

Personified Government and Constitutional Morality

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I. INTRODUCTION

Statutory and common law rules govern the behavior of private actors. Constitutional law, in contrast and complement, is conceived as law for the government itself. But what is the government? Constitutional lawyers often implicitly answer this question by imagining government—considered generally, or disaggregated into institutional components like branches, agencies, or states—as if it were a big and powerful person.

Legal thought relies heavily on analogical reasoning, and the analogy of personhood has proven particularly attractive, since it permits the parsimonious assimilation of novel and complex social forms into more familiar conceptual models developed around real-life persons.¹ The tortuous history of personification of the business corporation in private law and legal theory is a familiar example.² Personification of government, which might be seen as the public law equivalent, comes with an even more distinguished intellectual pedigree. There is, after all, a long tradition in political theory of anthropomorphizing the state, culminating in Hobbes's "Artificiall Man," Leviathan.³ Following Hobbes, American constitutional

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¹See Meir Dan-Cohen, *Rights, Persons, and Organizations* (1986).

²On the intellectual history of corporate personality, see Morton J. Horowitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 *W. Va. L. Rev.* 173 (1986); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 *U. Chi. L. Rev.* 1441 (1987). For criticisms of the consequences of corporate personification, see, e.g., Daniel R. Fischel & Frank H. Easterbrook, *The Economic Structure of Corporate Law* 12 ("More often than not a reference to the corporation as an entity will hide the essence of the transaction[s]" among employees, managers, equity and debt investors, and other corporate stakeholders); Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 *B.U. L. Rev.* 307, 312-13 (1991); V. S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 *Harv. L. Rev.* 1477 (1996).

³Thomas Hobbes, *Leviathan* [first paragraph of Hobbes's Introduction]. Depicted in the book's frontispiece as a sword and staff wielding giant with a coronated human head (of state), Leviathan is a vivid and influential incarnation of the pervasive "body politic" metaphor—though far from the most elaborate. John of Salisbury's twelfth-century *Policraticus* is portrayed in rich anatomical detail, with the prince as head; the senate as heart; judges and governors of the provinces as ears, eyes, and tongue; executive officials and soldiers as hands; the treasury and tax collectors as intestines and belly; and so on, down to the goutish feet of the peasantry. Closer to American constitutional law, we hear Madison in *The Federalist Papers* comparing the nation to a sick patient, *The Federalist* No. 38, and Hamilton opining that "seditions and insurrections are, unhappily, maladies as inseparable from the politic as tumors and eruptions from the natural body." *The Federalist* No. 28. See also *The Federalist* No. 64 (Jay) ("[W]hen like bile in the natural [political jealousy] abounds too much in the body politic, the eyes of both [natural and political bodies] become very liable to be deceived by the delusive appearances which that malady casts on surrounding objects."). See generally Note, *Organic and Mechanical Metaphors in Late Eighteenth-Century American Political Thought*, 110 *Harv. L. Rev.* 1832 (1997).

Personified understandings of government have been especially influential in the theory of

theorists since the Founding have defended the binding force of constitutional commitments in contractual terms, premised upon the collective agency of “We the People,” a mysterious entity often conceived as a unified decisionmaker of indefinite lifespan.⁴

As with any metaphor, however, personhood threatens to obscure more than it reveals. The corporate analogy should serve as a cautionary reminder that the moral and instrumental justifications for legal arrangements will not necessarily continue to hold once we substitute metaphorical persons for real-life ones.⁵ This, unfortunately, is a caveat that is too often lost on constitutional lawyers and theorists. In many different areas and for many different purposes, constitutional law has seized upon concepts and categories developed in the context of private persons without paying sufficient attention to what is, or should be, lost in the personal-to-political translation.

An influential defense of constitutionalism, for example, casts the political community as Ulysses, binding himself to the mast as a “precommitment” against the deadly allure of the singing sirens. Like Ulysses’s strategy of self-binding, or for that matter ordinary contract law, constitutionalism is said to enhance our capacity for self-government by enabling us to resist pathological temptations to act against our deeper or more enduring values. As numerous critics have pointed out, however, assimilating constitutionalism to the autonomy-enhancing contracts or precommitments of ordinary individuals ignores fundamental differences between personal and collective political decisionmaking and personal and collective identity over time.⁶ Similar disanalogies undermine constitutional law’s conventional

international relations, starting with Hobbes’s analogy (reiterated by Locke and others) between the state of nature populated by individual persons and an international arena populated by states, and continuing through the realist view of states as unitary, rational, self-interested actors. On the connection between realism in international relations and Hobbesian political theory, see Charles R. Beitz, *Political Theory and International Relations* 13-66 (1979).

⁴Cf. Bruce A. Ackerman, *We the People: Transformations* 187 (1998) (disclaiming “an overly anthropomorphic understanding” of his conceptualization of “the People,” as if it were “a superhuman being who could ‘speak’ at an election in the same way that you or I might speak at a lecture podium”).

⁵It is now widely appreciated that personifying corporations for purposes of legal analysis tends to disguise what is actually at stake for the real-life human beings in the web of contractual relationships that the corporation represents. See Daniel R. Fischel & Frank H. Easterbrook, *The Economic Structure of Corporate Law* 12 (“More often than not a reference to the corporation as an entity will hide the essence of the transaction[s]” among employees, managers, equity and debt investors, and other corporate stakeholders). For example, thinking of corporations as persons invites courts to extend criminal liability to corporate entities, ignoring the inapplicability of the primary rationales for individual criminal liability, following from the facts that corporations cannot be imprisoned or stigmatized. See Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 *B.U. L. Rev.* 307, 312-13 (1991); V. S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 *Harv. L. Rev.* 1477 (1996).

⁶See Jon Elster, *Ulysses Unbound* 92-96 (2000); Jeremy Waldron, *Law and Disagreement*

portrayal of branches and institutions of government as rational, self-interested actors in their own right. Separation of powers law and theory, for example, is premised on the Madisonian understanding that branches of governments possess self-aggrandizing “wills” or “interests” of their own that lead them to pursue power and to check and balance one another.⁷ Upon closer inspection, however, it is hard to see how the political incentives of voters, interest groups, and officials operating within the institutional structures of American democracy would generate these kinds of incentives.⁸ Government behavior cannot be explained or predicted by imagining government institutions as selfish (or for that matter magnanimous) individuals.

This Article starts with another set of dubious implications of personified government prevalent in constitutional law and theory. Constitutional law often assumes that government behavior should be subject to moral and legal assessment in much the same way, and by many of the same standards, as the behavior of ordinary persons. Thus, constitutional doctrine has embraced agent-centered moral principles developed in the context of personal interactions, placing significantly greater weight on harms government actively inflicts than on harms it merely fails to prevent, and also on intentionally caused harms as opposed to inadvertent or merely foreseen ones.⁹ At an architectural level, moreover, constitutional law has followed personal morality and common law rules in focusing on the rightness or wrongness of particular government actions, borrowing a transactional framework that focuses on discrete interactions between governments and citizens. In these and other respects, constitutional law seeks to hold personified government to the same moral and legal standards to which morality and private law hold real-life persons.

Yet there is every reason to doubt that the structure and principles of normative assessment developed in the context of private individuals can be applied in just the same way to government actors and institutions. To start, consider the widely acknowledged principle of liberal political morality that government must regard its citizens impartially and treat them all with equal concern and respect. Ronald Dworkin refers to this principle as the “special and indispensable virtue of sovereigns.”¹⁰ The virtue is “special” precisely because most people would *not* insist that private individuals treat everyone with equal concern; we generally think people are permitted to display greater concern for their own lives and the lives of people

chptr. 12 (1999).

⁷See Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311 (2006); Daryl J. Levinson, Empire-Building Government in Constitutional Law, 118 Harv. L. Rev. 915, 964-71 (2005).

⁸See *id.*; Levinson & Pildes, *supra* note __.

⁹See Samuel Scheffler, Agent-Centered Restrictions, Rationality, and the Virtues, in *Consequentialism and Its Critics* 243 (Samuel Scheffler ed. 1988).

¹⁰Ronald Dworkin, Sovereign Virtue 6 (2000).

close to them than for the lives of distant strangers. In this rather fundamental respect public and private morality are simply different.¹¹ The reason they are different, in the view of liberal theorists, is that real-life persons have private lives, “ambitions and attachments of [their] own that [they] are at liberty to pursue”¹² and that “shape individual lives.”¹³ Government does not.¹⁴

Indeed, there is good reason to think that questions of political justice ought to be approached across the board quite differently from questions of personal morality and legality. John Rawls famously begins *A Theory of Justice* by identifying justice as the distinctive “first virtue” of “social institutions” like the state.¹⁵ Principles of justice, in Rawls’s view, apply to the “basic structure” of society, comprising “the political constitution, the legally recognized forms of property, and the organization of the economy, and the nature of the family.”¹⁶ Principles of justice do not, however, apply to “individuals and their actions in particular circumstances.”¹⁷ Rawls thus proposes a “division of moral labor” between government and private individuals, in which government is responsible for maintaining the background conditions of systemic social justice, while individuals in their day-to-day lives are subject to a different set of more localized moral constraints.¹⁸

This Article suggests that such a division of moral labor has underappreciated significance for constitutional law and theory, and possibly for political philosophy as well. The Article begins, in Part II, by describing how constitutional law has adopted the “transactional” framework of personal morality, oriented around local harms to individual interests and emphasizing negative responsibility, intentional wrongdoing, and deliberative rationality. This Part argues that several rather obvious disanalogies between government and real-life persons render this framework a bad fit for the state. The extensive and pervasive causal efficacy of government makes it difficult to isolate particular interactions or their consequences from government’s

¹¹See Ronald Dworkin, *Law’s Empire* 173-75 (1986); Thomas Nagel, *Ruthlessness in Public Life*, in *Mortal Questions* 75, 82-84 (1979).

¹²Dworkin, *Law’s Empire*, supra note ___, at 174.

¹³Nagel, *Ruthlessness*, supra note ___, at 84.

¹⁴Though of course government officials do, during nonworking hours.

¹⁵John Rawls, *A Theory of Justice* 3 (1971).

¹⁶John Rawls, *Political Liberalism* 258 (1993).

¹⁷Rawls, *Theory of Justice*, supra note ___, at 54.

¹⁸See Rawls, *Political Liberalism*, supra note ___, at 268; Thomas Nagel, *Equality and Partiality* 53-62 (1991); Murphy, supra note ___, at 257-64. But see Robert Nozick, *Anarchy, State, and Utopia* 204-10 (1974).

overall course of dealings with citizens and the states of affairs that result, pushing toward a systemic rather than a transactional level of analysis. At the same time, deontological, agent-centered principles of morality lose their grip when carried over to an impersonal actor like government.

Part III begins by contrasting the personified morality of constitutional law with the predominantly impersonal perspective of political justice. Discussions of distributive justice focus less on the moral quality or consequences of local actions and interactions and more on systemic institutional arrangements and the global states of affair these arrangements produce. This normative framework fits government along precisely those dimensions that personified constitutional morality does not, and, if generalized, it threatens to absorb agent-centered transactional morality into a global assessment of systemic consequences. Part III proceeds to explore whether it is possible to reconcile personified constitutional morality with impersonal political justice through a second, intragovernmental division of moral labor. The idea would be to hold government to the demands of distributive justice on one normative track, while simultaneously policing the morality of particular transactions between government and citizens on a separate, complementary track.

The possibility of some such division, or combination, of distributive justice and transactional morality is taken for granted by constitutional and political theorists alike. It is also taken for granted in everyday moral and political discourse.

We hold government responsible both for broad social problems like the economic and racial injustice that was appalling evident in the wake of Hurricane Katrina, and also for discrete wrongs like the ethnic profiling or torture of suspected terrorists. Both kinds of wrongdoing seem morally pressing. Yet it is not at all clear how these two normative perspectives can be fit together into a coherent vision of what should be expected of government, and indeed, circling back to the question asked at the outset, of what government *is*.

II. PERSONIFIED CONSTITUTIONAL MORALITY

If government were a person it would be a person of a most peculiar sort (starting with a peculiar name, like Leviathan). Unlike ordinary persons, government has no life of its own, no special attachments or affiliations, no personal goals or projects; it exists only to serve the collective good of society—which is to say, the goals and projects of others. Compared to real-life persons, government is immensely powerful, not just because it asserts a monopoly over the use of violence but also because of its broad regulatory authority and legal control of the basic institutional structure of society: markets, schools, families, and the like. Government thus exerts a uniquely pervasive influence over the lives of others and uniquely expansive causal efficacy in the world. These differences are amplified when we step outside of the metaphor of personhood and recognize that government is, in fact, an institutional or collective actor. In this respect, government shares some of the features of corporations that have proven problematic to assimilate to personal morality and private law models developed around the behavior of natural

persons. But the differences between “public corporations” like governments and ordinary private corporations, suggested above, cut across the institutional commonalities. This Part describes how constitutional law, in many different areas and in its basic normative structure, has glossed over both sets of distinguishing features of government (institution versus person and public versus private) in applying the framework of personal morality to the state.

A. *Acts and Omissions*

Conventional morality holds that actively causing harm is morally worse than merely allowing to occur harm that one might have prevented. Killing, for instance, is usually regarded as morally worse than merely letting die. Private law regimes draw the same distinction, attaching tort and criminal liability to harm-causing acts but usually not to harm-resulting omissions, even in cases where minimal effort by the defendant would have averted severe harm. The moral and legal distinction between acts and omissions may be supported by some measure of overlapping consensus between deontologists and consequentialists. Deontologists, concerned not just with the effects of actions but with the moral quality of the actions themselves, tend to regard harm-causing acts as worse than equivalent-harm-causing-omissions, whether because the act/omission distinction has intrinsic moral significance or because it serves as a proxy for other relevant moral variables.¹⁹ For consequentialists, in contrast, a harm is a harm, whether actively caused or passively permitted to occur. Nonetheless, in practice, there may be good consequentialist reasons for caring about the act/omission distinction, some of which are discussed below.

