



**October 12th, from 4-7 pm
Lester Pollock Room, FH, 9th Floor**

Colloquium in Legal, Political, and Social Philosophy

Conducted by

Jeremy Waldron and Liam Murphy

Speaker: Daryl Levinson, NYU

Paper: **Personal Morality and Political Justice**



Colloquium Website: <http://www.law.nyu.edu/node/22315>

Dear NYU Colloquium readers,

The colloquium reading and topic of discussion will be chapter 6 of a book ms I've just completed, entitled *Law for Leviathan: Constitutional Law, International Law, and the State*. I've also provided the introduction in case anyone is interested in the larger project, but that is outside the scope of the colloquium. Here's a brief summary of the book, just for context:

For the past several centuries of Anglo-American legal thought, law has been paradigmatically understood as the product of the state. Operating through the legal and political institutions of its government, the state imposes law on the people who are its subjects. Over the same centuries, however, the state itself has also become subject to law—most prominently, international law and constitutional law, overseeing the external and internal conduct of the state, respectively.

But systems of law for states necessarily work differently than systems of law by states for people. For one thing, law for states must do without a super-state or government standing above the state, capable of creating and enforcing law from the top down. For another, the state is a unique kind of legal subject, calling for different behavioral models, moral standards, and regulatory techniques than those developed for ordinary people.

It is precisely these differences that have long marked international law as a curious and in many eyes dubious, form of law. Seeing a system of “law without government” operating according to a structural logic of “anarchy,” skeptics have long questioned how international law can possibly operate with the kind of efficacy that is taken for granted in “hierarchical” domestic legal systems backed by the state. Even those who are more sanguine recognize that, precisely because it is a system of law for states, international law must work differently from ordinary state-run legal systems.

Constitutional law is equally a system of law for states. Oddly, however, it has seldom been subject to the same doubts, or fully understood as different in kind from the paradigmatic legal system run by and through the state. As a result, constitutionalists have lagged, and still have much to learn from, their internationalist counterparts in coming to grips with the common project of making the state the subject rather than the source of law. By assimilating constitutional and international law as parallel projects of imposing law upon the state, and by highlighting the peculiarities of the state as a legal subject, this book aspires to close that gap, and to bring focus to *Law for Leviathan* as a distinctive legal form.

This chapter examines the moral and legal frameworks that have been used to assess state wrongdoing. For this purpose, as well, the state is commonly imagined as a personified Leviathan whose (mis)behavior can be evaluated by the standards we routinely apply to ordinary persons. That appears to be the approach of constitutional law, which has borrowed the basic principles of personal morality and legality for purposes of adjudicating when the state has violated constitutional rights. As a result, constitutional law myopically focuses on small-scale harms to individuals while blinding itself to big-picture, systemic injustices, from racial and economic inequality and subordination to the degradation of democracy. Internationalists, in contrast, have joined moral and political philosophers in recognizing that normative frameworks and principles developed to govern the conduct of regular persons are a poor fit for the peculiar creature of Leviathan. We should demand more from the state.

morality, the state, sovereign virtue, constitutional rights, inequality, corrective justice, consequentialism, division of moral labor, just war, global justice

C6 Chapter 6

Personal Morality and Political Justice

C6P1 A characteristic feature of constitutional law is its categorical indifference to what many see and experience as the deepest injustices of American society. There is

systemic racial inequality: Black families own a fraction of the wealth of white families and are disproportionately living in poverty; Black income and high school and college graduation rates are substantially lower; Black men are far more likely to be unemployed, incarcerated, or killed by the police; and so, tragically, on.¹ There is persistent gender inequality: women continue to suffer from a significant gender wage gap, vulnerability to domestic and sexual violence, the disproportionate burdens of childcare and domestic labor, and other long-standing patterns of economic and social subordination.² There is increasingly severe economic inequality: income inequality has returned to Gilded Age levels, and American CEOs, who in 1965 earned about twenty times the income of a typical worker, now get paid close to 300 times as much as their average employee; the top 10% of Americans now hold nearly 70% of U.S. wealth, while the bottom 50%, comprising 160 million people, may well be collectively less wealthy than the three richest Americans; measured by Gini

¹ See Hedwig Lee et al., *The Demographics of Racial Inequality in the United States*, Brookings, July 27, 2020.

² See Paula England et al., *Progress Toward Gender Equality in the United States Has Slowed or Stalled*, 117 *Proc. Nat'l Acad. Sci.* 6990 (2020); *Violence Against Women in the United States: Statistics*, National Organization for Women.

coefficient, the economic inequality of the United States ranks higher than any other developed country, on a par with Haiti and the Democratic Republic of the Congo.³

C6P2

None of this counts as a violation of anyone's constitutional rights. In all of these domains, American constitutional law invites the government to absolve itself from responsibility simply by ignoring existing patterns of inequality and subordination. So long as the state avoids actively and intentionally inflicting additional harms by purposeful discrimination, it is under no constitutional obligation to not itself with structural inequality or distributive injustice. As constitutional law sees it, the state's obligations to its citizens are no greater than the legal obligations of citizens to one another. The legal subjects of the state are prohibited from inflicting various kinds of harm upon one another; but they are seldom obligated to go out of their way to help one another. Constitutional law treats Leviathan as if it were an ordinary person, applying the same moral and legal frameworks that permit us regular folk to go about our day-to-day lives with limited regard for our fellow human beings.

C6S1

States as Moral Persons

³ Council on Foreign Relations, The U.S. Inequality Debate, updated April 20, 2022; Gini Coefficient by Country, World Population Review. The comparison between the three richest Americans and the bottom 50% was made by Bernie Sanders in 2019. See Bernie Sanders, Trump Is the Worst Kind of Socialist, Wall Street Journal, June 26, 2019.

Constitutional law is not alone in looking at the state through the lens of personal morality and legality. Captivated by the analogy between persons in the state of nature and states in the international arena, Hobbes was tempted to transpose their moral and legal natures. His vision of autonomous, morally independent persons in the state of nature was a reflection of the sovereign state, as Hobbes saw it, pursuing its self-interest in the anarchical domain of international relations.⁴ The other way around, Hobbes also projected the legal and moral standing of persons onto states: “[B]ecause commonwealths once instituted take on the personal qualities of men,” he wrote, “what we call a natural *law* in speaking of the duties of individual men [becomes] the *right of Nations*, when applied to whole commonwealths.”⁵ Thus, according to Hobbes, “every Sovereign hath the same Right, in procuring the safety of his People, that any particular man can have, in procuring the safety of his own Body.”⁶ To be sure, Hobbes also saw a crucial disanalogy in the circumstances of states and persons. The fact that persons but not states lived under a law-giving Leviathan meant that they

⁴ See Richard Tuck, *The Rights of War and Peace* 8–9, 126–41 (1999).

⁵ Thomas Hobbes, *On the Citizen* 156 (Richard Tuck & Michael Silverthorne eds. & trans., 1998) (1647).

⁶ Thomas Hobbes, *Leviathan* 244 (Richard Tuck, ed., 1991) (1651).

alone were subject to obligations of law and justice.⁷ But this disjunction was merely a matter of circumstance. In their natural conditions, Hobbesian states and persons were similar beings.

C6P4

Hobbesian personification remains highly influential in thinking about the moral rights and duties of states in the international realm. Following Hobbes most literally are international relations realists who dismiss the relevance of law and morality in the anarchical international state of nature. But pursuing the Hobbesian analogy between states and persons need not lead to nihilism about international legality and morality. As Chapter 2 described, sovereign states have long been conceived as possessing rights comparable to the liberty and autonomy rights of ordinary persons. Political theorist Michael Walzer's account of sovereign states as personified rights-holders captures this line of thought:

C6P5

[T]he recognition of sovereignty is the only way we have of establishing an arena within which freedom can be fought for and (sometimes) won. It is this arena and the activities that go on within it that we want to protect, and we protect them, much as we protect individual integrity, by marking out boundaries that cannot be crossed,

⁷ For states, in contrast, “the notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power there is no Law: where no Law, no Injustice.” Leviathan at 90.

rights that cannot be violated. As with individuals, so with sovereign states: there are things that we cannot do to them, even for their own ostensible good.⁸

C6P6

For Walzer and many other theorists of international relations, as for Hobbes, “states possess rights more or less as individuals do.” Walzer’s influential theory of just war extends that moral equation. Reasoning from the Hobbesian analogy between states in international society and persons in domestic society, Walzer proceeds to derive principles of permissible war-making behavior on the part of states from the legal and moral rules regarding self-defense and harm to innocents that apply to ordinary people in “the familiar world of individuals and rights.”⁹

C6P7

As important as the states-as-moral-persons analogy has been to the development of international thought, however, sophisticated internationalists have always been attuned to its limitations. That includes Hobbes, who, having cast states in a war of all against all on the model of persons in the state of nature, nonetheless recognized that the “misery, which accompanies the Liberty of particular men” need not follow for states.¹⁰ Developing that disjunction, subsequent theorists have recognized that, because “states are different kinds of agents from natural individuals,” they “can more peaceably coexist with other states” even without the

⁸ Michael Walzer, *Just and Unjust Wars* 89 (1977).

⁹ Walzer at 61.

¹⁰ *Leviathan* at 90.

kind of Leviathan necessary to maintain order among persons within states.¹¹ States are also arguably different in their status as rights-holders. As we saw in Chapter 2, critics of the analogy between state sovereignty and personal autonomy have emphasized that “[s]tates are not sources of ends in the same sense as are persons” and cannot claim rights on their own behalf.¹² Notwithstanding the use he makes of the states-as-persons analogy, Walzer himself is well aware that, in many respects, “[s]tates are not in fact like individuals (because they are collections of individuals) and the relations of states are not like the dealings of private men and women.”¹³ Like other theorists of international relations, Walzer recognizes that the moral and legal rules that govern the behavior of states will not always match the ones that apply to regular people.

C6P8

Moral and political philosophers focused on the domestic-facing side of the state have gone further in decoupling the status of states and persons, holding that states have special duties and obligations that ordinary persons do not. For example, liberal political morality demands that Leviathan treat its citizens impartially, with equal concern and respect. Ronald Dworkin tellingly refers to this principle as the

¹¹ David Singh Grewal, *The Domestic Analogy Revisited: Hobbes on International Order*, 125 *Yale L.J.* 618, 651 (2016).

¹² Charles R. Beitz, *Political Theory and International Relations* 180 (1979).

¹³ Walzer at 72.

“special and indispensable virtue of sovereigns.”¹⁴ The virtue is special because, in the view of Dworkin and other political liberals, it does not apply to ordinary persons, who are morally permitted to display greater concern for their own lives and the lives of people close to them than for the lives of distant strangers. That permission reflects the fact that real-life persons have private lives, personal projects, ambitions, and attachments, which many think they should have the freedom to pursue without perpetual and equal regard for the welfare of others. Leviathan, in contrast, lacks any similar set of self-centered interests—for the simple reason that it lacks a self.

