fact of the matter about which self-determining polity ought to have authority over which decisions. We want a critical standard by which to judge any given allocation of authority, and a normative standard that might guide the initial negotiators, judges, or other decision makers. Non-domination might be highly attractive as a source for these standards; and non-interference, being procedural and substantively empty, cannot be their source. To put it another way, if non-interference is a necessary decision rule at a fairly quotidian level, that only increases the urgency of applying non-domination as an evaluative standard to both the initial allocation of authority and the eventual outcomes, as the non-interference mechanisms, if left to take their own course, are sure to exacerbate inequalities and injustices.

Those responses, in a sense, sidestep the objections by placing non-domination at a different level from jurisdictional rules. But Young might also have responded head-on, and argued that jurisdictional instability was an acceptable or even desirable price to pay for avoiding the demerits of non-interference, because that instability could allow for creative democratic space and opportunities to coexist with the institution of federalism, whereas the rule-bound federalism of non-interference tends to suppress such democratic possibility. This, I think, is one of the enduring lessons of Justice and the Politics of Difference. One does not have to think that stability, certainty, or clarity are valueless to think that they may be bought at too high a price. The ability of traditional liberal theories of justice to provide them was, Young argued, bought in just that way. It is odd to describe Young’s philosophical temperament as deeply optimistic. Her work was constantly motivated by attention to the evils of sexism, oppression, structural injustice, and so on; she was engaged in a search for “democratic theory for unjust conditions” (2000a, 33). But there was a kind of deep optimism nonetheless: an optimism that, given the space for creative democratic action, people would make use of it. Young was never inclined to say that her diagnoses of the injustice of a given situation foreclosed the remedy of improvement through understanding and democratic contestation. Self-determination as non-interference accepts that many decisions will
be made unilaterally, without attention to the interests of all those affected; it relies on a good initial allocation of authority, post-facto bargaining, or the simple ability of each polity to affect the other as safeguards. Self-determination as non-domination hopes that we can do better, by treating self-determination and shared decision making as compatible and recognizing our shared fates.

Notes

This essay aims to continue conversations Iris Young and I had had over some years about our parallel interests and divergent views on federalism and indigenous rights, especially following her presentation in January 2004 of the paper that became “Self-Determination as Non-Domination: Implications for the Context of Palestine/Israel” at a conference on “Constitutionalism in the Middle East” at the University of Chicago’s Center for Comparative Constitutionalism. I thank Christina Bellon and two anonymous referees for comments, Suzanne Dovi for a helpful conversation about the development of Young’s institutional theory, and Sarah Wellen for research and editorial assistance.

2. Young 2000b, 2000c, 2001, 2005. All but 2000c have been reprinted in Global Challenges, and I give page references from that source. “Self-determination as Non-domination” is the last article of Young’s that appeared in print before her death, though other works of hers continue to be published.
3. Throughout her writing on federalism, Young invoked both the feminist, relational critique of the idea of autonomy as independence, and the neorepublican, non-domination critique of liberty as non-interference. She thought that these were highly parallel, and used “relational” and “non-domination” almost interchangeably. I have my doubts about this. I think that liberty as non-domination does, or can, retain an understanding of agents as substantially independent, not mutually constituting. I lack the space to pursue this thought here, though, and the critique I do offer of Young does not depend on it.
4. For an earlier treatment of justice for the Maori, see Young (1992). But the Maori had (at the time the essay was written) guaranteed representation in the New Zealand Parliament, and at the time this was the differentiated right of greatest interest to her; the essay belongs to the era of Justice and the Politics of Difference and not to that of Inclusion and Democracy.
5. Events have outstripped Young’s treatment of the case. At this writing, the contract between the Goshutes and the private firms that would have located the waste on their land has recently been annulled by the Bureau of Indian Affairs, notwithstanding BIA’s approval of the deal some years earlier, and notwithstanding approval from the Nuclear Regulatory Agency. The tribe has sued to overturn the decision, charging that it is politically motivated (the Bush administration is close to Utah Republican politicians). This is almost certainly true, and almost certainly not legally relevant, as BIA has wide discretionary authority over tribal business contracts. In my view, this indicates some of the unreality in Young’s worries that non-Indians in the American
political system will have their interests unduly neglected by autonomous tribes, and
counts in favor of stronger non-interference rights than Indians currently have. But my
argument in the main text does not depend on this empirical consideration. To avoid
unnecessarily convoluted past-tense conditionals, the main text proceeds as if the legal
situation were as it was when Young wrote: that the Goshutes apparently had the right
to proceed but there was ongoing dispute.

6. “At law” is an important qualifier, distinct from “at equity.” These governments
generally may not be sued for torts or contract violations, which yield money dam-
ages, without their consent; most have given their consent to be sued for breach of
contract and for some limited categories of torts. They may be sued for equitable relief,
for example, by persons seeking an injunction to prevent enforcement of an unconsti-
tutional statute. It is important to note that sovereign immunity is not the doctrine
according to which, famously, the Santa Clara Pueblo may not be sued in federal court
over gender-discriminatory membership rules. Santa Clara Pueblo v. Martinez (1978) was
a case about statutory interpretation. The question was whether Congress had made
the federal courts the venue for suits under the Indian Civil Rights Act, not whether
it could have done so.

7. Compare Waldron (1992), who argues that cosmopolitanism and the rejection
of rights of autarkic cultural preservation follow from a recognition of the social and
economic facts of interconnectedness.

8. The Montevideo Convention holds that part of the definition of a state is that
it is an entity “capable of entering into relations with other states,” in addition to all
the domestic criteria of having territory, a government, and so on. That this is partly
circular is well understood but not a fatal objection.

federalist institutions against attempts to pluralize decentralized jurisdictions in the
manner recommended by subsidiarity, or otherwise to map jurisdictional boundaries
onto the complex social world in which each kind of decision might have a different
level of government attached to it. The latter specifically argues that self-government
for American Indians is badly impaired by the absence of rigid jurisdictional rules
and an excessive judicial solicitude for the ways in which tribal decisions affect local
non-tribe members.

10. My argument here about Young’s use of non-domination substantially mirrors
that offered by McMahon (2005) about Pettit’s theory. See also Pettit’s (2006) response.
But I do not rely on McMahon’s critique. Non-domination might be sufficiently deter-
minate as a guide to policy, as Pettit argues, without being sufficiently determinate to
ground jurisdictional rules or decide jurisdictional disputes.

argument I suggest here.

12. And as noted in footnote 5, Utah turned out to be right about that.
References