Constitutional law, too, is centrally structured around the distinction between government acts and omissions. The threshold test for whether constitutional rights apply at all is whether the harm that has occurred can be traced to some form of “state action.” Government’s passive failure to prevent harm to constitutionally protected interests proximately inflicted by some non-state actor is generally understood not to be constitutionally culpable. Thus, government is immune from constitutional liability for choosing not to prohibit race discrimination or censorship of speech by private businesses, and government’s failure to prevent the destruction of homes in New Orleans by Hurricane Katrina does not count as a constitutional taking requiring just compensation. It is not hard to appreciate why constitutional law as presently conceived needs something like the state action doctrine. Constitutional norms are supposed to apply to government but not to private actors; that limitation would effectively disappear if government were always held responsible for failing to hold private actors to these norms. Yet a number of difficulties arise in attempting to carry over the conceptual distinction between acts and omissions from individual to government behavior.²⁰ And even if government

¹⁹See, e.g., Shelly Kagan, *Normative Ethics* 94-100 (1998).

²⁰To be sure, the conceptual distinction between acts and omissions in the context of individual behavior is not always straightforward or philosophically transparent. How do we know that the reckless driver who mows down a pedestrian is guilty of the homicidal act of reckless driving

acts and omissions can be coherently distinguished, it is not at all clear that the distinction should carry comparable moral significance.²¹

An initial conceptual difficulty stems from the nature of government regulatory choices. When government declines to regulate in some area, that decision can be understood not as a mere omission but as an affirmative choice to permit the relevant conduct to proceed. As Sunstein and Vermeule put the point, unlike private individuals, “government is in the business of creating permissions and prohibitions.”²² We might think of government failures to regulate, then, as regulatory “permissions,” closer to statutory enactments explicitly warranting the relevant conduct than to regulatory silences.²³ In its strongest form, the claim is that the prevailing regulatory regime blankets all policy space—that all private conduct is either permitted or prohibited, and that each prohibition and permission reflects an equivalent kind of choice for which government can be held responsible. This understanding of state action and government responsibility has become increasingly conventional in the post-New Deal era. As the notion of a “private” sphere of liberty, immune from government control, has given way to the understanding that the public sphere is essentially boundless, government’s failure to regulate in *any* area is now more readily perceived as an exercise of policy discretion.²⁴

Individual conduct is not all-encompassing in this sense. We do not think of individuals as choosing to permit or endorse all of the actions and events that they do not actively participate in. In part, this reflects a qualitative difference between private and public behavior—the difference between engaging in primary activity and regulating the primary activity of others. But it must also reflect the fact a quantitative contrast: Individuals lack both the cognitive capacity to be aware of more than a tiny fraction of what goes on in the world and the causal efficacy to

as opposed to the mere omission of failing to apply the breaks? Why do we describe the person who refuses to interrupt his game of beach volleyball to save a drowning swimmer as having merely omitted to rescue instead of having actively caused the swimmer’s death by engaging in one set of actions (playing volleyball) instead of another (effecting the rescue)? Nonetheless, at least at the level of moral intuition, most cases of individual conduct code one way or the other. Not so for government, and for reasons that threaten to undermine any coherent distinction between public acts and omissions. For an illuminating discussion of the conceptual difficulties of distinguishing individual acts from omissions, see Leo Katz, *Bad Acts and Guilty Minds* 140-44 (1987).

²¹See Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 53 *Stan. L. Rev.* 703, 709 (2005) (arguing that “the act/omission distinction systematically misfires when applied to government, which is a moral agent with distinctive features”).

²²See Vermeule & Posner, *supra* note ___, at 721.

²³See *id.* at 721-22; see also Lawrence Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 *Hastings Const. L.Q.* 893 (1975).

²⁴See Louis Michael Seidman & Mark V. Tushnet, *Remnants of Belief* 66-67 (1996).

make a nontrivial difference in how it goes. Holding them responsible for “choosing” not to affect events outside of their tiny bubbles of awareness and efficacy is as unfair as it is unrealistic. Government’s vastly greater informational capacity and causal efficacy may justify extending its responsibility much further, converting many (if not all) failures to regulate into affirmative policy choices.²⁵

Government’s formidable causal efficacy blurs the act/omission distinction in another way, as well. Even limiting attention to “active” forms of regulation, like enacting and enforcing statutes and common law rules, government has a causal hand in virtually everything that happens in the world. This makes it conceptually difficult to isolate “pure” omissions from all of the ancillary government actions that are causally intertwined with the relevant outcomes. The basic point is familiar in constitutional theory. Legal theorists from the Realists on have emphasized that government regulation inevitably structures and supports nominally private institutions and ordering, creating some measure of government responsibility for market allocations, familial relations, and even individual preferences. As a consequence, government failures to prevent (nominally and proximately) private harms are invariably embedded in a set of affirmative regulatory acts that are also causally connected to the harm. Expanding focus from the narrow regulatory omission to a somewhat broader course of affirmative conduct by government will convert every apparent omission into an act. For example, when government fails to prohibit private race discrimination or private censorship of speech, we can locate state action simply by pointing to the state-created and -enforced property rights that permit the owners of restaurants and newspapers to exclude. Individual omissions, in contrast, typically (though not invariably²⁶) involve harms that have materialized with no further causal contribution by the individual actor. This creates stable conceptual boundaries that government omissions lack. Put differently, government leaves a much bigger causal footprint in the world than any individual, leaving less untrodden turf for “pure” omissions to occupy.

Even it were somehow possible to identify a coherent category of government omissions, it is far from clear that the act/omission distinction should carry the same moral or legal weight for government as it does for individuals. There are a number of explanations for why the distinction might carry normative weight in the individual case. Without necessarily embracing any of them, it is enough to see that none translate straightforwardly to government.

²⁵See Martha C. Nussbaum, *Frontiers of Justice* 308 (2006); Michael J. Green, *Institutional Responsibility for Global Problems*, 30 *Phil. Topics* 79, 85-86 (2002). Both Nussbaum and Green distinguish individuals from “institutions,” a category that includes not just governments but also private entities like corporations. Large multinational corporations no doubt rival and surpass low-level governments (and high level governments in other countries) in capacity. To the extent responsibility for omissions turns on capacity, therefore, the more relevant distinction may well be individual/institutional, not private/public.

²⁶See earlier footnote and Katz for the exceptional individual cases, which have the same, omission-embedded-in-acts, structure as the typical governmental case.

From a moral perspective, as applied to personal conduct the act/omission distinction probably does not perfectly track individual blameworthiness, but it might serve as a fairly good proxy or heuristic for a number of morally relevant factors.²⁷ Harm causing acts are more likely to reveal bad purposes or characters than harm causing omissions, which in many cases reflect merely inattention or inability to change the course of events. Moral responsibility for omissions may be further diminished by diffusion over an open-ended group of potential actors. Whereas harm causing actions create a closed set of causally responsible wrongdoers, there is no obvious limit to the number of wrongdoers who might be held responsible for harm causing omissions, which in theory could have been prevented by the actions of anyone. Even adding the proviso “at reasonable cost” will often leave many individuals who were well enough or equally well situated to prevent the harm. Ex ante, such situations create collective action problems that arguably dilute the blameworthiness of each individual, if only by imposing coordination demands that individuals can hardly be blamed for failing to meet. How much am I personally to blame for global poverty or warming, given my own trivial contribution (or lack thereof) to the overall problem and the difficulty of organizing the collective action that would be required to make a serious dent? Finally, and perhaps most fundamentally, the act/omission distinction as applied to personal conduct might reflect a kind of moral compromise between the conflicting and perhaps incommensurable values of impersonal beneficence and personal autonomy. Forgiving omissions can be understood as a way of limiting our responsibility to others and creating a safe harbor within which we can pursue our own lives and projects, unencumbered by the otherwise all-consuming needs and demands of others.²⁸

The act/omission distinction in tort and criminal law seem to reflect this same set of essentially deontological concerns, amplified by individual liberty interests that may be threatened by state-imposed affirmative behavioral requirements (which logically forbid infinitely many alternative courses of action; as compared to negative prohibitions, which forbid only a single course of action).²⁹ But the

²⁷See Sunstein on moral heuristics; S. Kagan on act/omission as a rough proxy.

²⁸See Nagel, *Ruthlessness*, supra note __, at 83; Nussbaum, supra note __, at 308-09. Indeed, it is the threat of such limitless demands that deontologists present as a challenge to the intuitive plausibility of consequentialist moral theories. Am I really obligated to transfer resources to sick and dying strangers until I spend myself down to near-poverty, or to donate one (or both) of my kidneys to a stranger? Some utilitarian purists answer such questions in the affirmative (see, e.g., Peter Singer), but most look for ways to square the impersonal demands of consequentialism with our strong intuitions that morality cannot possibly be so demanding as that. For example, in many contexts it is easy to give a plausible consequentialist account of why encouraging the uncoordinated beneficence of large numbers of individuals by assigning each an undifferentiated personal duty would lead to less good than limiting personal duties and channeling beneficence through coordinated institutional arrangements. See Nussbaum, supra, at 309-10.

²⁹Cite morality-based criminal law literature and corrective justice tort law literature.

act/omission distinction also implicates consequentialist concerns about administrative costs and behavioral effects. Because the set of potential defendants for omission-based liability is theoretically unbounded, the law confronts an embarrassment of potential defendants. If a swimmer drowns near a crowded beach, should every person on the beach—or in the entire jurisdiction?—be subject to liability for failing to attempt a rescue, and if so, to what extent? Moreover, the threat of liability for omissions might have perverse behavioral consequences, if it leads dozens of beachgoers to plunge at once into a chaotic rescue attempt, or if potential rescuers avoid beaches for fear of being held liable in case someone drowns.³⁰

The important thing to see is that *none* of these moral and legal justifications for the act/omission distinction, deontological or consequentialist, seem to apply in any straightforward way to government behavior. In light of government's enormous informational capacity and causal efficacy, its omissions are far less likely to reflect nonculpable inattention or powerlessness and far more likely to reflect blameworthy decisions to permit harm. And of course the institutional structure of government solves—indeed, in the Hobbesian view, *exists* to solve—the collective action problems that bedevil the moral and legal treatment of individual omissions. No individual acting alone can make a meaningful contribution to reducing global warming, but government can provide the coordination necessary to address such large-scale harms. Government is the solution to the problem of undifferentiated collective responsibility that undermines both individual culpability and legal administrability. Legal doctrine invites this same insight. In tort and criminal law, omissions do, in fact, trigger liability where the existence of a special relationship between potential rescuer and victim (e.g., lifeguards and swimmers) or the potential rescuer's causal role in creating the threat of harm (e.g., I throw you in the water and omit to rescue) creates an individuated “duty” to act. By these criteria, government might well be assigned a general and comprehensive duty to act. In many contexts government is easily identifiable as the best-situated (if not uniquely qualified) preventer of harm. And, as noticed above, virtually all privately-inflicted harms are in fact facilitated by various forms of state action.³¹

Finally, government's moral responsibility cannot be compromised by the kinds of autonomy interests that, for real persons, push back against the impersonal demands of beneficence.³² Government has no such interests, or self-regarding projects of its own; it exists only to serve the interests of other, real persons. For the same reason that government has a special obligation to treat all citizens with equal concern and respect, then, it cannot disclaim responsibility for leaving them

³⁰See Landes & Posner; Levmore.

³¹See Sunstein & Vermuele, *supra* note ___, at 726.

³²See Nagel; Nussbaum.

unprotected from harm.³³ Lacking a life of its own, government's responsibility for causal harms cannot end at the (conceptually obscure) boundary between acts and omissions.

B. *Purposes and Effects*

Personal morality tends to attach special significance to intentionally caused harms, as opposed to harms that are merely foreseeable. The same is true of legal culpability, which often correlates with the intentionality of harm. In criminal law, for example, intentionality may be all that distinguishes killings that count as murder from those that are merely manslaughter or innocent accidents. For (some) deontologists, this reflects the view that purposeful harms are intrinsically morally worse than inadvertent ones.³⁴ We intuit, for instance, that it is permissible for a doctor to deny an organ to one patient in need of a transplant in order to save the life of another, even knowing this will cause the first patient's death, but it is certainly not permissible for the doctor to kill a patient in order to use his organs to save one or more others, nor is it permissible to withhold treatment from an annoying patient just for the purpose of causing his death.³⁵ More simply, as Holmes famously observed, "Even a dog distinguishes between being stumbled over and being kicked."³⁶ Consequentialists, in contrast, are inclined just to count up the kicks and corpses. While there may be good consequentialist reasons to care about purpose in certain circumstances, for the most part the (in)significance of intentionality marks an important division in personal ethics. Some of the most pointed debates between deontologists and utilitarians fixate on whether intentional harms are generally distinguishable from and morally worse than merely preventable and foreseeable ones.

In constitutional law, these dueling moral perspectives have been channeled into debates about whether the focus of analysis and prohibition should be on the effects of government statutes and policies or the purposes they reflect. Should equal protection and free exercise of religion be understood to forbid, or at least to call into question, government policies that have a disparate impact on racial minorities or the practices of religious groups, or do these constitutional provisions only forbid purposeful discrimination on the basis of race or religion? Do governmental burdens on expressive conduct violate free speech even if they are not aimed at expression or

³³See supra TAN __.