C6P9

Leviathan is different in other ways as well. Following Hobbes, the prevailing view among political philosophers is that the special set of moral demands stemming from political justice are applicable only to the state. John Rawls thus begins his landmark *A Theory of Justice* by identifying the domain of justice as the “basic structure” of society, comprising the major political and legal institutions of the state.¹⁵ Because the principles of justice do not apply to “individuals and their actions in particular circumstances,”¹⁶ Rawls draws a “division of [moral] labor.” The state

¹⁴ Ronald Dworkin, *Sovereign Virtue* 6 (2000).

¹⁵ John Rawls, *A Theory of Justice* 7 (1971); see also John Rawls, *Political Liberalism* 258 (1993) (explaining that the basic structure includes “the political constitution, the legally recognized forms of property, and the organization of the economy” and other major institutional determinants of the life prospects of people in society).

¹⁶ Rawls, *Theory of Justice* at 54.

alone is subject to the demands of justice, while individuals are subject to a different set of more localized and limited legal and moral obligations in their personal lives.¹⁷

In constructing a theory of justice distinctively suitable to the state, Rawls works from the premise that “[t]he correct regulative principle for anything depends on the nature of that thing.”¹⁸ The nature of Leviathan, in the view of Rawls and many others, is simply different from the nature of ordinary persons.

C6P10

As the discussion that follows will describe, that difference has been lost on constitutional law. Disregarding any special demands of political justice, distinctive moral virtues suitable to sovereigns, and divisions of moral labor, constitutional law essentially holds the state and its government to the standards of ordinary personal morality and legality. The moral and legal framework that constitutional rights create for Leviathan seems as if it were built for an ordinary, if over-sized, person.

C6S2

Constitutional Justice

C6P11

Abstracting from specific rights and doctrinal rules, the basic architecture of constitutional rights jurisprudence is broadly consistent. Most rights protect citizens only against “state action”—specific, active, interventions by government that result in harm. State *inaction*—the failure or disinclination of the state to prevent or repair harms, or make any attempt to remediate inequality or disadvantage—is seldom

¹⁷ John Rawls, *Political Liberalism* 268–69 (1993); see also Liam B. Murphy, *Institutions and the Demands of Justice*, 27 *Phil. & Pub. Aff.* 251, 257–58.

¹⁸ Rawls, *Theory of Justice* at 29.

constitutionally culpable.¹⁹ Even within the domain of state action, moreover, the state is typically held responsible only for *intentionally* inflicted harms.²⁰ Policies and practices that create, exacerbate, or predictably reproduce inequalities or disadvantages fall outside of constitutional rights protection so long as the government does not act with the purpose of bringing about these consequences. Layered on top of these limitations is the basic premise of constitutional adjudication that government liability is assessed one action at a time. The standard unit of constitutional analysis is a specific, discrete policy or intervention. Harms resulting from an array of policies and interventions over time, or cumulative conditions caused by a mix of factors including but not limited to state actions, seldom come into focus as constitutional cases.

C6P12

The upshot is that constitutional law focuses on discrete, small-scale harms while blinding itself to big-picture, systemic injustices. Specific acts of discrimination based on race or gender are constitutionally prohibited, but entrenched conditions of racial and gender inequality are effectively invisible to constitutional law. A modest program of racial preferences in public university admissions or economic assistance to women workers will run into an equal protection challenge, but the broad conditions of inequality that such programs are meant to address remain off the

¹⁹ See generally Cass R. Sunstein, *The Partial Constitution* (1993).

²⁰ See, generally, Richard H. Fallon, *Constitutionally Forbidden Legislative Intent*, 130 *Harv. L. Rev.* 523 (2016).

constitutional radar. A constitutional case is created when government regulation diminishes the value of a particular parcel of property, but broad poverty and economic inequality generate only constitutional shrugs. Targeted restrictions on political spending violate free speech, but systematic inequality of political influence and the general degradation of political discourse raise no constitutional issues.

C6P13

Constitutional theorists and political advocates have long lambasted this myopic approach to constitutional responsibility. From the progressives and legal realists of the early twentieth century through the critical race studies and law and political economy movements of the present, critics have questioned why the state should be free to ignore and exacerbate racial, gender, economic, and other constitutionally salient forms of inequality and subordination that are within its power to ameliorate or prevent.²¹ When the state decides to do nothing about these constitutional injustices, or blindly takes action that perpetuates them, critics contend, that is no less a choice than the decision to actively inflict harm, and therefore no less

²¹ See, e.g., Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis* 129 *Yale L.J.* 1784, 1806–13 (2020); Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 *Pol. Sci. Q.* 470 (1923); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *Stan. L. Rev.* 1111 (1997); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 *U. Chi. L. Rev.* 935 (1989).

a matter of constitutional responsibility.²² Moreover, critics emphasize, the state is, in fact, actively implicated in all of these injustices. Present-day racial inequality, for example, is in large part a product of actively implemented state policy, from support of slavery and Jim Crow segregation to discriminatory housing, criminal justice, and economic policy.²³

C6P14

Some of these lines of critique have on occasion gained traction. During the Great Depression, proponents of more expansive economic regulation—legal theorists, President Roosevelt, and his New Deal coalition allies—made the case that government should take broad responsibility for the economy and its social consequences. Against the prevailing constitutional view that government regulation and redistribution were impermissible interferences with economic liberty in a “free market,” New Dealers reminded the public that there was, in reality, no such thing as a government-free market in which people were left alone in their liberty to make private choices. Quite the contrary, government was pervasively responsible for creating, structuring, and regulating the economy through law. That responsibility began with the common law rules of property and contract that determine who owns what and create the basic infrastructure of market exchange. Progressives and legal

²² See Louis Michael Seidman & Mark V. Tushnet, *Remnants of Belief* 27–28, 66–67 (1996); Sunstein, *Partial Constitution*, at 71–75; Cass R. Sunstein, *State Action Is Always Present*, 3 *Chi. J. Int’l L.* 465 (2002).

²³ See Ta-Nehisi Coates, *The Case for Reparations*, *The Atlantic*, June 2014.

realists had already debunked the notion of “private property” by pointing out that property rights depended on legal recognition and enforcement by the state;²⁴ they were a delegation of public “sovereignty.”²⁵ The same was true of the “free market” more generally, which relied not just on the common law but on the legal creation of corporations, the banking system, antitrust, securities, and labor law, and so on. Removing the state from markets, the New Dealers rightly observed, would not make them free; it would make them collapse.²⁶

C6P15

The moral of this understanding, for FDR and his allies, was that government must be held responsible for the economic and social outcomes that the market produces. Where markets were failing to provide people with basic needs or a decent life, that failure was the responsibility of the state. President Roosevelt thus instructed Americans that we “must lay hold of the fact that economic laws are not made by nature. They are made by human beings,” with the implication that, “when people starve, it is the result of social choices, not anything sacred or inevitable.”²⁷ By “social choices,” Roosevelt meant democratic decisions given effect by government laws and policies: when citizens starved, it was ultimately government’s responsibility. Embracing that responsibility, Roosevelt, in his 1944 State of the

²⁴ See, generally, Barbara H. Fried, *The Progressive Assault on Laissez Faire* (1998).

²⁵ See Morris R. Cohen, *Property and Sovereignty* 13 *Corn. L. Rev.* 8 (1927).

²⁶ See Cass R. Sunstein, *The Second Bill of Rights* 17–31 (2004).

²⁷ *Id.* at 25.

Union Address, promised the country a “Second Bill of Rights.” Those rights would guarantee all Americans “a useful and remunerative job,” to “earn enough to provide adequate food and clothing and recreation,” to “a decent home,” to “adequate medical care and . . . good health,” to “protection from the economic fears of old age, sickness, accident, and unemployment,” and to “a good education.” Flipping the constitutional premise of economic liberty, Roosevelt argued that the failure of the state to provide these foundational goods and opportunities would amount to a denial of freedom.²⁸

C6P16

Roosevelt’s Second Bill of Rights marks a path not taken by American constitutional law. Roosevelt himself did not conceive of his Second Bill as creating judicially enforceable constitutional rights.²⁹ As far as constitutional law was concerned, Roosevelt’s legacy was limited to pushing the Supreme Court away from enforcing rights *against* economic regulation and redistribution on the ground of protecting economic liberty and freedom of contract. Rights *to* government regulation and redistribution were a constitutional bridge too far.

C6P17

Not that the Second Bill of Rights was such a radical proposition. Constitutions in many other countries around the world actually do provide for similar kinds of social welfare rights.³⁰ The South African Constitution, for instance, guarantees access to adequate housing, food and water, healthcare, education, and

²⁸ Id. at 235–44 (reprinting Roosevelt’s address); 9–16.

²⁹ See id. at 61–66.

³⁰ See id. at 99–105.

social security.³¹ And courts in South Africa have taken at least tentative steps toward enforcement of some of these rights, ordering the state to take “reasonable measures within its available resources to achieve [their] progressive realization.”³² Even in the United States, there was a period during the 1960s and early ’70s when the Supreme Court at least flirted with the possibility of creating and enforcing some version of constitutional welfare rights.³³ And state courts have, in fact, stepped up to enforce state constitutional guarantees of educational adequacy and equality, ordering increased spending on public education and redistribution of funding to under-resourced school districts.³⁴

C6P18

It is within the bounds of constitutional imagination to hold government responsible for preventing its citizens from starving, or being denied the basic

³¹ S. Afr. Const., 1996, ch. 2, Sections 26–27, 29; see also Sunstein, Second Bill, at 216–29.

³² See Sunstein, Second Bill, at 220–23. For a broader survey of judicial enforcement of social welfare rights around the world, see Mila Versteeg, Can Rights Combat Economic Inequality?, 133 Harv. L. Rev. 2017 (2017).

³³ Sunstein, Second Bill, at 149–71; see also Frank I. Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. (1969).