³⁴See Kagan, supra note __, at 100-05 (1998); Thomas Nagel, *Autonomy and Deontology*, in *Consequentialism and Its Critics* 142, 160-61 (Samuel Scheffler ed. 1988).

³⁵See Brief for Dworkin et al. in *Washington v. Glucksberg*. Note the nonobviousness of what counts as "intentional" harm. Slippery double-effect distinction between intending harm as a means and knowing that harm will follow from a course of action, but merely as an unintended by-product.

³⁶Oliver Wendell Holmes, *The Common Law* 7 (1881).

communication? In these and other areas of constitutional law, the debate between consequentialists and deontologists at the individual level is recast as a debate about whether it is the effects of government policies or their motivations that are primarily at issue.³⁷

What has emerged from the constitutional debate is the recognition that *both* effects-based and intent-based approaches to normative assessment run into a series of distinctive difficulties when carried over from individual to government behavior. The familiar problem with constitutional effects tests is that they seem either impossibly demanding or institutionally unworkable. Virtually every government law and policy has the effect of burdening some constitutionally protected interest. Entrenched racial inequality means that many educational requirements and criminal laws will have a racially disparate impact; because money buys access to channels of communication and political influence, any law affecting the distribution of wealth will treat some speakers and their political viewpoints less favorably than others; and any number of ordinary obligations and prohibitions, like drug laws and zoning ordinances, will burden idiosyncratic religious practices. Short of requiring government to calibrate every law and policy to eliminate all differential effects on constitutionally-protected interests, harmful effects seem inevitable. Of course, government might be permitted to pursue policies that promise sufficient benefits to outweigh the constitutional burdens. But balancing benefits against harms on a case-by-case basis raises its own set of difficulties. It is entirely unclear, for example, how the stream of social benefits and constitutional harms flowing from a statute over its expected lifespan would be quantified, or how constitutional harms would be weighted or made commensurable with social benefits—especially by courts.

Notice that the root of this problem, once again, is the enormous causal efficacy of government laws and policies. Forbidding an individual, or even a large corporation, from inflicting harm to the person or property of others is manageable because privately-inflicted harms are the exception rather than the rule. This is why strict liability in private law is not unworkable (and also why negligence standards, which require cost-benefit balancing, are not thought to place impossible demands on courts). In contrast to the relatively slight effects of most private actions on third-parties, however, government policymaking typically affects the welfare of large numbers of individuals in one fell swoop. As a result, constitutional effects tests are swamped by the serious set-backs to constitutionally protected interests that flow from nearly every law or policy decision.

Recognizing the problems with effects-based constitutional analysis, courts and theorists have moved more and more toward intent-based approaches. The

³⁷For explicit use of the analogy between effects tests and consequentialism and between intent tests and deontology, see, e.g., Charles Fried, *Types*, 14 *Const. Comm.* 56-66 (1997); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 *U. Chi. L. Rev.* 413, 506-07 n.256. Note that the constitutional issue is whether bad effects are sufficient to make state action illegal, as opposed to whether overall good effects are sufficient to validate the morality of individual conduct.

Supreme Court has now made clear that violations of equal protection, free speech, and free exercise, among other important constitutional provisions, turn primarily, if not exclusively, on whether government has acted with a forbidden purpose.³⁸ Focusing on purpose solves the administrability problems of effects tests by immunizing most laws and policies from serious constitutional doubt. But purpose tests are also justified in deontological terms, as appropriately directing attention to the intrinsic moral quality of government acts, and particularly to the morally significant difference between intended and inadvertent harms.³⁹

Intent-based constitutional analysis of government conduct raises its own difficulties, starting with the conceptual puzzle of what it means to attribute purposes to an institutional actor like a legislature. Courts often treat legislative intent as if it were a psychological state, relying on the same kinds of evidence that would be probative of individual intentions, such as statements of individual legislators revealing (perhaps) their personal viewpoints, understandings, or motivations. This has led to much confusion, and framed a number of perplexing but perhaps gratuitous questions about what it could possibly mean to attribute a singular purpose to a collective decisionmaking body like a legislature; how to discern, disentangle, and somehow aggregate the multiple motivations and intentions of individual legislators; whether and how we are supposed to “pass through” the intentions of constituents to their representatives; and the like.⁴⁰ Of course, these are all questions that could be asked of moral and legal attributions of intentionality to non-governmental organizations like corporations, as well.⁴¹

A different and more distinctive kind of conceptual difficulty comes with identifying the purposes of governmental decisions by way of a counterfactual inquiry into the causal role of constitutionally forbidden reasons in the political decisionmaking process.⁴² Constitutional purpose inquiries are probably best understood as asking whether the same decision would have been reached behind a veil of ignorance with respect to the constitutionally protected criteria (race, gender, religion, the content of speech, and the like). In equal protection cases, for example, the question might be framed as whether the same decision would have been made if the positions of blacks and whites or men and women were reversed. If the answer is

³⁸See Richard H. Fallon, Jr., *Implementing the Constitution* 89-93 (2001).

³⁹See Fried, *Effects*, *supra* note ___, at 57 (“[H]ow an effect is produced may be of such significance that it overcomes any argument stated in terms of the effect alone. This is true in our personal morality and it is true for governments as well.”). Indeed, the primacy of purpose in constitutional law is often justified by Holmes’s aphorism about kicked dogs. See Fallon, *supra* note ___, at 93.

⁴⁰See generally Jeremy Waldron, *Law and Disagreement* chptr. 6 (1999); Brest; others.

⁴¹See Kutz, Gilbert, Bratman et al. on collective action and intentions.

⁴²See Donald Regan, *Protectionism and Balancing*; others.

no, then government is said to have acted with a race or gender discriminatory purpose. This is not a claim about the individual or collective psychology of legislators at all, but it better captures what courts seem to be driving at when they ask about legislative purposes.

As constitutional theorists have recognized, however, constructing government purposes through counterfactual comparisons of this kind confronts a different conceptual challenge.⁴³ In constructing these counterfactuals, how do we know how much of the world to hold constant and how much to treat as variable?⁴⁴ Asking whether government would have allocated jobs using standardized testing in a world in which whites scored poorly due to a history of discrimination and lack of educational opportunity comparable to that of black Americans, or whether government would criminalize abortion in a world where men got pregnant instead of women, is simply nonsensical. The root of the problem is that is that we have no idea what a counterfactual world cleansed of the effects of gender and race would look like, much less how government would have made any particular decision in that world. Now, counterfactual approaches to identifying discriminatory purposes do not invariably unravel in this way. Where there is some relatively determinate set of criteria for allocating benefits and burdens, we can, and often do, equate discriminatory intentions with otherwise inexplicable departures from those criteria. Private employers who fail to hire qualified minority applicants, or who hire less qualified nonminority applicants, can be found liable for intentional employment discrimination on that evidence alone. What makes the private employment context different is the existence of a fairly well-defined baseline of fair market treatment, departures from which can be deemed discriminatory.⁴⁵ Counterfactual determinations of discriminatory intent work tolerably well as applied to decisionmaking by market actors because market norms usually provide such a baseline.⁴⁶ Government, however, is not a market actor.⁴⁷ Its decisions about how to

⁴³See David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. Chi. L. Rev. 935 (1989).

⁴⁴This problem also arises with respect to originalist exercises in reconstructing what the Framers would have thought about some modern problem, taking account of changed circumstances. See Klarman on Lessig. The difficulties with counterfactual analysis are well known in the philosophy literature. See David Lewis.

⁴⁵See Strauss, *supra* note ___, at 1009; see also Mark Kelman, *Market Discrimination and Groups*, 53 Stan. L. Rev. 833 (2001).

⁴⁶Private antidiscrimination laws apply primarily, but not exclusively, to market actors. In market settings problems arise where deviations from market norms are required by law (such as bans on rational statistical discrimination and taking account of discriminatory customer preferences). In non-market settings, intentional discrimination by private actors may become conceptually impossible to ascertain in the same way as for public actors, though there may also be alternative baselines (think about notion of “essential functions” of nonmarket private organizations in cases like *Dale*).

⁴⁷Note the possibility that when acting in certain “proprietary” capacities government may be

allocate public benefits and burdens are not subject to any determinate set of criteria that would dictate what any individual or group was entitled to receive from a nondiscriminatory political process.⁴⁸ This leaves only the hopeless counterfactual inquiry into how government's decisionmaking process would have played out had race or gender not been a factor.

Even supposing some conceptually coherent understanding of government purposes and how they are to be ascertained, we should recognize that the meaning and normative implications of these purposes will not necessarily be the same as those of the purposes we routinely attribute to ordinary persons. In fact, the reasons why individual intentions are thought to matter in moral and legal analysis may not carry over to government at all.⁴⁹ Deontological morality is premised on the moral significance of personal goals, relationships, and commitments, which in some circumstances take priority over the impersonal maximization of the collective good. In essence, individuals are permitted to disclaim ownership of some of the consequences of their decisions in order to preserve the integrity of their own projects.⁵⁰ Viewed in this light, the distinction between intentional and unintentional harms might be understood to serve the same basic need as the distinction between acts and omissions: that is, to strike a moral balance between personal autonomy and impersonal obligations to the collective good.⁵¹ To reiterate, however, this is not a need that arises for government. Lacking projects and attachments of its own, government has nothing to balance against concern for the collective good. This suggests that government morality should be much more strongly impersonal and outcome-based than individual morality.⁵² If so, then the intentionality of

subject to market norms. But even in employment and procurement contexts, government is often entitled or compelled to pay attention to distributive and political considerations that would be competed or regulated out of private markets.

⁴⁸See Strauss, *supra* note __, at 1010; Kelman, *supra* note __, at 834 n.3.

⁴⁹Sunstein and Vermeule express such doubt:

[Government policies are] set by a complex process of democratic and regulatory interactions among voters, legislators, administrators, and judges. In this large-scale process of collective decisionmaking, the concept of intention might be coherent, but it becomes too attenuated to bear the moral weight often put upon it.

See Sunstein & Vermeule, *supra* note __, at 723.

⁵⁰This is a simplistic summary of the central argument in Bernard Williams, *A Critique of Utilitarianism*, in *Utilitarianism: For and Against* (J. J. C. Smart & Bernard Williams eds., 1973). See also Nagel, *Autonomy and Deontology*, *supra* note __.

⁵¹See *supra* TAN __.

⁵²See Nagel, *Ruthlessness*, *supra* note __, at 83-84 (arguing that public morality should be understood as more impersonal and consequentialist than individual morality). But cf. Williams, *supra* note __, at 138-39 (suggesting that a society with a utilitarian public morality but a deontological private morality will inevitably be manipulative and undemocratic).

government harms should be no more relevant than whether these harms resulted from an act or an omission.

Finally, to the (limited) extent that special normative attention to intentional harms can be justified on consequentialist grounds, these grounds, too, will shift when government intentions are substituted for individual ones. The consequentialist case for focusing on intentional harms is that the existence of a bad purpose may serve as a useful proxy for expected future harm. As utilitarians since Bentham have pointed out, intention may correlate with the probability and magnitude of harm, on the theory that someone who intends to inflict harm will be more likely to succeed and end up doing greater damage.⁵³ Analogously, constitutional theorists argue that, given the difficulty of directly assessing the effects of laws and policies, consequentialist courts might use bad intent as a proxy for expected long-term harms.⁵⁴ This may turn out to be true in certain contexts, but the analogy to individual conduct is not enough to make the case. Whether intentional harms are more likely to be repeated is an empirical question, and the empirics of governmental and individual behavior may well be different. For example, we might observe that at least some types of unintentional constitutional harms will occur reliably and repeatedly, whereas some types of intentional ones will seldom recur. Consider equal protection and race. Under existing conditions of racial inequality, broad categories of “race neutral” (i.e., non-purposeful) statutes bearing on wealth, education, and crime will disproportionately disadvantage racial minorities. The combined impact of these “unintentional” harms will be much greater than the harm inflicted by the limited forms of intentional race discrimination that might tempt contemporary legislatures in the absence of constitutional constraints (racial gerrymanders of election districts, racial profiling in some contexts, etc.). Bentham’s observations about patterns of individual behavior offer little help in predicting whether state action intentionally targeted at constitutional values poses a greater threat to these values than state action that inadvertently but systematically undermines them. Here again, we should not expect government purposes to do the same moral or legal work as individual ones.

C. *Rationality and Integrity*

A widely shared ideal of personal conduct is that we strive to act according to a coherent and consistent set of reasons, principles, and values.⁵⁵ Consider Dworkin’s description of “integrity” as an “ideal of personal morality”:

⁵³Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*. See also Steven Shavell, *Foundations of Economic Analysis of Law* 553-53 (2004).

⁵⁴See, e.g., Kagan, *supra* note ___, at 507-09.

⁵⁵More widely shared by philosophers than others, perhaps; and hardly universal or plenary. Emerson, Whitman, et al. Failures in this regard are described pejoratively in terms of hypocrisy, weakness of will, lack of moral character, or plain irrationality. As this range of epithets suggests, the ideal of “principled” behavior operates at a number of different levels and imposes different kinds of requirements in different settings.