³⁴ See James E. Ryan & Thomas Saunders, Foreword to Symposium on School Finance Litigation: Emerging Trends or Dead Ends?, 22 Yale Law & Pol’y Rev. 463 (2004).

necessities of life. But the more revolutionary seeds of the New Deal critique have never bloomed. For constitutional lawyers in the U.S. and other countries, it remains unimaginable that the state could be held legally responsible for eliminating broad social inequalities or preventing subordination. Beyond minimal welfare rights, the prospect of recognizing a constitutional requirement of thoroughgoing economic justice would stretch constitutional rights jurisprudence beyond recognition. The same would be true of constitutional demands for the kinds of social and economic restructuring and redistribution that would be necessary to alleviate entrenched forms of racial and gender inequality. Such demands would swamp the structure of constitutional doctrine and adjudication, requiring a radical reconceptualization of what rights entail, who possesses them, and how they should be enforced. Recognizing this, even the most far-reaching “justice-seeking” constitutionalists resign themselves to the inevitability that even the best-case-scenario regime of constitutional rights will leave a “durable moral shortfall” when measured against the full-fledged demands of social and political justice.³⁵

C6P19

What explains constitutional law’s moral shortfall? Part of the story, quite obviously, is political. The ideals of racial, gender, and economic equality pressed by progressives, and the kinds of activist government interventions that would be required to realize these ideals, are a hard sell for most Americans, and an impossible one for conservatives and libertarians. Yet political disagreement cannot be the

³⁵ Lawrence G. Sager, *Justice in Plainclothes* 78–81 (2004).

complete explanation for the limited horizons of constitutional rights. Roosevelt and the New Dealers were not lacking in political support, but they did not see even relatively limited welfare rights as a plausible part of constitutional law. Also unconstrained by politics, academic theorists constructing utopian visions of the American constitutional system see no prospect of translating their egalitarian political ideals into constitutional forms.

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One sticking point is the expectation that constitutional rights will be enforced by courts. The complex distributive trade-offs and aggressive restructuring of social and economic arrangements that would be necessary to implement sweeping structural reforms would be widely regarded as well beyond the institutional capability and democratic legitimacy of the judiciary. But this need not be a reason to limit the scope of substantive constitutional rights; it might only be a reason to limit the scope of judicial enforcement. Courts in South Africa and other countries have backed away from “strong-form” judicial review when dealing with more ambitious forms of rights while retaining a role in guiding and prodding the political branches to do the heavy lifting.³⁶ And, of course, it is entirely possible to have meaningful constitutional rights that are not judicially enforced at all. It is telling that even constitutional theorists who fully appreciate the possibility of “judicially

³⁶ See Mark Tushnet, *Weak Courts, Strong Rights* (2009).

underenforced rights” do not believe that constitutional rights can give full effect to egalitarian justice.³⁷

C6P21

Still, the expectation that constitutional rights will be adjudicated in ordinary courts, central to the practice of American constitutionalism, must have something to do with the perceived limitations on the form and substance of such rights. It is probably not a coincidence that constitutional rights in the American system, at least, have been cast on the model of the common law rights created by courts. The traditional, classically liberal model of a common law case features atomistic individuals who interact only at the point of a discontinuous event, tightly bound in space and time. In the case of a tortious injury, for instance, the unit of legal analysis is defined by the self-contained, harm-inflicting interaction that disrupted the otherwise unrelated lives of the two parties. The focus of liability is on the harm to the plaintiff, measured by the marginal, negative deviation from her position just prior to the collision with the defendant. The corresponding remedial goal is to achieve corrective justice by restoring the plaintiff to her pre-harm, status quo ante position. Constitutional rights violations are conceptualized in much the same way. Constitutional cases, too, focus on whether state action has inflicted a discrete harm on an individual or protected group with respect to some constitutionally protected

³⁷ See Sager at 84–128; see also Lawrence Sager, Material Rights, Underenforcement, and the Adjudication Thesis, 90 B.U. L. Rev. 579 (2010).

interest. And that harm is typically measured relative to a status quo ante position that is treated as independent of any prior state action and or preexisting responsibility.³⁸

C6P22

As applied to ordinary persons in common law cases, this legal model closely tracks commonsense morality. Familiar intuitions of deontological morality direct blame to specific bad acts that cause harm to others. Leaving others alone—omitting to help them, even when help is possible—is generally regarded as less blameworthy. Further, harms inflicted accidentally or inadvertently are generally less blameworthy than intentional harms. For purposes of both conventional morality and the common law, killing someone is worse than merely allowing them to die, and intentional killings are more culpable than merely negligent ones. Constitutional law seems to extend similar intuitions to the state. When government fails to prohibit discrimination, censorship of speech, or any other harmful conduct that is proximately perpetrated by private actors, or when it chooses to leave structural inequality alone, those apparent omissions might be deemed less blameworthy than actively-inflicted harms. And even when government itself is the active and proximate inflictor of

³⁸ This default model of constitutional adjudication has been brought into relief by experimental departures, perhaps most strikingly the ambitious structural reform litigation attempted by courts in the 1970s. See Owen Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1 (1978) (“The 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.”).

harm, perhaps it deserves less blame where its actions were not intentionally discriminatory or purposefully targeted at constitutionally protected conduct or groups.

C6P23

Here, then, is another explanation for constitutional law's approach to responsibility and rights: constitutional law and adjudication has followed in the footsteps of the common law, repurposing legal and moral frameworks that were designed to regulate the behavior of ordinary people. Anchoring itself on private legality and personal morality, constitutional law and adjudication has likewise focused on localized, self-contained transactional harms, emphasizing negative responsibility and intentional wrongdoing. Constitutional law regulates the behavior of the state as if it were an ordinary person—or a personified Leviathan.

C6P24

Constitutional law, unfortunately, is a context in which the intuitive pull of the state-as-person metaphor is bound to be misleading. The state is conspicuously different from an ordinary person in ways that make the standards and expectations of private legality and personal morality a poor fit for assessing constitutional responsibility. Applying these standards to the peculiar person of Leviathan yields entirely different results. And there are good reasons to doubt that legal and moral standards built around ordinary persons should apply to Leviathan at all.

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To start, Leviathan is a giant, with vastly greater capability and causal efficacy in the world than any ordinary person. That basic fact has implications for how we should think about government's responsibility for what happens in the world. Starting with omissions, the more that government is capable of doing, the more that

its failures to do those things can be understood as a culpable choice. Ordinary people have limited ability to help most others in the world, and their omissions are not usually the cause of anyone's suffering. Holding them legally or morally responsible for harms beyond the ones they actively caused, in most cases, would be unfair and instrumentally pointless. Leviathan is different. States and governments operate on a different scale and are capable of accomplishing things that no ordinary person possibly could. That includes preventing or alleviating all manner of constitutionally salient harms suffered by its citizens. When the state ignores harms that it is fully capable of preventing, its omissions can more fairly be construed as culpable choices, and culpability can realistically motivate different and more beneficial behavior.³⁹

C6P26

Indeed, simply holding the state to the ordinary-person standards of liability for omissions could generate boundless legal and moral responsibility. In cases where a person is distinctively well-situated to prevent harm to someone nearby or is in a special relationship with them, private law will sometimes make an exception to the normally dispositive distinction between acts and omissions, imposing a special duty to rescue. For reasons of instrumental efficacy and fairness, that duty is especially

³⁹ This is a point that has been about states from an international perspective. See 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 high-capacity “institutions,” a category that includes not just states but also, for example, multinational corporations.

likely to attach in contexts where there is a single, salient rescuer. When a swimmer drowns near a crowded beach, there is no way the multitude of beachgoers will be held accountable—doing so would seem unfair given the collective action problems and diffusion of responsibility; and the threat of liability for all might only serve to incentivize chaos.⁴⁰ Whereas the lifeguard who fails to attempt a rescue might well be subject to liability based on her special duty. Leviathan is the lifeguard. Created as a solution to collective action problems among its subjects and the provider of public goods, and specially equipped to prevent harms to its subjects, the state might well be held generally liable for constitutional harms based on a duty to rescue. The exceptional circumstances that occasionally justify omissions liability for regular people is the ordinary case for Leviathan.

C6P27

At the same time, Leviathan’s massive causal efficacy and impact also dramatically expands the scope of its responsibility for harm-causing *actions*. As the New Deal critique of the idea of “free markets” illustrates, the state’s (invisible) hand has played a causal role in creating the social, economic, and legal conditions that make possible and affect nearly everything that happens in society. The pervasiveness of state action and its consequences is what drives the standard critique of the public/private distinction: nominally “private” decisions, institutions, and arrangements invariably turn out to be shaped and supported by state action. A

⁴⁰ See Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 Va. L. Rev. 879 (1986).

business that discriminates on the basis of gender is not operating in some fictional realm of purely private choice and contracting. The business would not exist without the state's creation and enforcement of property and contract rights, security, transportation and trade networks, and the market economy in which all of these are embedded. In the state of nature, there would be no discrimination because there would be no business. The same is true of gender discrimination in nominally private families and households that would also not exist in anything like the same form without the accrued actions and policies of the state. Even the beliefs and preferences of individuals that motivate their "private" behavior are inevitably shaped by law and the state. In short, as generations of constitutional critics have argued, there is *always* state action: any constitutionally salient harm or condition of inequality or subordination can be causally attributed to what the state has actively contributed to making the world turn out that way.⁴¹

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Treating Leviathan as a legal and moral person might mean holding it personally responsible for both causing and failing to prevent everything that happens in the world. But there is the further question of whether the standards of personal morality and private legality are suitable for Leviathan at all. Particularly questionable are the familiar principles of deontological morality that make acts more blameworthy than omissions, and intentional harms more blameworthy than inadvertent or merely

⁴¹ See infra note 20.

foreseeable ones.⁴² In the case of ordinary persons, perhaps the most compelling justification for applying these principles is that they serve to limit responsibility in ways that protect individual autonomy. The strictly consequentialist view that everyone is fully obligated to do, and not do, all they can to avoid harm or create good in the world would seem to require people to spend their entire lives in the service of undifferentiated others,⁴³ eliminating any room for personal projects, relationships, or free choices about how to live. Deontological limitations on responsibility insulate individual lives against the insatiable demands of serving the collective good, creating morally valuable space for people to put others aside and pursue their own projects. Within the broad bounds of not intentionally inflicting harm on those around us, we give ourselves legal and moral permission to live our own lives.⁴⁴

⁴² Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 53 *Stan. L. Rev.* 703, 709, 722 (2005) (arguing that the “act/omission distinction . . . systematically misfires when applied to government, which is a moral agent with distinctive features,” and that the “very concept of ‘intentional’ action, and the moral relevance of intention, are both obscure when government is the pertinent moral agent”).

⁴³ See, e.g., Peter Singer, *Famine, Affluence, and Morality*, 1 *Phil. & Pub. Aff.* 229 (1972).

⁴⁴ See Thomas Nagel, *Mortal Questions* 83 (2012); Thomas Nagel, *Autonomy and Deontology*, in *Consequentialism and Its Critics* 142 (Samuel Scheffler ed., 1988);

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But Leviathan does not have a life of its own. As political philosophers and theorists of international relations and moral philosophers have stressed, a fundamental disanalogy between states and ordinary persons is that states do not have personal interests, special relationships, or autonomous lives to lead; they are essentially selfless. The state exists only to serve others: the collective good of the real persons who are its subjects. Absent any reason for concern about Leviathan's personal autonomy or particularistic attachments, deontological limitations on its responsibility are simply misplaced.⁴⁵

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Leviathan's special relationship with its subjects combined with its giant footprint in the world creates further problems for the common law approach to liability and adjudication. Recall that in the prototypical common law case involving ordinary persons, the focus is on self-contained harms suffered as a result of one-off transactions between otherwise disconnected parties. If I run you over with my car or breach a contract with you, it is easy to identify and isolate the harm I have caused, which can be measured as the diminution in your welfare from the baseline position you occupied before I came crashing or contracting into your life. Difficulties arise only in cases involving more complex or multifaceted interactions. Suppose that you

Nussbaum at 308–309; Bernard Williams, *A Critique of Utilitarianism*, in *Utilitarianism: For and Against* (J.J.C. Smart & Bernard Williams eds., 1973).

⁴⁵ See Nagel, *Mortal Questions*, at 93; see also David Enoch, *Intending, Foreseeing, and the State*, 13 *Legal Theory* 1, 23 (2007).

are not a stranger but my longtime neighbor, and this particular interaction is one of a long series of harm-causing and benefit-conferring exchanges between the two of us. Yes, I ran over your toe today; but yesterday, I took care of your child while you were at work, and the day before you lost control of your lawn mower and destroyed my vegetable garden. Now it becomes possible for the law to “frame” a transaction between the two of us in more than one way. Instead of drawing a tight circle around your toe, the law might widen the frame to include the childcare, the vegetable garden, or other harm-causing and benefit-conferring interactions in our past or future.⁴⁶ At the extreme, the law could keep a single ledger for the entire course of our relationship, demanding (or permitting) a reckoning only at the relationship’s end, at which point the bottom-line debtor might be required to compensate the bottom-line creditor. Some legal regimes governing repeat-play and multidimensional relationships—within marriages and families, workplaces, and corporations—do, in fact, deploy strategies like this. But for present purposes, the important thing to see is that, once we move from isolated interactions to extended relationships, how to frame the relevant legal transaction is no longer intuitively determinate.

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That indeterminacy is endemic to constitutional cases. Because Leviathan is engaged in a continuous, multifaceted relationship with its subjects, there is no objective or clearly intuitive way of framing constitutional transactions. The state’s

⁴⁶ For an overview of how tort law has handled these kinds of cases, see Ariel Porat & Eric Posner, *Offsetting Benefits*, 100 Va. L. Rev. 1165 (2014).

enormous causal footprint and the multiple ways it affects the lives of its citizens creates no joints for slicing-off discrete, self-contained transactions as legally cognizable events. Conceptualizing a constitutional harm or rights violation as a setback from some status quo ante position of independence becomes impossible because there is no position of prior independence from the state.⁴⁷ Focusing on one specific state action seems arbitrary, given the many and multifarious other state actions that will have always already affected the constitutionally protected interest and its holder and the many more that will continue to do. Moreover, because the *raison d'être* of the state is to benefit its subjects, even those subjects who are harmed in some specific way by the state are likely to be net beneficiaries—better off by virtue of their relationship with the state than they would have been in the state's absence. The very idea of a state-inflicted “harm,” or rights violation, dissolves in a sea of offsetting benefits.⁴⁸

⁴⁷ This is what is sometimes called the “baselines” critique of constitutional law. For examples, see, e.g., Robert Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 *Colum. L. Rev.* 321 (1935); Seidman & Tushnet at 27–28, Sunstein, *Partial Constitution*, at 351–53.

⁴⁸ This is what is sometimes called the “framing” critique of constitutional law. See Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 *Yale L.J.* 1311 (2002); see also *id.* at 1376–83 (explaining how the framing and baselines critiques fit together).

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Consider a constitutional claim brought by an owner of beachfront property arguing that his property rights have been violated (or “taken”) by state environmental regulations that prevent her from building a house on the parcel. Narrowly framed, the relevant regulation inflicts an economic harm on the owner by diminishing the value of her property. Yet the same environmental regulatory regime might have prevented beach erosion or flooding that would have rendered the property worthless. The state might also be credited for providing the roads and electricity that made the property accessible and habitable, not to mention the property and contract law without which there would be no property or market value in the first place. Any or all of these government benefits could conceivably be bundled together and offset against the localized harm inflicted by the environmental regulation. And, of course, the same is true of the benefits and harms flowing in the opposite direction, from the citizen to the state, including the payment of taxes. At the logical limit, we might be driven to ask whether, taking account of the entirety of their relationship, the claimant has been harmed by the state on net. That is the same as asking for a comparison between the current position of the claimant and what her life would have been like in the absence of the state. If the benchmark is the Hobbesian state of nature, Leviathan will almost always prevail.

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Not all constitutional rights are aimed at protecting individuals against harm relative to some baseline position. Other rights are keyed to equality, measuring harm relative to how the state has treated some other individual or group. But equality cases are no less dependent on arbitrary framing choices. Race-conscious benefit programs

can be challenged as violating equal protection by framing the benefit in isolation, focusing on that single dimension of unequal treatment on the basis of race. But race-conscious benefits can also be more broadly framed as remedial, compensating for disadvantageous, racially discriminatory treatment in the past. Widening the frame still further to encompass the entire history of slavery, segregation, and discrimination would turn the equality claim on its head, entitling Black Americans to massive, additional remedial measures. Switching to the religion clauses of the First Amendment, the state can be portrayed as violating the principle of religious neutrality when it provides funding to religious schools; alternatively, widening the frame, the state can be portrayed as violating neutrality by *refusing* to fund religious schools, given its support of secular education. In equality cases and individual rights cases alike, transactional frames can be freely adjusted to portray the state as harming, benefiting, or acting neutrally.

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So: the common law model of liability and adjudication—designed around the occasional, harm-inflicting interactions of non-altruistic strangers—loses its conceptual grip when transposed to the very different situation of the state’s dealings with its citizens. The model also loses a large part of its normative appeal. The common law concern with transactional harm is intuitively grounded in corrective justice, giving victims a claim to the preservation or rectification of their status quo position against wrongful alterations by injurers. When that model is applied to ordinary individuals, the question immediately arises why corrective justice should be

prioritized over other values—particularly distributive justice.⁴⁹ After all, there will be many cases in which the status quo ante positions of the parties are distributively unjust, and in which the relevant transaction brings them closer to justice (imagine: an impoverished parent steals a loaf of bread from the backyard table of a wealthy homeowner to feed the parent’s starving child). The standard explanation for why the law should prevent or rectify those transactions is that there is independent value in protecting even unjust status quo distributions. Certain kinds of nonconsensual transfers may be intrinsically wrong; or forcing compensation may create instrumentally efficient incentives to avoid harm in the future. But what about the trade-off with distributive justice? Legal theorists propose a best-of-both-worlds solution, based on an institutional division of labor. While legal rules operate on one track to prevent localized harms and preserve status quo distributions, the state operates on a parallel track to pursue distributive justice through taxation and spending.⁵⁰ It is this bifurcated model that legal theorists have in mind when they describe corrective justice as “personal or individual justice,” and distinguish it from

⁴⁹ See Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in *Oxford Essays on Jurisprudence, Fourth Series* 237 (Jeremy Horder ed., 2000).

⁵⁰ See Perry at 261; 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).

the kind of distributive, or “social justice,” that applies not to individuals but to the state.⁵¹

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When corrective justice is imposed upon the state, however, the problem is obvious. If the state is subject to the same constraints on upsetting status quo distributions as private actors, then it cannot play its assigned role in bringing about distributive justice. Conceptualizing constitutional rights on the model of common law ones can have precisely this consequence. When government takes property from a rich developer to build low-income housing, or levels down the political influence of wealthy individuals and corporations by regulating campaign expenditures, or provides race-conscious remedial measures, constitutional law is quick to perceive a problematic departure from the status quo baseline of entitlements or equality. That perception is conceptually problematic, for the transactional framing reasons just discussed. But it is also normatively problematic in the priority it places on corrective over distributive justice—protecting an unjust baseline distribution against redistributions that would make it more just. That priority is justified in the case of private actors only because distributive justice is being handled by the state. But if the state is required to adopt the same hands-off posture toward existing distributions as private actors, then distributive justice along constitutionalized dimensions is

⁵¹ Perry at 238–39; Christopher Kutz, *Reparations: The Cost of Memory and the Value of Talk*, 32 *Phil. & Pub. Aff.* 277, 299–300 (2004); see also Ronald Dworkin, *Law’s Empire* 310 (1986).

sacrificed altogether. In constitutional law's personified perspective, the state's special role in redistribution is disappeared, along with much else that makes the state distinctive.

C6S3 **Political Justice**

C6P36 Up to now, the point has been that legal and moral frameworks designed around ordinary persons do not translate easily to the state. The reverse is also true. Normative frameworks developed by theorists of political justice are meant to apply only to the state and not to ordinary persons. Recall Rawls's "division of moral labor" between the state and private persons, holding the state solely responsible for maintaining the background conditions of systemic social justice and remitting ordinary persons to the different and less demanding standards of personal morality.

C6P37 Now, Rawls's sharp contrast between political justice and personal morality has provoked a meta-ethical debate about how deep the distinction can cut. Philosophers disagree about whether the normative principles governing the personal and political spheres must evolve from a common set of fundamental first-principles, or whether the two spheres should be understood as morally distinctive all the way down.⁵² For Rawls, the distinctive moral character of the state meant that the standards of political justice could not be derived from the same moral principles that

⁵² G. A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 *Phil. & Pub. Aff.* 3 (1997); Murphy; Thomas W. Pogge, *On the Site of Distributive Justice: Reflections on Cohen and Murphy*, 29 *Phil. & Pub. Aff.* 137 (2000).

govern ordinary persons. Opposed to this deep moral “dualism” is the “monistic” view that “any plausible overall political/moral view must, at the fundamental level, evaluate the justice of [political] institutions with normative principles that apply also to people’s choices.”⁵³

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We will come back around to this debate, but for now, it is enough to appreciate what monists and dualists can agree upon. Even if the moral obligations of states and persons are ultimately reducible to a single set of standards, the special role and capabilities of the state in making it possible for people to live up to those standards can generate very different, state-specific obligations.⁵⁴ Utilitarians, for example, take a fundamentally monist view of morality, applying the single moral metric of maximizing utility to everyone and everything. Nonetheless, an influential strain of utilitarian thought—so-called government house utilitarianism,⁵⁵ as articulated by Bentham and Austin, among others—takes the position that maximizing utility for society as a whole requires holding the state and ordinary persons to different moral standards. Specifically, government house utilitarians believe that government should be directly guided by the utilitarian calculus in setting

⁵³ Murphy at 253.

⁵⁴ See *id.* at 254, 263, 280; Liam Murphy & Thomas Nagel, *The Myth of Ownership* 71 (2002).

⁵⁵ This was Bernard Williams’s derogatory characterization. See Bernard Williams, *Ethics and the Limits of Philosophy* 108 (1995).

public policy, but that it would be better for people in their quotidian lives to avoid utilitarian calculations and adhere to more commonsense forms of morality.⁵⁶ For all practical purposes, therefore, monist utilitarians and dualist Rawlsians agree that the operative principles of political justice might be entirely different from those of personal morality.