We want our neighbors to behave, in their day-to-day dealings with us, in the way we think right. But we know that people disagree to some extent about the right principles of behavior, so we distinguish that requirement from the different (and weaker) requirement that they act in important matters with integrity, that is, according to convictions that inform and shape their lives as a whole, rather than capriciously or whimsically.⁵⁶

For Dworkin, the ideal of personal integrity has a perfect analog at the level of government decisionmaking. We can, and do, he says, “make the same demands of the state or community taken to be a moral agent.”⁵⁷ Political integrity thus “requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens.”⁵⁸ Dworkin’s paradigmatic illustration of the failure of political integrity is a “checkerboard statute” made up of internally inconsistent provisions, for instance a law imposing strict liability on manufacturers of automobiles but not on manufacturers of washing machines, or a “Solomonic” statute criminalizing abortion only for women born in even years.⁵⁹ He suggests that our intuitive aversion to laws like this is of a piece with our demand for principled behavior at the individual level. As Dworkin emphasizes and explicates, “Political integrity assumes a particularly deep personification of the community or state.”⁶⁰

Dworkinian demands for political integrity echo throughout constitutional law.⁶¹ Dworkin himself points to equal protection law’s prohibition on “internal compromises over important matters of principle.”⁶² In Cass Sunstein’s influential view, the least common denominator of a number of areas of constitutional doctrine is the requirement that government distribute benefits and burdens based on principled, public-regarding reasons rather than merely “naked preferences” or “raw

⁵⁶Law’s Empire at 166.

⁵⁷Id. at 166.

⁵⁸Id. at 165.

⁵⁹Id. at 178.

⁶⁰Id. at 167. The contrast between Dworkin’s approach to integrity, a personal value that directly translates to the political level, and his approach to the principle of equal concern and respect, a political value that does not translate to the individual level, in chapter 5 of *Law’s Empire* suggests unexplored complexity in his views about the general relationship between individual and political morality.

⁶¹The irony that the U.S. Constitution looks very much like a checkerboard statute, filled with unprincipled compromises—counting slaves as three-fifths of a person for purposes of apportioning representation in Congress and providing small states with equal representation in the Senate, etc.—is not lost on Dworkin. See id. at 184.

⁶²See id. at 185.

political power.”⁶³ Rationality review under the due process and equal protection clauses, for example, requires government to justify its actions by reference to some public purpose and forbids actions that are arbitrary or motivated merely by irrational animus or the raw political power of the victors; the eminent domain clause permits government to take property only for a “public use,” not simply to redistribute to a politically powerful interest group; and the dormant commerce clause prohibits discrimination against out-of-state economic interests based solely on the self-interested, protectionist motives of in-staters.⁶⁴ Still more generally, for Sunstein and other “civic republican” theorists, much of constitutional law and structure is animated by the ideal of deliberation about the public good.⁶⁵ Their idealized republican legislature—committed to reasoned, deliberative decisionmaking in pursuit of a singular public good—might display something very much like Dworkinian political integrity.

Imagining Congress as a rational and principled person has intuitive appeal, but transposing the ideal of personal integrity to government is not as simple, and perhaps not as desirable, as might initially appear. At the conceptual level, aggregating individual judgments to generate a collective political decision raises a distinctive set of difficulties. In addition to the familiar aggregation problems associated with Arrow’s Theorem, which threaten instability and inconsistency in collective decisions over time, there is a further set of problems with group decisionmaking that aspires to duplicate personal integrity. Integrity requires synchronization of decisions and reasons in a way that groups may find impossible.⁶⁶ The intuitive nub of the problem can be captured by what Lewis Kornhauser and Lawrence Sager call the “doctrinal paradox.”⁶⁷ Consider a three judge panel deciding a case, the outcome of which depends on the resolution of two distinct issues; for example, a case of liability for contract breach that turns on, first, whether a valid contract existed and, second, whether the defendant breached (liability requires both). Kornhauser and Sager point out the possibility that a (different) majority of the three judges might decide that (1) a valid contract existed, and (2) that the defendant breached, but (3) that the defendant was not liable. The potential

⁶³See Sunstein, *Partial Constitution*, *supra* note ___, at 24-27; Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *Colum. L. Rev.* 1689 (1984).

⁶⁴See Sunstein, *Naked Preferences*, *supra* note ___.

⁶⁵See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *Stan. L. Rev.* 29 (1985); see generally 1988 *Yale L.J.* symposium on “The Civic Republican Tradition.”

⁶⁶See Lewis A. Kornhauser & Lawrence G. Sager, *The Many as One: Integrity and Group Choice in Paradoxical Cases*, 32 *Phil. & Pub. Aff.* 249 (2004); Christian List & Philip Pettit, *On the Many as One: A Reply to Kornhauser & Sager*, 33 *Phil. & Pub. Aff.* 377 (2005).

⁶⁷See Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 *Cal. L. Rev.* 1 (1993).

for paradoxical group choices of this kind turns out to be quite general. Groups that must deliberate over and decide not just final outcomes but also the premises or reasons supporting those outcomes may find that their collective judgments are internally inconsistent—the reasons that the group endorses (say, by majority vote after deliberation) may not support the outcome. Moreover, group judgments will almost inevitably be inconsistent with one another over time. This is true even if each member displays perfect integrity in her own decisionmaking. There are many complexities here, but the simple upshot is that government cannot be expected to display the same kind of deliberative rationality or integrity as an idealized individual decisionmaker.⁶⁸

Moral and constitutional imperatives that personified government “speak with one voice” or “act with one mind” thus may demand the impossible. But suppose it were possible for government to unify its mind and voice: Would this be desirable? Dworkin recognizes that government routinely falls far short of the ideal of integrity, but he urges us to regard this as grounds for criticism and reform.⁶⁹ The same is true of constitutional theorists like Sunstein, who, though he recognizes that it may be practically impossible for constitutional law to eliminate the routine “naked preferences” of pluralist politics, urges courts at least to affirm a symbolic commitment to reasoned, republican governance.⁷⁰ Yet it is far from obvious that political integrity or its constitutional law equivalents represent attractive, let alone approachable, ideals for a democratic government in the way that personal integrity might for a virtuous individual.

Standing in opposition to integrity is the fact, and arguably the value, of pluralism and reasonable disagreement in morality and politics.⁷¹ At a philosophical level, it is hard to see how a government could achieve integrity without embracing a single, comprehensive moral vision and thus sacrificing liberal neutrality among competing conceptions of the good.⁷² The contrast between the individual’s freedom

⁶⁸As Pettit emphasizes, it is possible in theory for a legislature to display integrity by limiting responsiveness to its members views on some issues or by enforcing unanimity. See Pettit, *supra* note __; Philip Pettit, *Groups with Minds of Their Own*. Kornhauser and Sager point out seemingly insuperable obstacles in practice and raise an additional set of theoretical problems related to the structure of moral reasoning and political representation. One might also emphasize the sacrifice of democratic values that would be entailed by suppressing some arbitrary subset of group judgments in order to maintain consistency and coherence.

⁶⁹See Dworkin, *supra* note __, at 184, 217.

⁷⁰See Sunstein, *Interest Groups*, *supra* note __.

⁷¹See Andrei Marmor, *Should We Value Legislative Integrity?*

⁷²See *id.* at 10-16. As Marmor puts it:

A political society cannot speak with one moral voice because its moral voice is essentially fragmented and, taken as a whole, profoundly incoherent. An attempt to impose coherence on it can only mean that some comprehensive doctrines will win the day while others will be suppressed. This cannot be a liberal ideal.

to choose a conception of the good and the liberal state's obligation *not* to choose creates a rather dramatic disanalogy between the values of personal and political integrity. In any case, the value of political integrity cannot be assessed in isolation from institutional context. The unprincipled compromises and inconsistencies that characterize so much of government decisionmaking go hand in hand with democratic institutions and arrangements that may well be superior to any of the realistic alternatives. The constitutional separation of powers, for example, establishes independent institutional sites of deliberation and decisionmaking, leading to conflict and compromise in policymaking, but in the service of valuable checks and balances. Political party competition requires policymaking compromises, and rotating party control of government institutions leads to inconsistency over time, but political parties also foster accountability, moderation, and stability in government. Interest group politics trade off integrity against welfare maximization, democratic responsiveness, and instrumental efficacy.⁷³ As Joseph Raz summarizes the institutional case against Dworkinian integrity, "In the politics of this imperfect world, we know that imposing one voice on the law can be achieved—if at all—only through the imposition of a regime with an inherent tendency to sacrifice justice and fairness, restrict civil rights, and curtail individual freedom."⁷⁴ The moral valences of integrity at the personal and political levels may be opposites.

D. *Transactional Harm*⁷⁵

Personal morality and common law rules governing the behavior of private actors are both built around a model of transactional harm. The paradigmatic moral and legal event is a discrete, self-contained transaction between two private individuals—a tortious injury, for example, or a contract breach. One party, the victim-plaintiff, suffers a morally or legally cognizable harm as a result of the transaction with the injurer-defendant. The magnitude of this harm is measured by the victim's reduction in welfare, relative to a baseline level of welfare set just prior to the transaction (or, alternatively, a counterfactual baseline of what her welfare level would have been had the transaction not occurred⁷⁶).

This model works well enough in the cases it was designed around: the isolated or occasional interactions of atomistic individuals whose lives are otherwise disconnected. When two strangers collide, we intuitively draw a circle around that

Id. at 15.

⁷³See Marmor.

⁷⁴See Joseph Raz, *Ethics in the Public Domain* 312 (rev. ed. 1994).

⁷⁵This section draws on Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 *Yale L.J.* 1311 (2002).

⁷⁶These competing baselines create a number of puzzles in private law theory and practice. See Perry; others in San Diego symposium on compensation.

transaction, marking it off from the rest of their lives and from the lives of others. That circle, or “frame,” determines the pre-transactional baseline and the magnitude of transactional harm. Complications arise only when the transactional harm model is applied to individuals who interact not just discretely and occasionally but intensively or relationally. In multi-dimensional or repeat-play relationships, numerous harms—and benefits—may be passed back and forth, all at once or over time. This removes any “natural” frame that would demarcate a discrete, harm-causing transaction. We are now faced with a choice between assessing net harm (minus benefits) at the level of particular interactions or, instead, keeping a ledger of harms and benefits mutually inflicted and conferred over a broader set of interactions, perhaps postponing a final reckoning of net harm for some (indeterminate) duration.

To illustrate, consider a very simple framing ambiguity that has occasionally puzzled moral philosophers: You come across a hiker trapped beneath a fallen tree who will die unless you set him free by cutting off his leg. From a consequentialist perspective, of course you should lop off the leg, bestowing a net benefit on the trapped hiker. Deontologists would surely reach the same conclusion, but their analytic path is convoluted by the question of whether injuring the hiker in order to save him would violate a deontological prohibition against doing harm. The answer might depend on whether the local harm to the leg is framed as its own transaction, or whether the relevant transaction is conceived as the overall rescue, yielding a global benefit on net.⁷⁷ A bare moral prohibition on doing harm tells us nothing about how to frame the morally relevant act.

Variations on this small-scale framing puzzle arise sporadically in common law cases. A surgeon who operates on a patient without consent and causes pain and suffering may be able to offset future pain and suffering averted by the successful operation. Contrast the case of an altruistic surgeon who volunteers to perform life-extending heart surgery on a patient who could not otherwise afford the operation and then, some years later, negligently treats the same patient with a drug that causes a heart attack. As a matter of law, clearly the surgeon will not be permitted to combine the two operations into a single transaction and offset the earlier benefit against the malpractice harm—no more than someone who saved the trapped hiker would be given blanket moral or legal permission to kill him at some point in the future. Yet it turns out to be quite difficult to explain what, exactly, distinguishes these cases. Why do we think that it is okay to combine and offset relatively proximate harms in a single transactional frame while insisting that somewhat less proximate ones be evaluated separately? What is the moral or legal relevance of (qualitative or temporal) proximity?

In practice, common law regimes can probably afford to duck these questions, leaving framing choices and their justifications obscure. Cases that create intuitively troubling ambiguity about framing are exceptional in common law

⁷⁷See Kagan, *supra* note ___, at 86-88.

contexts because most harm-producing interactions correspond to the paradigm of simple, discrete collisions between strangers. Moreover, the kind of uncompensated benefits that might be offset against localized harms are relatively scarce in common law settings. Only in situations where a harm-causing defendant has acted altruistically or generated substantial positive externalities to the benefit of the victim will the choice of transactional frame become consequential.

In constitutional law, however, the problem of framing transactions seems unavoidable. Constitutional cases, like common law ones, typically focus on whether government has inflicted a discrete, localized harm on an individual or protected group with respect to some constitutionally protected interest such as speech, property, or equality. But when government is substituted for the individual injurer in the common law model, the conceptual foundation of transactional harm dissolves into incoherence. Unlike the paradigmatic private persons in common law settings, whose lives intersect only at the point of a discrete interaction, government and citizens are inevitably engaged in a continuous, multifaceted relationship, as broad as the public sphere. Also, unlike most private relationships, the government-citizen one is rich in benefits: government, after all, is in the business of providing public goods. Because the government-citizen relationship involves innumerable harms and benefits that are passed back and forth over time, the concept of transactional harm becomes indeterminate. Constitutional law must somehow slice off discontinuous, self-contained transactions from the background government-citizen relationship in order to determine which harms and offsetting benefits make it onto the adjudicatory ledger and which fade into the background or baseline from which harm is measured. But unlike the interactions of most private individuals in common law cases, the continuous, ubiquitous government-citizen relationship offers no natural joints at which to cut.