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Notwithstanding their many other differences, Rawlsians and utilitarians, as well as political philosophers of other stripes, also agree on *how* political justice differs from personal morality. One distinguishing feature of political justice is that it is *systemic* in orientation. The unit of analysis for purposes of moral assessment is not discrete decisions or actions but the basic institutional structure of government and society as a whole.⁵⁷ This macro-level focus contrasts with personal morality's micro-level concern with discrete interactions among ordinary persons and narrowly drawn transactional harms.⁵⁸ Neither Rawlsian principles of justice nor the optimal set of rule utilitarian social arrangements is meant to directly govern micro-level interactions. As Rawls puts it, justice applies to a different domain than "the rules applying directly to individuals and associations and to be followed by them in particular transactions."⁵⁹

⁵⁶ See Robert E. Goodin, *Utilitarianism as a Public Philosophy* 60–77 (1995).

⁵⁷ See Samuel Scheffler, *Boundaries and Allegiances* 149–72 (2001).

⁵⁸ See Robert Nozick, *Anarchy, State, and Utopia* 204–13 (1974).

⁵⁹ *Political Liberalism* at 268–69.

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This least common denominator difference between political justice and personal morality is cogently captured by philosopher Samuel Scheffler. Scheffler describes personal morality as:

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encourag[ing] 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.

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In contrast, Scheffler continues, “[i]deas of justice, fairness, equality, human rights, and the equal worth of persons have implications that transcend the arena of small-scale interpersonal relations.” These ideals reflect “an expansive understanding of the proper scope of moral concern” that is directed toward political morality and the institutional structure of society and state.⁶⁰

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The separation of systemic political justice from localized personal morality is supposed to serve the interests of everyone in society. Allowing ordinary persons to ignore systemic justice in their everyday economic and social interactions leaves

⁶⁰ Samuel Scheffler & Veronique Munoz-Darde, *The Division of Moral Labour*, 79 *Proc. Aristotelian Soc’y*, 229, 231–34 (2005).

them, as Rawls puts it, “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.”⁶¹ Joining Rawls in embracing a “moral division of labor,” Thomas Nagel emphasizes the advantages of permitting ordinary persons to channel their concerns about the welfare of others into support for just background institutions, freeing them from the kinds of oppressive demands that would otherwise threaten to suffocate their personal and private lives.⁶² Some utilitarians take the similar view that it is unrealistically and undesirably demanding to direct people to treat strangers the same as relatives, give away all their money to the poor, or follow other dictates of the utilitarian calculus as applied to their individual, day-to-day decisions.⁶³ In this view, limiting justice to the systemic level of government policymaking serves essentially the same purpose as deontological limitations on personal morality, creating space for the kind of personal lives and attachments that have value for individual human beings.

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But not for Leviathan. As we have seen, much of the moral pull of deontological principles in the personal domain comes from a concern for the autonomy of individuals in structuring their own lives, the special obligations they owe to others close to them, and the permissibly limited perspectives they may take

⁶¹ Id. at 269.

⁶² Thomas Nagel, *Equality and Partiality* 53 (1991).

⁶³ See Goodin at 65–77.

on their responsibility to the rest of the world. As political philosophers have pointed out, these kinds of concerns have no bearing on the state. Perhaps not surprisingly, then, a second feature that tends to differentiate political justice from personal morality is that theories of justice tend to jettison deontology and take on a broadly consequentialist cast. Nagel distinguishes the personal standpoint of ordinary morality, which takes account of individual rights and autonomy, from “the impersonal consequentialist standpoint that surveys the best overall state of affairs.”⁶⁴

It is the latter, impersonal standpoint that, in the view of Nagel and other political philosophers, is distinctly suitable for the state. That is transparently the view of government house utilitarians; but even staunch critics of utilitarianism gravitate toward its consequentialist perspective in the domain of political justice. Rawls, for one, focuses his principles of justice on the outcomes likely to be generated under different institutional arrangements. The Rawlsian division of moral labor thus distinguishes the deontological orientation and obligations of ordinary people going about their lives from the broadly consequentialist posture of political justices, oriented toward systemic outcomes.⁶⁵

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This is the division that constitutional law finds itself on the wrong side of. Rather than embracing the impersonal and systematic posture of political justice that philosophers have identified as distinctively suited to the state, constitutional rights

⁶⁴ See Nagel, *Mortal Questions*, at 83–86.

⁶⁵ See Thomas W. Pogge, *Realizing Rawls* 36–47 (1989).

jurisprudence has chosen the deontological and transactional stance of personal morality. By now it will be clear that many of constitutional law's difficulties and discontents stem from that mismatch. Futile efforts to draw and justify categorical distinctions between government acts and omissions, or between intentional and merely foreseeable government-inflicted harms, would have no place in a system of constitutional law that adopted the impersonal, consequentialist outlook of political justice, which obviates such deontological distinctions. Nor would the myopic focus on small-scale transactional harms and corrective justice, which are swamped by the systemic focus of political justice. Political justice fits the state along precisely the dimensions that constitutional law's borrowed wardrobe of personal morality and private legality do not.

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That misfit has not escaped the attention of political philosophers, who recognize that constitutional law, as it is currently conceived, can play only a limited role in achieving political justice.⁶⁶ In Rawls's theory of justice, constitutional law is

⁶⁶ That view of constitutional law may encompass a normative or conceptual view of how constitutional rights ought to work, beyond descriptive recognition of how they do, in fact, work. Rawls and Nagel seem to share the belief that constitutional rights require more specificity and agreement than will be typically be possible for principles of justice. See Rawls, *Political Liberalism*, at 229–30; Nagel, *Equality and Partiality*, at 88 (arguing that the limited aims of constitutional norms facilitate the kind of consensus that is necessary for stability); see also Lawrence G. Sager, *The*

charged with delivering a set of “constitutional essentials” that includes 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.⁶⁷ These are the familiar kinds of small-scale negative rights that constitutional law specializes in. But Rawls does not look to constitutional law for achieving the more ambitious goals of political justice, including fair equality of opportunity and egalitarian distributive justice pursuant to the difference principle. Nagel, too, sees a restricted role for constitutional law in enforcing the traditional kinds of constitutional rights, like “[f]reedom of speech and religion, due process . . . and protection against racial, religious, and sex discrimination,” which “can be hard-wired into a democratic society and enforced by an independent judiciary.” But like Rawls, he believes the “the bases of broader economic and social equality” lie beyond the reach of constitutional command.⁶⁸ In this regard, political philosophers join constitutional critics in recognizing that constitutional law is not built to achieve justice.

C6S4

Are Rights Left?

Why of Constitutional Essentials, 72 *Fordham L. Rev.* 1421, 1430 (1994) (explicating and embracing Rawls’s view).

⁶⁷ Rawls, *Political Liberalism*, at 227–30.

⁶⁸ Nagel, *Equality and Partiality*, at 87–89.

Or at least constitutional law is not built to achieve one kind of justice: the kind focused on broad equality and fair distributive outcomes. Still, the kinds of localized, transactional rights violations that constitutional law adjudicates are also matters of justice for many political philosophers. Rawls, for instance, famously offers not one but two principles of justice. Rawls's 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 achieve the greatest benefit for the least well-off. Rawls's first principle, however, takes priority over the second, calling for the protection of basic liberties, including voting and political participation, freedom of speech and assembly, and religious liberty.⁶⁹ Most of these liberties are cast 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."⁷⁰ Fittingly, these are the liberties that make up the core of Rawls's "constitutional essentials."⁷¹

⁶⁹ John Rawls, *Justice as Fairness* 42–44 (2001).

⁷⁰ See Rawls, *Justice as Fairness*, at 150–52. Rawls makes an exception for political participation rights, which he says must be guaranteed their fair value. See *id.* at 45. He also recognizes a right to a "social minimum providing for the basic needs of all citizens," which is included among the constitutional essentials. See *id.* at 148–50, 47–48.

⁷¹ Something like this "two principles" view of justice is widely shared among egalitarian moral and political philosophers. Even after rejecting the "rights-based,

Constitutional rights cast in the traditional form of transactional, negative liberties leave out the distributive dimension of justice. But these rights are supposed to serve justice along a different, and no less important, dimension.

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In fact, for other political philosophers, the rights dimension of justice is the *only* dimension. Libertarians believe that justice consists of nothing more than some version of Rawls's first principle. Like constitutional lawyers, their exclusive focus is on protecting negative rights against discrete, transactional violations by the state, rejecting any broader concern with distributive justice or structural inequality. In fact, any attempt by the state to engage in egalitarian redistribution or restructuring is likely to threaten libertarian rights. Constitutional law's prohibitions on uncompensated takings of property (even in the service of egalitarian redistribution), specific restrictions of political spending and speech (even in the service of equalizing political influence or improving political discourse overall), and instances of race- or

deontological political morality" of libertarianism when it comes to distributive justice in the economic sphere, Nagel continues to endorse traditional rights as a matter of political and constitutional justice. See Murphy & Nagel at 65. Dworkin, too, places distributive justice on a different philosophical track from other issues of political morality, developing a special theory of equality of resources that operates separately from moral assessment of whether government is treating its citizens with equal concern when it comes to civil liberties and political equality. See Dworkin at 138–47 (liberty), 209–10 (political equality).

gender-discrimination (even in the service of broader equality or anti-subordination) fit neatly with the libertarian view of justice.

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It should come as no surprise, then, that libertarianism is vulnerable to the same kinds of criticism as constitutional rights conceived on the model of negative liberty and transactional harm. Critics of libertarianism point out that the status quo positions protected by libertarian rights are not pre-political possessions but products of the state. Libertarian claims to rights-protected ownership of property and wealth, for example, have been met with precisely the counterpoints raised by FDR and the New Dealers to constitutional economic liberty rights. Individuals can claim no “natural” right to what they are able to take away from the “free market,” because the market and its outcomes are, in fact, pervasively determined by actions and decisions of the state. Libertarian assertions of rights to private property miss the truth that “property and law are born together, and die together. Before laws were made, there was no property; take away laws and property ceases.”⁷² Libertarian complaints of state-inflicted harm from taxation or regulation trigger reminders of the many and more-than-offsetting benefits conferred by the state and the system of social cooperation it supports. Libertarian invocations of natural rights to ownership invite the response that libertarians in the state of nature would securely own nothing, not even their lives.

⁷² Jeremy Bentham, *The Theory of Legislation* 113 (C.K. Ogden ed., Richard Hildreth trans., 1931) (1802).

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What libertarianism misapprehends, in the view of its critics, is the state's pervasive impact on, and responsibility for, the lives and fortunes of the people who live within it. In common with constitutional lawyers, libertarians myopically focus on a select subset of state–citizen interactions while ignoring the vastly broader, and grossly beneficial, relationship in the background. And they construct a similar moral framework, focused on bad acts and discrete, transactional harms. In short, libertarians treat the state as if it were an ordinary person.⁷³ As Scheffler observes, “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.”⁷⁴

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Recall, though, that libertarians are not the only political philosophers who take this view of rights. Rawls and other egalitarian theorists of political justice reject libertarianism when it comes to economic rights, substituting systemic distributive justice for protection of individual entitlements. But they continue to embrace the

⁷³ See Pogge at 45–47.

⁷⁴ Scheffler & Munoz-Darde at 229. Scheffler observes that monists seem to share the libertarian impulse to bring together personal morality and political justice but with the opposite goal of making the obligations of distributive justice play a greater role in personal morality.

libertarian—and constitutional—architecture of rights when it comes to non-economic liberties, such as speech, religion, and anti-discrimination.

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As we have learned from constitutional law, however, that architecture is vulnerable to the same critique regardless of which rights and liberties it is being used to protect. If claims of economic liberty can be denuded and dissolved into distributive justice, then so too can other liberty claims, including the liberal rights that egalitarians want to preserve. Rights-based concerns about transactional instances of race- or gender-discrimination can be subsumed into distributive concerns about the systemic subjugation of racial minorities and women.⁷⁵ A rights-based focus on discrete acts of censoring speech or restricting religion can be replaced by a broader perspective on the quality and diversity of public discourse or the flourishing of religious pluralism. Constitutional rights can prioritize the protection of individual liberty against broadly beneficial criminal justice or national security measures, or constitutional law can look beyond these rights in pursuit of the best overall strategy of providing liberty and security for all.⁷⁶

⁷⁵ Rawls excludes a prohibition on race discrimination from the basic liberties under his first principle of justice and instead deals with racial equality as a distributive issue pursuant to the second principle. See Seana Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 *Fordham L. Rev.* 1643 (2004).

⁷⁶ See Thomas W. Pogge, *Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions*, 1995 *Soc. Phil. & Pol'y* 241; Vermeuele & Sunstein;

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Of course, it could be the case that some individual rights and liberties—if not economic liberty, then free speech, religious liberty, or antidiscrimination—have independent moral value that is worth protecting regardless of any systemic outcomes. Indeed, at least as applied to some rights, such a view is so widely held among political philosophers and constitutional lawyers alike that it seems almost beyond doubt. And yet, the difficulties described in this chapter of making constitutional rights fit the state, coupled with the appreciation of seemingly better-fitting models of political justice, do raise some questions.

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First, there is the question of priority. As we have seen in constitutional law, there are many cases in which individual rights can conflict with systemic, distributive goals, in the same way that libertarian property rights conflict with economic redistribution. A right against race discrimination can be invoked to block the kinds of affirmative action and desegregation policies that progressives see as contributing to racial justice. Constitutional prohibitions on gender discrimination have similarly been invoked (by men) to block gender-specific policies designed to materially benefit women in ways that would plausibly promote gender equality. Constitutional free speech rights stand in the way of campaign spending reforms aimed at equalizing political influence and prevent prohibitions on hate speech that might prevent the silencing of disadvantaged groups. Constitutional rights to guns for

Adrian Vermeule, *A New Deal for Civil Liberties: An Essay in Honor of Cass Sunstein*, 43 *Tulsa L. Rev.* 921 (2007).

self-defense are not obviously consistent with a system of gun control that provides the most overall security against crime and violence. In cases like these, a choice must be made between prioritizing the protection of these individual rights and pursuing systemic forms of justice. Yet it is not at all clear how these two forms of justice should be weighed against one another or combined in an optimal scheme of overall justice.⁷⁷

C6P55

Even where individual rights do not conflict with systemic justice, or where they take priority over it, we need some way of determining when these rights have, in fact, been violated. As we have seen, however, the continuous and multidimensional relationship between the state and its citizens renders the transactional frames that we ordinarily rely upon to identify violations conceptually indeterminate. Government “takings” of property can be freely reconceived as broader transactions between the individual and the state that are on net advantageous with respect to the very interest in holding property that the right is supposed to

⁷⁷ Rawls’s view is complicated in this regard. He insists on the lexical priority of the first principle of justice over the second. But within the first principle, Rawls also says that “liberty can be restricted . . . for the sake of liberty,” paving the way for a systemic approach to maximizing overall liberty *within* the first principle in pursuit of “the best total system” of liberties. Rawls provides little guidance, however, in how the best total system would trade-off promoting liberty at the level of individual, transactional rights versus more systematically.

protect. Violations of rights to free speech, antidiscrimination, or religious liberty can be likewise framed away by widening the focus to consider the broader and beneficial course of dealings between the individual right-holder and the state. As transactional frames expand, discrete rights violations dissolve.

C6P56

Finally, the most fundamental question about individual rights is what independent moral value they are supposed to serve.⁷⁸ The answer is not obvious, even to those who hold the strong intuition that such a value must exist. Thomas Nagel, for one, recognizes that “it has proven extremely difficult to account for such a basic, individualized value in a way that makes it morally intelligible.”⁷⁹ Any plausible account must go beyond pointing out the special value of the interests that rights protect. A right to free speech may be of great and distinctive value to the right-holder, and the right to life even more so. But that does not explain why individual rights should be inviolable in contexts where the value of the very same interests that the right protects could be increased through violation. Even if suppressing one person’s speech creates greater freedom of speech overall (as could be true of political spending regulation), or if sacrificing one person’s life saves more lives overall (as is arguably true of the deterrent effect of the death penalty), individual rights are

⁷⁸ See T. M. Scanlon, Rights, Goals, and Fairness, 11 Soc. Ethics 81, 81 (1977)

(“[R]ights themselves need to be justified somehow, and how other than by appeal to the human interests their recognition promotes and protects?”).

⁷⁹ Thomas Nagel, Concealment and Exposure 34 (2002).

supposed to be sacrosanct. The justification for such a view, Nagel surmises, must be “agent-relative,” providing reasons why it would be wrong for an agent, from that agent’s own perspective, to violate a right, even in the service of a greater good.⁸⁰ These reasons are not consequentialist but deontological, prohibiting an agent from intentionally aiming to inflict the harm of violating a right, regardless of the comparable harms that might be prevented as a result.⁸¹

C6P57

The intuitive pull of deontological reasoning along these lines is evident in the case of ordinary persons. Intentionally aiming at harm, or violating a right, often seems like the wrong thing for a person to do, even when it accomplishes greater overall good.⁸² In at least some versions of the trolley problem, I am not morally permitted to kill one innocent person to save the lives of five others.⁸³ Here again, however, the moral agent we are talking about is not me or some other ordinary person; it is the state. As we have seen, there are good reasons to think that agent-relative, deontological morality applies less strongly to the state, if it applies at all. This is a point Nagel himself emphasizes outside the context of rights, arguing that

⁸⁰ Id. at 35. See Thomas Nagel, *The View from Nowhere* 175–80 (1986).

⁸¹ See Thomas Nagel, *The View from Nowhere* 175–85 (1986).

⁸²

⁸³ See, generally, F.M. Kamm, *The Trolley Problem Mysteries* (2015); Judith Jarvis Thomson, *Killing, Letting Die, and the Trolley Problem*, 59 *Monist* 204 (1976); Judith Jarvis Thomason, *The Trolley Problem*, 94 *Yale L.J.* 1395 (1985).

public morality should lean consequentialist, with “a heightened concern for [overall] results, “a stricter requirement of impartiality,” and correspondingly weaker deontological restrictions on means.⁸⁴

C6P58

Now, the reasons for treating the state differently in this regard are not exactly the same as the reasons for relaxing deontological constraints on the state’s moral obligations, which was the focus of the discussion above. The issue here is not whether the state should be able to assert its own autonomy and self-interest against demands that it act in the service of others. Instead, the issue is whether the state must limit its efforts to act in the service of others by respecting and upholding deontological rights. But the two issues are closely connected. Rights and other deontological constraints on the means that can be used to pursue good ends reflect the subjective perspective of personal morality. We are supposed to care about the harm we directly inflict, and the intentionality of that harm, more than the harm we fail to prevent. As we have seen, however, that subjective, morally myopic outlook does not make the same kind of sense as applied to the state. The state can and should see and care about the big-picture, valuing the harms that it can prevent just as much as the harms it causes, to the extent there is even a coherent difference between the two. The standard deontological moral distinctions between acts and omissions, doing and allowing, and intending and foreseeing speak to aspects of personal autonomy,

⁸⁴ Nagel, *Mortal Questions* at 82, 84.

special relationships, and human psychology that do not apply in the same way to Leviathan.⁸⁵

C6P59

Perhaps there is some better way of understanding the nature of individual, inviolable rights that explains why at least some such rights should apply against the state. There is no denying the intuition that it would be morally wrong for government to torture or execute an innocent person, even if doing so would save a number of other lives. Nagel argues that the same moral intuitions should cause us to recoil at violations of individual rights to free speech.⁸⁶ But again, the justification for these intuitions is far from clear; and it is at least possible that their source lies in deeply ingrained principles of personal morality transposed upon the impersonal state.

C6P60

In any event, as Nagel highlights, there is another, more straightforward, approach to justifying rights, one that carries over the impersonal, consequentialist perspective of political justice. Rights can be understood not as morally fundamental, but simply as instrumental tools for achieving systemic goals, such as “protect[ing] against the abuse of governmental and collective power.”⁸⁷ As it happens, that is the

⁸⁵ Again, this is the thrust of Enoch and Sunstein & Vermeule, *Is Capital Punishment Morally Required?* See also Cass R. Sunstein & Adrian Vermeule, *Deterring Murder: A Reply*, 55 *Stan. L. Rev.* 847, 849–52 (2005). But see Adam Omar Hosein, *Doing, Allowing, and the State*, 33 *L. & Phil.* 235 (2014).

⁸⁶ See Nagel, *Concealment and Exposure* at 42–48.

⁸⁷ See *id.* at 34.

understanding of rights that was developed in earlier chapters of this book. Chapters 3 and 4 presented rights not as intrinsic components of justice but as instrumental tools for achieving it. By ruling out, or requiring, certain uses of state power, rights work alongside votes to empower citizens to control the state, maximizing the benefits it provides while protecting themselves against the dangers it presents. This conception of rights is entirely consequentialist, geared toward achieving the best outcomes for the stakeholders of state power. It is also systemic in orientation, seeking the best consequences overall. That set of consequences might be described in terms of justice.