Consider a typical takings case. A state government enacts environmental regulation forbidding the owner of beachfront property from building a house. Under existing doctrine, the property owner may well have a takings claim for just compensation.⁷⁸ But has the property owner really suffered economic harm at the hands of government? That depends on the slice of his relationship with government that we carve out. In a very narrow frame, the property owner has lost some of the value of his property. But since it is an economic loss he is complaining about, it may be relevant to observe various economic benefits he has enjoyed thanks, also, to government. The very environmental regulation that imposed the immediate economic loss may have preserved whatever value the property possesses by preventing beach erosion from submerging it. The state may have provided the roads and electricity that make the property accessible and habitable. Moving further away from the particular parcel of land at issue, the state may have provided the owner with a public education that enabled him to earn the money he used to buy the land in the first place. And of course there's a certain irony in complaining about the state's

⁷⁸See Lucas.

diminution in the market value of the property, since without the state's promulgation and enforcement of property and contract law, there would be no market and hence no market value at all. Any or all of these state-provided benefits could conceivably be bundled together and offset against the local harm inflicted by the environmental regulation. By the same token, the property owner might propose that the benefits he has passed back to government—tax payments, military service, etc.—be placed on the ledger as well. At the extreme, then, we might be driven to ask the futile question of whether the property owner is better or worse off on net as a consequences of his overall course of dealings with the state. (Compared to what? The state of nature?)

Only by reference to some transactional frame can we tell whether government has inflicted the kind of economic harm on the property owner that takings law is meant to guard against. The transactional frame we impose will determine which of the innumerable benefits and harms flowing in both directions go on the ledger and therefore whether the owner has suffered a net harm or, to the contrary, enjoyed a net benefit. When a private individual burns down a property owner's house, the boundaries of the relevant transaction and the extent of transactional harm are self-evident. When the state is substituted for the private arsonist, however, the transactional frame seems entirely up for grabs, and the existence of constitutional harm therefore seems entirely indeterminate.

The problem of framing constitutional transactions is in no way unique to takings. Consider an example from equal protection jurisprudence. The constitutionality of race-based affirmative action and school desegregation programs on a "remedial" theory depends largely on the extent to which courts are willing to offset the benefits of these programs to racial minority groups against past race discrimination suffered by these same groups. If courts were willing to take account of the entire history of race discrimination in this country, from slavery through Jim Crow and beyond, then pretty much any government benefit to African Americans could be construed as compensatory. But of course courts are not willing to go that far, so they look for ways to exclude most past discrimination from the transactional frame. Affirmative action programs switch the usual valence of benefits and burdens, but otherwise raise just the same framing indeterminacies as plain race discrimination. An explicit police policy of aggressive police searches and arrests in minority neighborhoods would surely violate equal protection. But suppose there were definitive proof that the policy dramatically reduced crime and was beneficial on net to black residents of the community? It is easy enough to predict that courts would balk at expanding the transactional frame to allow the racially-assigned benefits of such a program to offset the racially-assigned harms—but not at all easy to explain why.

Similar framing puzzles arise in virtually every area of constitutional law.⁷⁹ In assessing whether abortion restrictions impose a selective and unequal burden on

⁷⁹See Levinson, *supra* note ___, at 1338-71.

women by conscripting their bodies to save the (potential) life of another, should that burden be packaged with and offset against the government's conscription of men for military service? Should these gender-selective burdens count as two separate equal protection violations or be combined into a single, gender-neutral transaction? Should the government have broad latitude under the First Amendment to regulate the political donations and expenditures of corporations because government itself contributed to the wealth and concomitant speech capacity of corporations by creating the corporate form with its benefits of limited shareholder liability and the like?⁸⁰ If so, should government also be able to regulate the content of newspapers on the ground that newspapers would not exist but for government-provided and government-enforced property rights? Under the religion clauses, does government violate religious neutrality when it provides funding to parochial schools, or is this a small step toward neutral treatment of religious education given government's massive support of secular public schools? In every unconstitutional conditions case, the question arises whether the "penalty" on the constitutional right is to be considered in isolation or merged with, and offset by, the discretionary benefit.

In these and other areas, transactional frames can easily be manipulated to portray government as harming, helping, or acting neutrally. Constitutional cases and theoretical debates are routinely resolved by implicit or off-stage choices about the size, shape, and location of transactional frames that are never discussed or justified. In fact, it is hard to see how these choices could be justified. Developed around the discrete interactions of private individuals, the moral and common law model of transactional harm lacks the conceptual resources to offer any guidance in carving out constitutional transactions from the very different relationship between government and citizens. If constitutional rules and rights aimed at protecting citizens against localized harms by government can be justified at all, the justification will have to come from outside of the analogy to discrete interactions between private persons.

E. *Corrective Justice and Redistribution*

The common law model of transactional harm is morally grounded in principles of corrective justice. Built into the model's understanding of harm is a claim by victims to the preservation or rectification of their status quo position against wrongful alterations by injurers. The moral force of this claim would seem to depend on the legitimacy of status quo positions. But this creates a puzzle for corrective justice theorists of private law. The most obvious basis for assessing the legitimacy of baseline distributions of entitlements is a theory of distributive justice, but if the only role for corrective justice is to maintain a distributively just pattern of entitlements, then corrective justice is subsumed by distributive justice and ceases to serve as a free-standing moral commitment. If corrective justice is placed entirely in

⁸⁰Compare *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), with *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

the service of distributive justice, moreover, it will offer little support for the actual structure of common law rules. In the real world, where prevailing patterns of entitlement deviate from any first-best theory of distributive justice, holders of distributively unjust entitlements would have no claim in corrective justice against injurers. Yet common law rules protect just and unjust holdings alike. A scurrilous tycoon who made his millions on the backs of exploited workers is nonetheless entitled to collect in tort when one of these workers accidentally dents his limousine. Furthermore, the common law is only concerned with transactional harms resulting from human agency, and in many contexts only human fault. Yet if the goal of corrective justice were simply to maintain a distributively just pattern of entitlements, there is no obvious reason why departures from that pattern brought about by faultless accidents, illness, and the like would not also trigger a demand for rectification.⁸¹

So, if corrective justice is to count as a free-standing moral principle or to serve as the underlying normative basis for private law, it must be understood as at least partly autonomous from distributive justice. The legitimacy of existing positions must be justified on grounds other than perfect correspondence to the distributively just pattern. The intuitively attractive solution offered by corrective justice theorists is to grant prevailing patterns of entitlement presumptive legitimacy against interference by private actors based on systemic values such as social stability and the welfare benefits of property rights and markets.⁸² Even if no particular individual entitlement can be deemed distributively just, at least so long as the overall distribution is not radically unjust, these systemic values may be sufficient to protect existing holdings against private infringements. In this view, corrective justice is ancillary to distributive justice, but the relationship is only indirect. Corrective justice holds existing distributions relatively constant while government works systematically in the background to move existing holdings closer to the distributive ideal. Thus, the distributive injustice as between the poor exploited worker and the tycoon is to be addressed not by allowing the worker to redistribute a bit of the tycoon's wealth (by "taking" a chunk of his limousine) but by imposing background rules of taxation and redistribution that over time will work to ameliorate this inequality.⁸³ This arrangement preserves a distinctive set of values said to be served by corrective justice in regulating the behavior of individuals in their personal dealings with one another, preventing these values from being

⁸¹See Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in *Oxford Essays in Jurisprudence*, Fourth Series 237 (Jeremy Horder ed. 2000).

⁸²Perry; Coleman, *Risks and Wrongs* 350-54 (1992). See also Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 *J. Legal Stud.* 797 (2000).

⁸³See Perry at 261.

subsumed into the social and systemic values furthered by distributive justice.⁸⁴

Thus, corrective justice may be understood as “personal or individual justice,” as distinct from distributive justice, conceived as “social justice,” applying not to individuals but to the state.⁸⁵ And conversely, for the division of labor justification to make sense, government cannot be subject to the same corrective justice constraints as private actors. Corrective justice legitimates the tycoon’s existing position, and sets it up as a baseline for establishing transactional harm, only vis-a-vis private redistributions. That baseline has no normative force against redistributions by government.⁸⁶ In contrast to the exploited worker, government is permitted, indeed obligated, to redistribute the tycoon’s wealth. On this understanding, the tycoon obviously cannot be permitted to complain that government redistribution inflicts the same kind of transactional harm as the dent to his limousine and demand rectification. That would make redistribution, and therefore distributive justice (at least on many theories of distributive justice), impossible to achieve.

Assimilating government to a private person, constitutional law has failed to appreciate their distinctive roles with respect to redistribution. Constitutional violations are routinely conceived in common law, corrective justice terms of government-inflicted harms, where harm is understood simply as a downward departure from the victim’s status quo position with respect to the relevant constitutional entitlement. Likewise, constitutional law often defines government “neutrality” simply as preserving some status quo distribution. Thus, government can claim constitutional neutrality and avoid inflicting constitutionally cognizable harms simply by not interfering with prevailing patterns of distributive inequality with respect to wealth, political speech, race, or gender. Constitutional issues arise only when government attempts to redistribute in these areas. Wealth redistributions are limited by the takings and contracts clauses (and once were more widely forbidden by a sweeping economic liberty right); most redistributions of expressive opportunities violate free speech; and racial redistribution (i.e., affirmative action) is strictly limited by equal protection.⁸⁷

Critics from the Legal Realists onward have excoriated constitutional law’s

⁸⁴Not entirely clear what these distinctive values are. See Perry (“autonomy” and “outcome-responsibility”); Benson (Hegelian will); Weinrib (“the free purposiveness of self-determining activity”).

⁸⁵Perry at 238-39; see also Dworkin, LE, *supra* note __, at 310; cf. Christopher Kutz, *Justice in Reparations: The Cost of Memory and the Value of Talk*, 32 *Phil. & Pub. Aff.* 277, 299-300 (2004).

⁸⁶See Coleman, *supra* note __, at 352. Coleman explains that, while present holdings are presumptively protected against infringements by private actors, they are not protected against “infringement by state action designed to replace them with the set of entitlements which could be defended as required by the best theory of distributive justice.” *Id.*

⁸⁷Sunstein, *Partial Constitution*.

strong presumption in favor of status quo distributions, and for good reason.⁸⁸ It is one thing for private law to take existing distributions as given, bracketing the question of their normativity and simply using them as an exogenous baseline for assessing the micro-redistributions of private actors. But it is hard to see how public law can justifiably take the same approach. One crucial difference, emphasized by the Realists and their successors, is that existing distributions cannot be understood as exogenous to government in the same way as they might be with respect to private actors. Because existing distribution of entitlements depends pervasively on legal rules and institutions (including common law rules and market allocations), and because government is capable of altering these distributions systematically at any point, it makes sense to charge government with responsibility for existing distributions. This leaves no neutral ground on which government can stand with respect to status quo holdings. Government is so deeply implicated in existing patterns of racial inequality, for example—both through its active role in supporting slavery and Jim Crow segregation and its passive tolerance of discrimination and disadvantage—that it cannot plausibly claim a posture of neutrality toward them. The same is true of existing distributions of wealth, speech opportunities, and the like. We might say that government “owns” these distributions in a way that private actors do not.

The division of labor understanding of corrective and distributive justice complements this critique. If government is expected and obligated to redistribute in pursuit of distributive justice, then it obviously cannot be held to the same status quo baseline-relative regime of corrective justice that governs private actors. Yet when constitutional rights are conceptualized on the common law model of transactional harm, this is just what they demand. In many areas of constitutional law, government is understood to inflict harm or to depart from neutrality when it engages in redistribution that leaves some individual or group worse off than they were before. And this is true even when the purpose of the redistribution is to further some plausible conception of distributive justice. When government redistributes the wealth of a rich property owner for purposes of environmental protection, or levels the political influence of rich and powerful donors through campaign finance reform, constitutional law is quick to perceive an infringement of baseline-dependent rights. This is not only misguided but self-defeating, since the normative space for the kind of transactional justice that is being enforced is created only by the assurance that the justice of existing distributions is being attended to elsewhere in the legal and political system. If government is required to adopt the same agnosticism toward existing distributions as private actors, there is no elsewhere.

Critics have long lamented constitutional law’s inattention to systemic distributive injustice with respect to race, gender, speech, and wealth.⁸⁹ But it is

⁸⁸See Barbara Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (1998); Seidman & Tushnet, *supra* note __; Sunstein, *supra* note __.

⁸⁹See, respectively, e.g., Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *Phil. & Pub. Aff.* 107 (1976); Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security,*

important to appreciate how deeply this inattention is embedded in the structure of constitutional thought. Constitutional law has unreflectively imported a common law conception of transactional justice that makes sense only as applied to private individuals, and only then on the assumption that government will held to entirely different standards. From this peculiar point of view, government is at once personified and disappeared.

III. POLITICAL AND CONSTITUTIONAL JUSTICE

Up to now, the suggestion has been that moral and legal frameworks designed around individuals do not translate easily to government. This Part begins by noticing that the reverse is also true. Normative frameworks developed by theorists of political justice specially for government generate a distinctive focus and set of principles that do not necessarily translate to private persons. Indeed, the normative perspective of political justice is distinctly *impersonal*, systemic in focus and consequentialist in orientation. In contrast to personal and constitutional morality, impersonal justice lacks the conceptual resources to assess discrete government acts or harms inflicted on individual citizens, all of which get absorbed into holistic analysis of the institutional structure of society and its overall consequences. This leads to the question of whether transactional constitutional morality can be preserved alongside impersonal political justice in some sort of intra-governmental division of moral labor. Concerns about the internal tensions and instabilities of such a division exacerbate the concerns raised in the previous Part about whether a personified moral perspective can be sensibly applied to government at all.

A. *A Division of Moral Labor: Personal and Political*

Political philosophers have long recognized special principles of political morality, or justice, that apply to the state but not to the behavior of individuals within the state. The apotheosis of this tradition is John Rawls, who emphasizes that his two principles of justice were “never proposed as a basis for [individual] morality” and cautions that they would give “unreasonable directives” as applied to individuals and private institutions.⁹⁰

Rawls’s sharp distinction between principles of individual morality and principles of political justice has triggered a meta-ethical debate about how deep the distinction can cut. There is disagreement about whether the normative principles governing personal and political life must evolve from a common set of fundamental first-principles or whether, instead, they should be understood as different all the way down.⁹¹ For Rawls, the distinctive moral character of the state meant that the

and Stone, Seidman, Sunstein & Tushnet’s *Constitutional Law*, 89 *Colum. L. Rev.* 264 (1989); Cass R. Sunstein, *Democracy and the Problem of Free Speech* 108-10 (1993); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 *Harv. L. Rev.* 7 (1969).

⁹⁰Rawls, *Political Liberalism* 261.

⁹¹See Nagel, *Ruthlessness*, *supra* note __, at 78-79; G. A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 *Phil. & Pub. Aff.* 3 (1997); Liam B. Murphy, *Institutions and the Demands of Justice*, 27 *Phil. & Pub. Aff.* 251 (1999); Thomas W. Pogge, *On the Site of Distributive*

normative standards of justice could not be derived from the same principles that govern other kinds of moral actors. Opposed to this deep moral “dualism” is the “monist” view that “any plausible overall political/moral view must, at the fundamental level, evaluate the justice of institutions with normative principles that apply also to people’s choices.”⁹² This view reflects the recognition that government is merely one of a number of means that people might use to accomplish their collective moral goals.⁹³

For present purposes, there is no need to take sides in this debate. Monists and dualists can agree that government and individuals have very different moral obligations, bracketing whether these differences are understood to reflect fundamentally distinct moralities or merely different roles in a social system designed to best achieve a single set of moral goals.⁹⁴ Utilitarianism, for example, has been offered as, and is commonly understood to be, a comprehensive moral principle that applies “equally to all social forms and to the actions of individuals.”⁹⁵ For classical utilitarians like Bentham and Austin (and their contemporary “government house” successors), however, applying utilitarian principles systematically to the social structure yields an arrangement in which the utilitarian calculus directly guides only government decisionmaking about broad matters of public policy, not personal decisionmaking in day-to-day life.⁹⁶ The utility-maximizing obligations of private individuals, in this view, might be hard to distinguish, at a distance, from the familiar demands of deontologically-inflected commonsense morality.⁹⁷ This is a monist approach that nonetheless yields quite different principles of political justice and personal morality.

What does matter for present purposes is the Rawlsian premise that government should be held to substantively (if not deeply qualitatively) different moral standards than those governing the behavior of private individuals. The need for some such “division of moral labor” between government and private individuals has attracted agreement among a number of moral and political philosophers.⁹⁸

Justice: Reflections on Cohen and Murphy, 29 *Phil. & Pub. Aff.* 137 (2000).

⁹²Murphy at 253.

⁹³*Id.*

⁹⁴See *id.* at 254, 263, 280; Liam Murphy & Thomas Nagel, *The Myth of Ownership* 71 (2002).

⁹⁵Rawls, *Political Liberalism* at 260.

⁹⁶See Robert E. Goodin, *Utilitarianism as a Public Philosophy* 60-77 (1995).

⁹⁷*Id.*

⁹⁸See Rawls, *Political Liberalism*, *supra* note __, at 268; Thomas Nagel, *Equality and Partiality* 53-62 (1991); Murphy, *supra* note __, at 257-64. Not everyone agrees on even a “shallow” division of moral labor. See Robert Nozick, *Anarchy, State, and Utopia* 204-10 (1974).

While the precise lines of division and the content of the principles of justice and morality on either side will of course vary with the particular theory on offer, a range of influential approaches—including utilitarian and Rawlsian theories, which will serve as exemplary—suggest two general features of political justice that distinguish it from personal morality.

The first might be termed *systemacity*. Rawlsian and utilitarian theories of justice, among others, apply their respective criteria of moral assessment to the basic institutions or background structure of society as a whole.⁹⁹ Neither the Rawlsian principles of justice nor the optimal set of rule utilitarian social arrangements can be used to evaluate the justice of any particular assignment of benefits or burdens. The macro-level focus of justice is in stark contrast to personal morality's micro-level concern with discrete interactions and incremental movements from the status quo.¹⁰⁰

Theories of distributive justice tend to lack resolving power on this micro-level of individual harms or entitlements. Because the justice of any individual position or change in position depends entirely on the overall distribution of benefits and burdens, normative assessment must take place wholesale rather than retail. Furthermore, because most theories of justice incorporate some measure of what Rawls calls “pure procedural justice,” setting out fair rules of the game rather than specifying particular winners and losers, a broad range of distributive patterns at any given time might qualify as just. On this approach, it is impossible to tell anything about justice just by looking at small-scale patterns of holdings in freeze-frame. Thus, there is no sense, from a Rawlsian or systemic utilitarian perspective, in asking about the justice of the wealth, status, or treatment of any individual in isolation.¹⁰¹ The answer will always depend on the justice of the overall social system in which the individual is embedded.

Principles of justice that make sense as applied systemically to the background structure of society do not translate straightforwardly into individual-level moral obligations. Indeed, the central insight of the moral division of labor is that overall justice may be better served if individuals act on entirely different principles in their economic and social interactions, taking account of justice only as it bears on their political obligations to support and contribute to a just background structure. So, again, Rawls advocates “an institutional division of labor between the basic structure,” governed by the principles of justice, “and the rules applying directly to individuals and associations and to be followed by them in particular

⁹⁹See Samuel Scheffler, *Boundaries and Allegiances* 149-72 (2001); Perry, *supra* note ___, at 260-61.

¹⁰⁰Nozick, *ASU* at 204-13.

¹⁰¹See Rawls, *Justice as Fairness* at 50-51 (“Observe that particular distributions cannot be judged at all apart from the claims (entitlements) of individuals earned by their efforts within the fair system of cooperation from which those distributions result.”).

transactions,” which do not directly reflect these principles.¹⁰² This arrangement would leave individuals and associations “free to advance their ends more effectively within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made.”¹⁰³ In particular, it would leave individuals free to maximize their own wealth and welfare in markets and other social institutions, delegating moral concerns about redistribution up to the systemic level of the basic structure. Thomas Nagel proposes a similar “moral division of labor” with respect to egalitarian distributive justice.¹⁰⁴ Nagel’s motivation, like Rawls’s, is to allow individuals to compartmentalize their concerns about the welfare of others into their support for just background institutions that do the redistributive work. These background institutions are meant to remove the weight of distributive justice from the shoulders of individuals in their day-to-day lives, limiting their burden to a much less intrusive set of mostly negative duties.¹⁰⁵ Along the same lines, the legal rules governing a well-designed Benthamite society would reflect utilitarian calculations, but these rules would almost certainly not require that individuals routinely make such calculations for themselves.¹⁰⁶

The second feature that distinguishes political justice from personal morality is, logically enough, its *impersonality*, or broadly consequentialist perspective. As the discussion in Part II emphasized, the non-consequentialist, deontological component of personal ethics depends on agent-relative concerns related to the autonomy of individuals in structuring their own lives and pursuing their own projects, the special obligations they have to others, and the permissibly limited perspectives they may take on their responsibility to the rest of the world.¹⁰⁷ All of these special features of personal morality are grounded in a rich conception of personal identity; it is hard to see how they could take root in the abstraction of

¹⁰²Political Liberalism at 268-69.

¹⁰³Id. at 269.

¹⁰⁴Equality and Partiality at 53.

¹⁰⁵See Murphy at 258.

¹⁰⁶See Goodin.

¹⁰⁷Nagel explains:

The action-centered aspects of morality include bars against treating others in certain ways which violate their rights, as well as the space allotted to each person for a life of his own, without the perpetual need to contribute to the general good in everything he does. Such provisions are described as action-centered because, while they apply to everyone, what they require of each person depends on his particular standpoint rather than on the impersonal consequentialist standpoint that surveys the best overall state of affairs and prescribes for each person whatever he can do to contribute to it.

Mortal Questions at 83.

government. Lacking a personal life or identity of its own, government seems to invite assessment based on impersonal rather than agent-centered standards.¹⁰⁸

Thus we find that most theories of political justice take a predominantly consequentialist perspective. This is obviously true of utilitarian theories. Perhaps less obviously, it is also true of Rawlsian justice in at least one important sense. While the structure of the original position is clearly motivated by non-consequentialist, Kantian concerns,¹⁰⁹ the parties in Rawls's original position care only about consequences, or states of affairs. Although the states of affairs they hope to bring about are different from those defined by maximization of utility, Rawls might be understood as following Bentham in assessing the justice of the basic institutional structure solely in terms of the outcomes likely to be generated under various institutional arrangements.¹¹⁰

Just as the systematicity of political justice does not translate to the individual level, the background consequentialism of a politically just society does not necessarily spill over into the day-to-day moral lives of the individuals living in that society. Thus, government house utilitarians stress that rule utilitarianism at the social level is perfectly consistent with something like commonsense, deontologically-inflected morality at the personal level. Quarantining the utilitarian calculus by permitting it to serve only as a guide to public policymaking allows utilitarians to avoid many of the deontological challenges directed against utilitarianism as a standard of personal conduct.¹¹¹ At the personal level, utilitarianism looks to be at once overly demanding, in requiring us to treat strangers with the same regard as relatives or to spend ourselves down to poverty providing aid to starving people in other parts of the world, and not demanding enough, in permitting (or requiring) us to kill innocents in order to save a greater number. These difficulties can be avoided, however, if the impersonal demands of utility maximization are limited to government policymaking, leaving individuals free to act in their usual self-regarding and rule-bound ways.¹¹² Along the same lines, individual members of a Rawlsian society need not worry about the difference principle in their everyday lives. Relegating principles of justice to the background structure permits society to achieve its consequentialist goals while leaving personal behavior to be guided by a less invasive and more rule-like set of norms that are not overtly attentive to these goals. Rawls's theory of justice thus might be understood as a form of "indirect consequentialism," in that its "broadly consequentialist

¹⁰⁸Id. at 83-86. Nagel cautions that agent- and action-centered constraints will not disappear entirely.

¹⁰⁹See TJ at 226.

¹¹⁰See Pogge, *Realizing Rawls* at 36-47.

¹¹¹Note other problems that are raised by this approach.

¹¹²See Goodin at 65-77.

justification of the ground rules does not corrupt the strictly deontological status these ground rules are to have” for the individuals who live under them.¹¹³

The systemacity and impersonality of political justice are in stark contrast to the transactional focus and deontological emphasis of personal morality. By now it will be apparent that many of the problems arising from constitutional law’s attempt to assimilate government into the framework of personal morality are symptomatic of being on the wrong side of this contrast. The difficulty of drawing and justifying deontological distinctions between government acts and omissions and between intentional and merely foreseeable government-inflicted harm invites the substitution of an impersonal consequentialism that obviates such distinctions. The conceptual difficulties with assessing the harmful effects of particular government actions, attributing purposes to them, or requiring a relationship of integrity between reasons and actions all are avoidable by shifting the level of analysis from particular acts to systemic outcomes. And it is the systemic nature of government’s effects on society that swamps the common law framework of transactional harm and the corrective justice intuitions that provide its underlying normativity. The structure of political justice is designed to fit government along just those dimensions that personal morality most conspicuously does not.

The reverse is also true: The very features that make principles of political justice particularly suitable for government also seem to make these principles particularly *unsuitable* as a basis for constitutional law. A consequentialist perspective on the (in)justice of government action points toward analysis of government rules and decisions in terms of the effects they are likely to produce. At the same time, a systemic perspective suggests that we should be looking at the effects not of any single or small set of decisions or actions by government but of a broad enough swath to encompass something like the basic institutional structure of the public sphere. Taken together, these two features suggest that assessments of justice should be directed at broad and persisting social conditions resulting from the effects of government institutions and arrangements in the aggregate. From this perspective, it is hard to see how anything like a discrete violation of an individual constitutional right could be conceptualized. In Rawlsian terms, justice and injustice will be a matter of the basic structure as a whole, and whether it provides for an adequate scheme of equal basic liberties, fair equality of opportunity, and inequalities only as permitted by the difference principle. No single government law or policy, even one that would count as the most egregious violation of a constitutional right will have significant enough systemic effects to count as just or unjust in its own right.

The misfit between political justice and constitutional morality has been apparent to Rawls and other philosophers of justice. Thus, Rawls distinguishes between the full requirements of political justice and a less ambitious set of “constitutional essentials,” which includes the basic structural features of

¹¹³Pogge at 42.

government and the political process and the “equal basic rights and liberties of citizenship that legislative majorities are to respect,” such as voting rights, freedom of political speech, and liberties of thought, association, and conscience.¹¹⁴ This familiar list of constitutional principles is limited to traditional, negative rights, leaving out altogether the distributional requirements of fair equality of opportunity and the difference principle.¹¹⁵ Likewise, Nagel suggests that the aims of constitutional law must be much more limited than the full demands of justice.¹¹⁶ Like Rawls, he contrasts rights of freedom of speech and religion, voting, and anti-discrimination with “the bases of broader economic and social equality,” which “cannot be put beyond the reach of political bargaining and economic motives.”¹¹⁷

Constitutional theorists, too, have appreciated that constitutional law will inevitably fall far short of any plausible conception of political justice. For example, Lawrence Sager, who offers a “justice-seeking” account of American constitutional practice, devotes most of his efforts to accounting for the “durable moral shortfall” of constitutional law, which almost entirely ignores such central concerns of justice as entrenched economic and racial inequality, confining itself to the enforcement of a small set of negative rights.¹¹⁸ Sager attributes the gap in large part to the institutional limitations of courts. Perhaps judges would be competent at formulating and enforcing basic welfare rights,¹¹⁹ but certainly we should not hand them responsibility for achieving full socioeconomic justice. The same is arguably true of broad distributive equality with respect to race and gender, educational opportunity, political influence, and the like.¹²⁰

Perhaps, then, we should think of constitutional norms as extending some distance beyond the boundaries of judicial enforcement, encompassing a somewhat

¹¹⁴Political Liberalism at 227-30.