C6P61

Constitutional rights do, in fact, sometimes work in this way. Chapter 5 described the *Carolene Products* approach to deploying rights for the purpose of redistributing and fairly balancing democratic power and political outcomes overall. Progressive critics of constitutional rights jurisprudence have pushed for similar strategies of putting rights in the service of systemic justice. Equal protection rights might be designed around the systemic goal of anti-subjugation, prohibiting only the kinds of discrimination that are likely to increase racial inequality while permitting or even requiring government to engage in race-conscious forms of redistribution for purposes of promoting equality. Free speech rights might be designed around the systemic goal of best promoting democratic self-government, permitting or even requiring government to restrict or selectively subsidize some types of speech in order to equalize influence or improve the quality of public debate. In place of protecting property rights, constitutional law might incorporate Roosevelt's Second Bill of

Rights, and beyond that hold government to the more ambitious aspirations of distributive justice.

C6P62

A thoroughgoing effort to make constitutional rights work as instruments of systemic justice would require rethinking not only the substantive content of rights but also the structure of adjudication and the role of courts. In some cases, the relevant constitutional obligations might be directed to the political branches, casting courts as occasional monitors of progress or leaving them out altogether. And there may be some imperatives of systemic justice that cannot usefully be served through any kind of rights-based requirements. Reconceptualizing and redesigning constitutional rights and liberties as instrumental tools of systemic justice is no simple matter, morally, empirically, or institutionally. But it promises a better return on investment than continuing on the present path. The prevailing conception of constitutional rights, modeled on personal morality and private legality, has floated too far free from political justice, and from its subject, the state.

C6S5

Is the State Left?

C6P63

One direction, then, is to focus constitutional law and political justice on the distinctive, depersonified nature of the state as a legal and moral actor. But there is another way of depersonifying the state. Rather than looking at the state as a legal and moral actor in its own right, we might switch focus to the actual persons who act through the state. As the next chapter considers in greater detail, Leviathan itself can be disaggregated out of moral existence.

Already in this chapter we have encountered skepticism about treating the state, or political justice within the state, as a separate moral subject. Rejecting the Rawlsian view that the state and its basic institutional structure should be subject to special principles of political justice inapplicable to ordinary persons, moral monists insist that the same normative principles must ultimately govern both. That does not necessarily mean, as we have seen, that the same moral and legal standards should be applied in all cases; monists accept that political justice could turn out to be very different in practice from personal morality. But monists do believe that political justice must be derived from, and reduceable to, moral principles about how people ought to behave in general. If political justice requires egalitarian redistribution of wealth, for example, that is because people themselves have a moral duty to pursue that end. To the extent the state is the best vehicle for achieving distributive justice, then ordinary people may fulfill their moral duties simply by supporting and appropriately directing the state and its institutions. But if there are other or better ways of bringing about distributive justice—such as private altruism to make up the state’s shortfalls—then people may be morally obligated to act outside of the state.⁸⁸

In the monist view, then, the state is not a moral being or subject in its own right. Consistent with the portrayal in Part II, it is merely a technology for accomplishing the collective moral goals of actual persons, who remain the sole moral agents and retain ultimate moral responsibility even when they are acting through the state.

⁸⁸ See Murphy at 278–84.

C6P65

A similar line of anti-statist moral thought has gained ground in philosophical and legal debates about justice in war. The traditional approach to thinking about just war conceives of war, like other matters of international relations and international law, primarily as something that happens between states. As we saw at the beginning of this chapter, that approach lends itself to casting states as personified moral actors. Moral and legal principles of *jus ad bellum*, protecting state sovereignty and territorial integrity against outside aggression and permitting states to fight in self-defense, are bolstered by the view that “[s]tates possess rights more or less as individuals do.”⁸⁹ Legal and moral rules of *jus in bello*, seeking to minimize harm to innocents during war, are likewise derived by analogy from “the familiar world of individuals and rights.”⁹⁰

C6P66

Even where traditionalists are inclined to disaggregate the state—considering the morality and legality of fighting and killing from the perspectives of soldiers, political leaders, and democratic citizens—there is something distinctively statist about their approach. The moral and legal rights and duties of the relevant persons are

⁸⁹ Walzer at 58.

⁹⁰ Id. at 61. This is at the level of moral philosophical justification. As a matter of historical and political explanation, rules of *jus in bello* have been designed in large part to serve the military advantage of powerful states. See Samuel Moyn, *Humane* (2021); see also John Fabian Witt, *Oh, the Humanity*, *Just Security*, Sept. 8, 2021.

understood to be fundamentally transformed by their relationship to the state.⁹¹ When Michael Walzer turns his attention to the moral responsibility of political leaders for the bad acts of their states, for instance, he embraces the Machiavellian view that special reasons of state permit or demand that leaders and officials sometimes take actions that would otherwise be morally prohibited. By virtue of their relationship to the state, officials become subject to a consequentialist code of political morality that can justify “dirty hands”—meaning, hands that would be morally dirty by the standards of ordinary, deontologically inflected personal morality.⁹² Something similar is true of soldiers, in the traditionalist view, who become subject to special, statist standards of morality and legality when they are engaged in war. Soldiers are not held responsible for killing their enemies on the battlefield, for example, even

⁹¹ See Jeff McMahan, *Killing in War* 79 (2009) (describing this view for the purpose of arguing against it).

⁹² See Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 *Phil. & Pub. Aff.* 160 (1973). The force of this idea might be connected to Hobbes’s insistence that the imperative of self-preservation trumps the demands of morality—a personified principle of morality as applied to the state. See C.A.J. Coady, *The Problem of Dirty Hands*, *Stanford Encyclopedia of Philosophy*, revised July 2, 2018. But in the hands of Walzer and others, the idea has gone in the direction of a special kind of political permission that does not have a direct equivalent at the personal level.

when they do so in prosecution of an unjust war. Responsibility for this form of injustice is effectively transferred from persons serving as soldiers to their state.⁹³

C6P67

In recent years, however, the traditionally statist (or, as it is sometimes called, “collectivist”) view of just war has been subject to sustained challenge.⁹⁴ Just war “revisionists” reject the statist premise that “the moral principles that govern the activity of war apply primarily to the acts of states and only derivatively and thus indirectly to the acts of persons.” Instead, revisionists focus on the actions, rights, and welfare of the persons engaged in and affected by war without regard to the intermediation of states.⁹⁵ That means looking past traditional doctrines of state sovereignty and nonintervention to prioritize the rights and welfare of the people who might benefit from humanitarian interventions.⁹⁶ It also means applying “familiar principles of liability as they apply in relations among persons” to conclude, for

⁹³ McMahan at 85. McMahan cites Hobbes as a supporter of this view: “[I]f I wage warre at the Commandment of my Prince, conceiving of the warre to be unjustly undertaken, I doe not therefore doe unjustly, but rather if I refuse to doe it, arrogating to my selfe the knowledge of what is just and unjust, which pertains onely to my Prince.”

⁹⁴ See, generally, Adil Haque, *Law, Morality, and War* (2017).

⁹⁵ McMahan, *Killing in War* at 79.

⁹⁶ See, e.g., Beitz at 67–123; David Luban, *Just War and Human Rights*, 9 *Phil. & Pub. Aff.* 161 (1980).

instance, that combatants fighting an unjust war can be held guilty of murder when they kill enemy soldiers.⁹⁷ If traditionalists vacillate between treating states as persons and persons as states, revisionists simply treat persons as persons, dropping out the state.

C6P68

A similar anti-statist revisionism has emerged in debates over the boundaries of distributive justice. Rawls's original theory of justice was explicitly limited to justice *within* states. When Rawls came to consider justice *among* states, he turned to a version of the domestic analogy. Substituting an idealized version of morally virtuous states for persons in the original position, he imagined these "peoples" coming together to agree on principles to govern their relationships.⁹⁸ But the principles Rawls imagined being chosen by states were much less demanding than the principles chosen by persons within a state. In particular, Rawls's states reject an egalitarian principle of distributive justice, disclaiming any duty on the part of the global rich to redistribute to the global poor. For Rawls and his followers, then, the full-fledged obligations of justice arise only within the special context of the state and do not apply to relations between states or between people in different states.⁹⁹

⁹⁷ McMahan at 79.

⁹⁸ John Rawls, *The Law of Peoples* 23–35 (1999).

⁹⁹ *Id.* at 113–20; see also Samuel Freeman, *Justice and the Social Contract* 267–69, 305–308 (2007); Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 *Phil. & Pub. Aff.* 257 (2001).

Critics have rejected such a stark, statist divide. Pressing the monist view that moral obligations are indifferent to state boundaries, cosmopolitan proponents of global justice contend that the mutual demands of justice apply to all people in the world.¹⁰⁰ From this perspective, sovereign states are at best vehicles for, and at worst barriers to, achieving justice among global citizens. Between cosmopolitan monists and Rawlsian statists are those who accept that the obligations of justice must be limited to groups of people with special relationships, but who see the potential for justice-supporting relationships outside of the sovereign state. In this view, the institutional and relational features of the state that Rawls saw as singularly significant—thick forms of interdependence among people, a common economic system, an overarching political and legal governance structure—have in fact been replicated to a considerable extent by the international order beyond the state.¹⁰¹ Even in the absence of an actual world-state, the argument goes, the international order has become sufficiently state-like to give rise to the demands of political justice.¹⁰² The Hobbesian boundary between order and justice within the state and anarchy outside it has blurred.

¹⁰⁰ See, e.g., Pogge, *Realizing Rawls*, at 247.

¹⁰¹ See, e.g., Charles R. Beitz, *Bounded Morality: Justice and the State in World Politics*, 33 *Int'l Org.* 405 (1979); Joshua Cohen & Charles Sabel, *Extra Republican Null Justitia?*, 34 *Phil. & Pub. Aff.* 147 (2006).

¹⁰² For a further discussion of this phenomenon, see Chapter 8.

C6P70 Still, that boundary may continue to matter. For Thomas Nagel, as for Hobbes:

C6P71 [S]overeign states are not merely instruments for realizing the preinstitutional value of justice among human beings . . . [but] precisely what gives the value of justice its application, by putting the fellow citizens of a sovereign state into a relation that they do not have with the rest of humanity, an institutional relation which must then be evaluated by the special standards of fairness and equality that fill out the content of justice.