¹¹⁵Rawls makes an exception for political participation rights. PL at 327.

¹¹⁶Equality and Partiality at 87-89.

¹¹⁷Id. at 89.

¹¹⁸Lawrence G. Sager, *Justice in Plainclothes* 78-81 (2004).

¹¹⁹Sager; Michelman; Rawls; see also Sunstein, *Designing Democracy* chptr. 10.

¹²⁰To be sure, some constitutional lawyers and theorists (and judges) have taken a more optimistic view of judicial competence in these areas. Perhaps the high water mark was the initial enthusiasm among a segment of legal academia for structural reform litigation in the 1970s. See, e.g., Owen M. Fiss, Foreword: The Forms of Justice, 93 *Harv. L. Rev.* 1 (1978). Fiss’s description of the judicial role in structural reform cases resonates with the systematicity of constitutional justice: “[T]he focus of structural reform is not upon particular incidents or transactions, but rather upon the conditions of social life and the role that large-scale organizations play in determining those conditions.” *Id.* at 18.

greater measure of justice.¹²¹ But even once constitutional norms are fully extended beyond the institutional limits of judicial enforceability, Sager still sees a significant shortfall between “constitutional justice” and full political justice. For instance, egalitarian principles of economic justice, are for Sager a crucial component of political justice that cannot be understood as a constitutional norm at all, not even as a judicially underenforced one.¹²² Rawls takes a similar view. His insistence on the limited domain of constitutional law does not depend on the limitations of judicial review (which he does not seem to regard as a necessary institutional feature of a just society), but on a set of criteria for what kind of principles are appropriately established at the constitutional stage.¹²³ These criteria seem generally similar to the reasons Sager offers for truncating constitutional justice. Both Rawls and Sager stress the importance of generating consensus in the political community on the relatively specific content of constitutional norms.¹²⁴ Both also share the view that constitutional norms should be “transparent, categorical, and non-negotiable against competing social goods,”¹²⁵ or “durable, spare, and capable of reasonably clear application and judgment.”¹²⁶

Sager and Rawls capture a widely-shared, if somewhat inchoate, sense that political justice could be converted into constitutional law only at the expense of what we conventionally recognize to be constitutional law’s defining features.¹²⁷

¹²¹See Sager, *supra* note ___, at 84-92.

¹²²See *id.* at 129-60.

¹²³See Frank I. Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment*, 72 *Fordham L. Rev.* 1407 (2004).

¹²⁴See also Nagel, *Equality and Partiality* at 88 (arguing that the limited aims of constitutional norms facilitates the kind of consensus that is necessary for stability).

¹²⁵See Lawrence G. Sager, *The Why of Constitutional Essentials*, 72 *Fordham L. Rev.* 1421, 1430 (1994) (explicating and embracing Rawls’s view). Rawls’s own explanation for limiting the constitutional essentials is brief and sketchy:

Whether the constitutional essentials covering the basic freedoms are satisfied is more or less visible on the face of constitutional arrangements and how these can be seen to work in practice. But whether the aims of the principles covering social and economic inequalities are realized is far more difficult to ascertain. These matters are nearly always open to wide differences of reasonable opinion; they rest on complicated inferences and intuitive judgments that require us to assess complex social and economic information about topics poorly understood. Thus, ... we can expect more agreement about whether the principles for the basic rights and liberties are realized than about whether the principles for social and economic justice are realized. This is not a difference about what are the correct principles but simply a difference in the difficulty of seeing whether the principles are achieved.

Political Liberalism at 229-30.

¹²⁶Sager, *Justice in Plainclothes* at 139.

¹²⁷Now, exactly why constitutional principles are subject to these special, more stringent requirements is not entirely clear. Sager says that our “robust commitment to democratic rule” limits

Most important among these, perhaps, is normative resolving power at the level of discrete government laws, decisions, or actions, and also at the level of defining and protecting something resembling individual rights. Systemic conceptions of political justice simply lack the conceptual resources to operate at these levels. While it may be possible to imagine some legalistic arrangement designed to police broad social conditions for compliance with principles of Rawlsian justice, such an enterprise would look very different from constitutional law as we presently conceive it.¹²⁸ The distinctive perspective of impersonal distributive justice that makes it a good fit for government makes it a bad fit for the personalized moral structure of constitutional law.

B. *A Different Division: Transactions and Distributions*

Constitutional law is concerned not with the systemic effects of social institutions but with the morality of localized government conduct. This normative perspective has been deemphasized in political philosophy, but it has not gone entirely missing. In stark contrast to systemic and impersonal theories of distributive justice, libertarian theorists follow personal and constitutional morality in focusing normative assessment on discrete transactions between individuals and the state and in their deontological commitment to protecting moralized individual rights against active and intentional violations by government.¹²⁹ As Samuel Scheffler puts it, “The libertarian gives priority to the values and principles that regulate small-scale interactions among individuals, and treats the larger-scale values of social justice and equality as valid only insofar as they can be construed as applications of values and norms that are at home in the context of one-on-one personal interactions.”¹³⁰

Concern with transactional, agent-centered political morality is not limited to libertarians, however. While liberal egalitarian theorists of distributive justice resist

the reach of constitutional justice, but he does not explain why democratic principles do not limit political justice as well. See *id.* at 139-40. Sager also asserts that constitutional principles must take a clear, rule-like form in order to serve “as the durable conscience of democratic politics,” without explaining why this is not a role for political justice. See *id.* at 143, 140-43.

¹²⁸One such possibility is Mark Tushnet’s popular constitutionalist strategy of “thinning” the constitution by reducing (or elevating) it to a handful of “unassailable moral truths” recognized in the Declaration of Independence and the Preamble of the U.S. Constitution in order to make constitutional principles accessible to and enforceable by the public through politics. This proposal comes close to erasing any distinction between constitutional law and justice. Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

¹²⁹See Pogge, *Realizing Rawls* at 45-47.

¹³⁰Egalitarian Liberalism as Moral Pluralism, *Supp. Vol. 78 Proceedings of the Aristotelian Society* 229 (2005). As Scheffler also recognizes, monists like Murphy and Cohen might be understood as sharing the libertarian impulse to bring together personal morality and political justice, but coming from the opposite direction: They want the obligations of distributive justice to play a greater role in personal morality.

the libertarian position when it comes to property and wealth, in other contexts they are happy to embrace the libertarian architecture of transactional morality. Thus, the distinction between distributive justice and transactional morality divides Rawls's two principles of justice. The second principle is distributive, requiring fair equality of opportunity to attain positions of status and power in society and the distribution of economic resources to the greatest benefit of the least well-off.¹³¹ But the first principle is cast in very different terms: It creates infeasible individual claims to a scheme of basic liberties, comprising such traditional liberal rights as voting and political participation, freedom of speech and assembly, and religious liberty.¹³² These liberties form the core of Rawls's "constitutional essentials," a category that definitively does not include the distributive imperatives of the second principle. Rawls makes clear that the basic liberties and constitutional essentials are to be conceived in the traditional form of individual rights that serve as trumps or side-constraints on both maximizing social welfare and pursuing distributive justice according to the second principle. And Rawls casts most of these liberties as strictly negative rights, not affirmative claims on the social and economic resources that might be necessary to realize their "equal worth" or "fair value."¹³³

Rawls's distinction between distributive justice in the economic sphere and transactional morality as applied to non-economic rights and liberties seems to be widely shared among liberal theorists. Nagel rejects the "rights-based, deontological political morality"¹³⁴ of libertarianism in favor of a consequentialist, egalitarian, impersonal vision of distributive justice. He recognizes that a non-libertarian approach to distributive justice is distinctly unsuitable for reduction to "specific and fairly well-defined rights" of the sort that might be constitutionalized, and he contrasts the traditional liberal rights to freedom of speech and religion, due process, voting, and nondiscrimination, which "can be hard-wired into a democratic political system and enforced by an independent judiciary."¹³⁵ Like Rawls, Nagel sees these rights as reflecting an act- and agent-centered sphere of deontological political morality, similar in structure to both personal morality and libertarian property rights but protecting different substantive interests.¹³⁶ Dworkin, too places distributive

¹³¹Justice as Fairness at 42-43.

¹³²Id. at 42, 44.

¹³³See Justice as Fairness at 150-52. The significant exceptions are political participation rights, which Rawls says must be guaranteed their fair value, and a right to a "social minimum providing for the basic needs of all citizens," which Rawls includes among the constitutional essentials. See id. at 148-50, 47-48.

¹³⁴Murphy & Nagel, *supra* note ___, at 65.

¹³⁵Equality and Partiality at 89.

¹³⁶See Ruthlessness at 87-89. A further difference from personal morality, on all liberal visions of political justice and morality, is that government retains special obligation of neutrality or

justice on a different philosophical track from other issues of political morality. He develops an elaborate conception of equality of resources, relying on special heuristics of allocation auctions and insurance markets, that stands separate from moral assessment of whether government is treating its citizens with equal concern along other dimensions or adequately respecting their rights and liberties.¹³⁷ Dworkin makes clear, for example, that civil liberties and political equality cannot be addressed within the equality of resources framework, and his discussions of specific constitutional issues suggest an approach that closely resembles the conventional transactional morality of constitutional law.¹³⁸

Here, then, is a second division of moral labor. Like the division between personal morality and political justice, it distinguishes two normative perspectives, one focused on the discrete actions of agents and emphasizing localized harms to well-defined individual interests, negative responsibility, and intentionality; the other focused on systemic institutional arrangements and the states of affair these arrangements produce. The suggestion is that instead of dividing these perspectives between the personal and the political we might draw this division within the political, distinguishing distributive and transactional components of (or between) political justice and morality. Rather than drawing a meta-ethical line between government and private individuals, that is, we might draw a line that runs *through* government.¹³⁹

An intra-governmental division of moral labor holds out the hope of accommodating a robust conception of transactional morality—of the sort exemplified by much of constitutional law, following personal morality—within an overarching approach to political justice that is simultaneously, and perhaps predominantly, concerned with the systemic consequences of the basic institutional structure of society. This is no small trick. Neither political philosophers nor

equality of concern among citizens.

¹³⁷Dworkin does endeavor to connect equality of material resources to other dimensions of equality and other values. Indeed, that is the point of his larger project. See *Sovereign Virtue*, supra note __, at 4.

¹³⁸See Ronald Dworkin, *Sovereign Virtue* 138-47 (liberty), 209-10 (political equality), and passim (2000); see also Don Herzog, *How to Think About Equality*, 100 *Mich. L. Rev.* 1621, 1631 (2002).

¹³⁹Rawls explains this second division of moral labor, corresponding to the division between his two principles of justice, as follows:

The basis for the distinction between the two principles is not that the first expresses political values while the second does not. Both principles express political values. Rather, we see the basic structure of society as having two coordinate roles, the first principle applying to one, the second principle to the other. In one role the basic structure specifies and secures citizens' equal basic liberties ... and establishes a just constitutional regime. In the other role it provides the background institutions of social and economic justice

Justice as Fairness at 48.

constitutional theorists seem to have fully confronted the difficulty of combining political justice and transactional morality into a single normative framework.

Consider Rawls's attempt to combine property rights with an aggressive theory of egalitarian distributive justice. Rawls includes among the basic liberties in his first principle of justice a "right to hold and to have the exclusive use of personal property."¹⁴⁰ But it is entirely unclear what kind of property rights are supposed to be given lexical priority over the redistributive demands of the difference principle.¹⁴¹ If government is required to tax and transfer wealth in order to improve the position of the worst-off group, then it is hard to see how the holdings of property owners could be given meaningful protection against transactional appropriation. Rawls says that property rights would extend at least to "real property, such as dwellings and grounds."¹⁴² Suppose that government confiscates the vast estate of a robber baron in order to build low-income housing for the poor. Is this transaction blocked by the robber baron's property rights? Even if it is far and away the best available strategy for moving toward satisfaction of the difference principle?

Constitutional protection of property rights invites the same kinds of questions. Most dramatically, during the New Deal, the Court was confronted with an apparent conflict between efforts by government to regulate and redistribute for the benefit of the worst-off and a longstanding constitutional commitment to economic liberty rights that stood in the way. Strong property rights ultimately gave way to redistribution in that context, but the Takings Clause continues to block certain forms of progressive redistribution, protecting the aforementioned robber baron (along with all other owners of real property) against expropriation. While constitutional law has never recognized or enforced distributive norms of the sort that might *require* government to do something to alleviate the miseries of poverty, courts and constitutional theorists might nonetheless be pressed to justify the enforcement of property rights in such a way as to hinder legislative efforts to pursue egalitarian distributive justice.

Of course, not all enforcement of property rights will have perverse consequences from a distributive perspective. Where government is not seeking to redistribute in a way that contributes to the achievement of distributive justice, enforcement of property rights need not create any conflict. Property rights might be adjusted in scope or made defeasible in order to permit redistributive steps in furtherance of distributive justice but not other redistributive steps. We might also attempt to demarcate a limited sphere of government activity within which redistribution is granted presumptive priority over property rights—in the way that constitutional law distinguishes the domains of taxation and regulation from the

¹⁴⁰Justice as Fairness at 114; TJ at 61.

¹⁴¹See Thomas C. Grey, Property and Need: The Welfare State and Theories of Distributive Justice, 28 Stan. L. Rev. 877 (1976).

¹⁴²Justice as Fairness at 114 n.36.

kinds of literal “takings” that require just compensation.¹⁴³ Nonetheless, both the resources devoted to protecting property rights and the opportunity costs of those rights for progressive redistribution efforts will create some measure of unavoidable tension between the transactional morality of property and economic distributive justice.

Conflicts between transactional property rights and egalitarian distributive justice can be avoided entirely only by abandoning the middle ground and moving in one of these directions or the other. Libertarians like Nozick simply deny any imperative of distributive justice beyond “justice in holdings.” In this view, protecting legitimately-held entitlements against nonconsensual transactional appropriation exhausts the demands of justice. Liberal egalitarians go in the opposite direction, denying the intrinsic moral status of individual property rights and redirecting claims of justice to overall distributions. What matters from this perspective is the socioeconomic justice of society as a whole, not the isolated effects of any particular redistributive move on the property holdings of a given individual.

It is not at all clear, however, why a systemic and consequentialist perspective is not equally attractive when extended beyond property to other rights and liberties. The challenge for liberal egalitarians is to keep distributive justice from swallowing up transactional morality altogether. What is the case for focusing on transactional instances of race- or gender-discrimination rather than (solely) on the systemic subjugation of racial minorities and women?¹⁴⁴ What is the case for focusing on transactional instances of censorship of speech or (dis)favoritism of religion instead of on the systemic quality and diversity of public discourse or the flourishing of religious pluralism? What is the case for prohibiting the torture of suspected terrorists or the death penalty, if the result is a greater number of innocent lives lost to murder?¹⁴⁵ Each of these traditional liberal and constitutional rights seems vulnerable to absorption into a distributive perspective that asks only whether social institutions are arranged in such a way as to create the best overall consequences with respect to the particular interest at stake (or, for that matter, in general).

Again, as with property rights, the conflict between transactional and distributional approaches in some of these areas may not be so great as to preclude their (uneasy) coexistence. A ban on transactional race discrimination is not necessarily inconsistent with a broad strategy for combating entrenched racial

¹⁴³But see Mark Kelman, *Strategy or Principle? The Choice Between Regulation and Taxation* (1999).

¹⁴⁴Rawls excludes race discrimination from the basic liberties of his first principle and deals with it as a distributional issue pursuant to his second principle. See Seana Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 *Fordham L. Rev.* 1643 (2004).

¹⁴⁵See Thomas W. Pogge, *Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions*, 1995 *Soc. Phil. & Pol'y* 241; see also Sunstein & Vermeule, *supra* note

inequality, and might even play a (relatively small) part in such a strategy. Only if the enforcement of antidiscrimination rules prevented effective affirmative action strategies or drained too many resources away from other more effective measures for achieving racial equality would the two approaches come into significant conflict. When it comes to torture or the death penalty, however, if the empirical basis for claims of deterrence and life-life trade-offs are sound and the alternatives wanting, then the conflict becomes immediate and irreconcilable. Speech may be an intermediate case, if one believes that censorship and suppression are generally harmful to public discourse, but that there are certain areas, such as campaign speech and finance regulation, in which regulatory “leveling” of expressive opportunities will improve political debate and make democracy more egalitarian overall.

To the extent that there are sufficient resources and conceptual space for transactional protections and distributive obligations to coexist, we might imagine the intra-governmental division of moral labor operating on the analogy of tort law against a background of redistributive taxation. Moral (and perhaps legal) assessment of wrongful transactions would proceed on one track, while distributive assessment would proceed on a separate track. To be sure, just as tort law prevents some redistributions from a distributive justice perspective would count as progressive (recall the tycoon’s limousine), at times government would be forced to work at cross-purposes with itself. Recall the expropriation of the robber baron’s estate, prevented by takings law even while the government is invited to effect the same wealth transfer through taxation. Or consider a ban on transactional discrimination that would prevent experimentation with single-sex (or single-race) educational environments, or a ban on transactional favoritism of religion that would make it financially impossible for a religious group to set up private schools or legally impossible for the group to engage in certain practices regarded by members as central to their faith. These kinds of contradictions and inefficiencies would have to be managed on a two-track model, whether through ad hoc negotiation or the development of a more systematic approach to trading off transactional and distributive values.

The threat to the stability of a two-track model is not just conceptual but political and psychological. For a democratic government to be committed to both transactional morality and distributive justice, citizens must be politically committed to both normative goals at once—simultaneously supporting, for instance, the property rights of the tycoon and the redistribution of wealth to the poor. The psychological difficulty, and attendant social instability, of attempting to maintain both kinds of commitment has been a central feature of the monists’ case against dualist approaches to distributive justice.¹⁴⁶ A moral division of labor that releases individuals of any concern for distributive justice in their day-to-day lives while demanding their political support for government redistributive programs will collapse unless individuals can prevent a moral atmosphere of permissible

¹⁴⁶See Cohen; Murphy; Nagel.

selfishness from extinguishing the flame of distributive obligation, while also keeping distributive demands from destroying the self-interested incentives that drive markets. It is not clear whether this task becomes easier or harder when we are asked to maintain a boundary not between the personal (or economic) and the political but instead between two different political outlooks.¹⁴⁷ Either way, we should be concerned about the stability of a two-track model of transactional and distributive political obligation that divides not just government but also each citizen's political psychology against itself.

IV. CONCLUSION: THE UNEASY CASE FOR CONSTITUTIONAL MORALITY

We have seen that political justice invites a very different normative perspective than personal morality, focusing less on the moral quality or consequences of particular actions and interactions and more on the systemic consequences of the basic institutional structure of society. We have also seen that this perspective is almost entirely missing from constitutional law, which follows personal morality in assessing the transactional morality of government conduct while for the most part ignoring systemic distributional issues. Isolated takings of property raise constitutional issues, but entrenched poverty and distributive injustice do not. Specific restrictions on political speech count as core violations of the First Amendment, but the general degradation of political discourse is beyond the purview of constitutional law. Discrete acts of discrimination based on race or gender are salient to courts and constitutional lawyers, whereas conditions of enduring racial and gender inequality in society are beyond the constitutional pale.

For those constitutional theorists committed to understanding constitutional law as “justice-seeking,” such pervasive inattention to the central concerns of political justice create an explanatory challenge.¹⁴⁸ The omission of distributive norms from constitutional adjudication may well be explicable in terms of the limited institutional capabilities of courts,¹⁴⁹ but we should recognize that this leaves distributive justice not merely “underenforced” but almost entirely irrelevant to constitutional practice. Worse still, transactional adjudication in some constitutional contexts may actually work to undermine distributive goals, as when constitutional property rights prevent progressive wealth redistributions, equal protection prohibits race-based redistributive programs, and the First Amendment blocks the “leveling” of influence in political campaigns.

One could imagine a more genuinely justice-seeking system of constitutional

¹⁴⁷The case that it is harder might start with the observation that political vs. personal (or public vs. private) boundaries are familiar and pervasive features of liberal democracy.

¹⁴⁸See Sager, *supra* note ___, at 3-6.

¹⁴⁹It is harder to explain the omission of these goals from constitutional law understood more broadly to encompass the constitutional obligations of non-judicial institutions of government and citizens in their “popular constitutional” roles. See *supra* TAN ___.

law that, while perhaps not charging courts with direct enforcement of distributive norms, at the very least did not create transactional rights at cross-purposes with these norms and, what is more, designed these rights strategically, so that case-by-case enforcement would be conducive to the systemic achievement of distributive goals over time.¹⁵⁰ Indeed, it may be possible to rationalize some areas of existing constitutional doctrine along these lines. Doctrinal rules prohibiting purposeful, content-based restrictions on speech, for instance, might be understood as a second-best, systemically consequentialist strategy for optimizing the quality of public discourse, given that courts are not equipped to evaluate public discourse systemically or even to evaluate the effects on public discourse of particular government interventions.¹⁵¹ Similar systemically consequentialist accounts might explain constitutional prohibitions on government funding or accommodation of religious practices (which might create divisive religious controversy or undermine the strength or independence of religion); race or gender discrimination (which might reinforce the salience of race or gender as sociological categories, in turn perpetuating discrimination and inequality); and other constitutional rights.

So, it is imaginable that much of the transactional morality of constitutional law could be recast as second-order systemic consequentialism in pursuit of political justice. Imaginable, but ultimately not very convincing. Accounts like these raise all the flags of ad hoc rationalization, often requiring heroic empirical assumptions about the abilities and limitations of courts and the social consequences of legal rules, and often ignoring or dismissing seemingly more straightforward and equally institutionally practical means of accomplishing the same consequentialist goals. In any case, such accounts fail to capture the intuitively-felt moral force of many transactionally-framed constitutional rights. Constitutional violations like race discrimination, speech censorship, and property takings are commonly understood to be inherently wrongful, not just instrumentally prohibited. It is perhaps conceivable that this sense of inherent wrongfulness could be entirely explained in terms of the internalization of rule-consequentialist norms, but that would require an imaginative stretch far beyond the boundaries of conventional constitutional discourse. If the self-conception of (most) courts and constitutional theorists is any indication, what constitutional law seems to be seeking is not macro-level political justice, systemically consequentialist in orientation, but micro-level transactional morality with an inescapably deontological cast.

Whether this normative framework, borrowed from personal morality, can be sensibly applied to government has been the motivating question of this Article. The Article has suggested some reasons for skepticism, starting with a rather obvious set of disanalogies between government and real-life persons that makes the architecture of personal morality a misfit for the state. Transactional morality focuses on discreet

¹⁵⁰Cf. T. M. Scanlon, *Rights, Goals, and Fairness*, in Samuel Scheffler ed., *Consequentialism and Its Critics* 74 (1988); Joseph Raz, *The Morality of Freedom* 255-63 (1986).

¹⁵¹See Scanlon; Schauer; E. Kagan, *supra* note ___, at 507-09.

harms suffered by individuals at the hands of government. But the hands of government are large and busy, creating pervasive causal consequences, many of these beneficial. Any claim of harm will be relative to some baseline position, but if, as will almost always be the case, government has had a hand in establishing that position in the first place, then the localized harm may lose its claim to moral significance. Moreover, any claim of harm might be “reframed” into a non-harmful transaction by placing it on a ledger with enough of the innumerable benefits bestowed by government on its citizens to keep government in the black. The basic problem is that there is no way of holding government morally accountable for particular interactions or their consequences without first defining the scope of the interaction, as distinct from government’s overall course of dealings with citizens and the states of affairs that result. But the criteria for isolating sub-systemic government transactions that would carry inherent moral significance remain mysterious. In sum, the extensive and pervasive causal efficacy of government pushes toward a systemic level of normative analysis

At the same time, the enormous causal efficacy of government together with its impersonal nature push toward consequentialism. At the personal level, transactional morality is circumscribed by a familiar set of deontological ideas. Prominent among these are the significantly greater weights placed on harms we actively inflict on others compared to harms that we merely fail to prevent, and also on intentionally caused harms over inadvertent or merely foreseen ones. As applied to government, however, the act versus omission and intentional versus inadvertent distinctions become conceptually obscure, in large part because the causal efficacy of government makes all instances of harm look indistinguishably like the products of responsibility-bearing decisions by government. Moreover, and more fundamentally, it is not at all clear that deontological limitations on responsibility have any relevance to government in the first place. Deontological limitations seem to reflect the desirability of preserving a sphere of autonomy and personal integrity that would otherwise be swamped by externally-imposed demands.¹⁵² But government has no personal life. Lacking the kinds of projects or attachments of its own that would support a deontological prerogative, government might well be held to purely consequentialist criteria.

All of this suggests that transactional constitutional morality might be deeply misguided—perhaps nothing more than personal morality misplaced in the political

¹⁵²Scheffler describes deontological limits on individual responsibility as follows:

They encourage us to be, as it were, good citizens of our moral neighbourhood: to be mindful of how we conduct ourselves toward those people who, because of their physical or social or emotional proximity, or because of the directness or immediacy of our causal interactions with them, are taken to fall within the proper sphere of our moral concern. These ‘limiting’ values and norms, as we may call them, are most at home in the context of small-scale personal relations and interactions.

Scheffler, *Moral Pluralism*, supra note ___, at 233.

sphere by way of unreflective personification.¹⁵³ Pressing back against that conclusion, however, are widely-shared and deeply-entrenched intuitions about political and constitutional morality. We routinely focus our normative assessment of government on the intrinsic merit and localized consequences of particular acts or policies, and we routinely distinguish between consequences that government affirmatively causes or intends and those that it merely allows to come about or to persist. Confiscating a family home can provoke greater moral and political outrage than persisting conditions of poverty. Ethnic profiling or the torture of innocents in order to prevent many deaths at the hands of terrorists is regarded as at least morally regrettable if not absolutely forbidden. Whether and how the intuitive pull of transactional morality can be reconciled with the impersonal perspective of systemic justice, and what conception of government would support such a reconciliation, seem like important, unresolved questions for political and constitutional theorists.

¹⁵³Sunstein on moral heuristics.