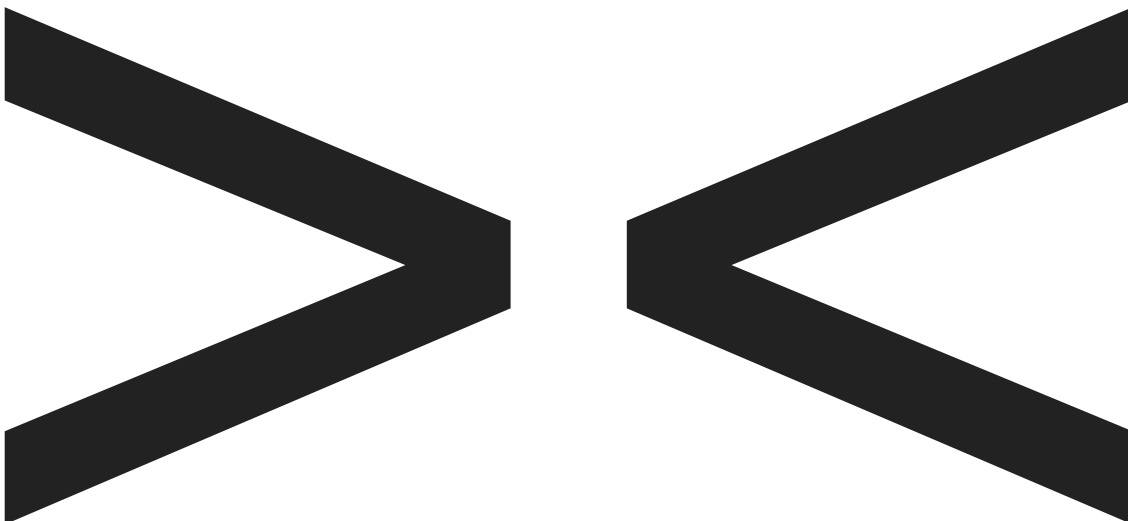
C6P72 What remains special about the state is its characteristically Hobbesian combination of legitimate coercive authority exercised over, but also by or on behalf of, its subjects: the state “exercises sovereign power over its citizens and in their names.” For Nagel and other traditional statist, that is the fundamental reason why the citizens of sovereign states “have a duty of justice toward one another through the legal, social, and economic institutions that sovereign power makes possible.” This duty, like Leviathan itself, is “*sui generis*.”¹⁰³

C6P73 The aim of this chapter is not to take a definitive side in this, or the many other, debates that have arisen about justice and the state. The point is just to show how these debates trace back to a common source. Recall Rawls’s methodological

¹⁰³ Thomas Nagel, *The Problem of Global Justice*, 33 *Phil. & Pub. Aff.* 113, 121 (2005).

first principle: “The correct regulative principle for anything depends on the nature of that thing.” How we think about the morality and legality of what the state does and does not do will depend on what kind of thing we understand the state to be. Should we understand the state as a personified moral agent and moral subject in its own right? Or as a distinctively peculiar one? Alternatively, should we look inside the state to focus on the actual people who act and relate through and within it? Are their actions and relationships meaningfully different from other kinds of organized and institutionalized collective actions and interactions? Or is there in fact nothing special about the state at all? As we have now seen, the answers to these questions have varied dramatically across moral and legal contexts and among theorists and practitioners of different stripes. The nature of Leviathan remains unresolved.

End of Chapter 6



Introduction

Thomas Hobbes famously portrayed the state as a personified Leviathan, and Hobbes's arresting image of the state as a giant person remains deeply influential to this day. Indeed, much of the theory of international law and international relations can be read as an extended interrogation of the Hobbesian metaphor of states as persons. One might have expected constitutional law, the second major regime of law for states, to follow a similar path. As the chapters that follow will show, however, many of the most persistent theoretical and practical difficulties of constitutional law stem from the inability of its designers and practitioners to appreciate the distinctive difficulties of imposing law upon Leviathan. Because Leviathan is different from an ordinary person, law for Leviathan must also be different. Laying out the distinctive structural, functional, and moral features of that form of law is the project of this book, previewed in the Introduction.

constitutional law, international law, Hobbes, Leviathan, state, personification, domestic analogy

Introduction

For the past several centuries of Anglo-American legal thought, law has been paradigmatically understood as the product of the state. Operating through the legal

and political institutions of its government, the state imposes law on the people who are its subjects. Over the same centuries, however, the state itself has also become subject to law—most prominently, international law and constitutional law, overseeing the external and internal conduct of the state, respectively. But systems of law for states necessarily work differently than systems of law by states for people. For one thing, law for states must do without a super-state or government standing above the state, capable of creating and enforcing law from the top down. For another, the state is a unique kind of legal subject, calling for different behavioral models, moral standards, and regulatory techniques than those developed for ordinary people.

C0P2

It is precisely these differences that have long marked international law as a curious, and in many eyes dubious, form of law. Seeing a system of “law without government” operating according to a structural logic of “anarchy,” skeptics have long questioned how international law can possibly operate with the kind of efficacy that is taken for granted in “hierarchical” domestic legal systems backed by the state.¹ Even those who are more sanguine recognize that, precisely because it is a system of law for states, international law must work differently from ordinary state-run legal

¹ See Eric A. Posner, *The Perils of Global Legalism* xiii (2009) (“law without government”); Kenneth Walz, *Theory of International Politics* (1979) (developing the foundational distinction between the “anarchy” of international politics and the “hierarchy” of domestic politics).

systems. Constitutional law is equally a system of law for states. Oddly, however, it has seldom been subject to the same doubts, or fully understood as different in kind from the paradigmatic legal system run by and through the state. As a result, constitutionalists have lagged, and still have much to learn from, their internationalist counterparts in coming to grips with the common project of making the state the subject rather than the source of law.

C0P3 By assimilating constitutional and international law as parallel projects of imposing law upon the state, and by highlighting the peculiarities of the state as a legal subject, this book aspires to close that gap, and to bring focus to *Law for Leviathan* as a distinctive legal form.

C0S1 **Seeing the State**

C0P4 What is Leviathan? To start, it is the creation of Thomas Hobbes, the first “modern theorist of the sovereign state.”² The iconic frontispiece of Hobbes’s eponymous work of political theory, first published in 1651, depicts the state as an “Artificiall Man,”³ a kingly colossus looming over countryside and town, wearing an expression of beatific omnipotence beneath his coronated human head (of state).⁴ Hobbes’s arresting image

² Quentin Skinner, *From the State of Princes to the Person of the State*, in Quentin Skinner, *Visions of Politics* 413 (2002).

³ Thomas Hobbes, *Leviathan* 9 (Richard Tuck ed., 1991) (1651).

⁴ See *Leviathan* at lxxiv. In words, Hobbes describes Leviathan using the traditional imagery of the body politic:

For by Art is created that great LEVIATHAN called a COMMON-WEALTH, or STATE, (in latine CIVITAS) which is but an Artificiall Man; though of greater stature and strength than the Naturall, for whose protection and defence it was intended; and in which, the *Soveraignty* is an Artificiall *Soul*, as giving life and motion to the whole body; The *Magistrates* and other *Officers* of Judicature and Execution, artificiall *joynts*; *Reward* and *Punishment* (by which fastened to the seate of the *Soveraignty*, every joynt and member is moved to performed his duty) are the *Nerves*, that do the same in the Body Naturall; The *Wealth* and *Riches* of all the particular members, are the *Strength*; *Salus Populi* (the *peoples safety*) is *Business*; *Counsellors*, by whom all things needfull for it to know, are suggested unto it, are the *Memory*; *Equity* and *Lawes*, an artificiall *Reason* and *Will*; *Concord*, *Health*; *Sedition*, *Sicknesse*; and *Civill war*, *Death*. Lastly, the *Pacts* and *Covenants*, by which the parts of this Body Politique were at first made, set together, and united, resemble that *Fiat*, or the *Let us make man*, pronounced by God in the Creation.

Leviathan at 9.

On the body politic metaphor generally, see David George Hale, *The Body Politic: A Political Metaphor in Renaissance English Literature* (1971); Judith N. Shklar, *Men and Citizens 198–99* (1969). The metaphors for the state offered by prominent political theorists since Hobbes are even more mysterious. Hegel described the state

of the state as a giant person remains deeply influential to this day.⁵ Routinely personifying the state, ordinary citizens and sophisticated theorists alike speak of its interests, desires, and emotions, and hold it personally responsible for its decisions, actions, and obligations. As the book will go on to describe, even while calling into question the reality and utility of the states-as-persons metaphor, international law and relations have been deeply influenced by it.⁶ Equally pervasively, but less self-consciously, constitutional law and its surrounding political theory likewise has been built around the anthropomorphized image of the state as a giant person.⁷

as the “Divine Idea on Earth.” Nietzsche referred to the state as the “coldest of all cold monsters”—perhaps recalling the original Leviathan from the Book of Job, a sea monster so powerful that no human could hope to control it.

⁵ See Alexander Wendt, *The State as Person in International Theory*, 30 *Rev. Int’l Stud.* 289, 289 (2004).

⁶ See Charles R. Beitz, *Political Theory and International Relations* 69 (1979) (“Perceptions of international relations have been more thoroughly influenced by the analogy of states and persons than by any other device.”); see also Edwin Dewitt Dickinson, *The Analogy Between Natural Persons and International Persons in the Law of Nations*, 26 *Yale L.J.* 564 (1917).

⁷ For a similarly Hobbesian perspective on constitutional law’s personification of the state, see Alice Ristroph, *Covenants for the Sword*, 61 *U. Toronto J.J.* 657, 660 (2011).

Yet the image of a personified Leviathan we carry in our heads is not the one Hobbes or his cover artist actually portrayed. A closer look at the frontispiece brings into focus the multitude of “natural” persons—as Hobbes distinguished them from the artificial person of Leviathan—whose tiny figures populate Leviathan’s arms and torso, and whose collective identity Leviathan is meant to represent. To further complicate matters, Hobbes’s head of state, drawn to resemble that of a real-life monarch,⁸ is supposed to represent not the natural person of the king but the impersonal government offices in which sovereign authority has been vested. As the text of *Leviathan* makes clear, the power and status of these offices—the crown, as well as representative assemblies and other institutions of government—are independent of the persons who occupy them at any given time.⁹ The modern state as Hobbes saw it is thus, in the words of Quentin Skinner, “doubly impersonal”: “We distinguish the state’s authority from that of the rulers or magistrates entrusted with the exercise of its powers for the time being. But we also distinguish its authority from that of the whole society or community over which its powers are exercised.”¹⁰

⁸ In one version of the frontispiece, accompanying a special copy of the manuscript Hobbes presented to King Charles II, Leviathan’s face is rendered with an uncanny resemblance to Charles himself.

⁹ See also Ernst H. Kantorowicz, *The King’s Two Bodies* (1957).

¹⁰ Quentin Skinner, *The State*, in *Political Innovation and Conceptual Change* 90, 112 (T. Ball et al. eds., 1989); see also Harvey C. Mansfield, Jr., *On the Impersonality of*

This depersonified understanding of the state is true to both its historical development and the modern reality of its form and function. The state is nothing more, or more mysterious, than a particular approach to social organization and governance that has prevailed over the past several centuries.¹¹ That approach is characterized by the centralization of lawmaking and enforcement in a governmental

the Modern State: Machiavelli's Use of *Stato*, 77 *Am. Pol. Sci. Rev.* 849, 851 (1983); Quentin Skinner, A Genealogy of the Modern State, 162 *Proc. Brit. Acad.* 325 (2009). For an exploration of the meaning of the "personality" of the state in Hobbes's and subsequent political thought, see David Runciman, *Pluralism and the Personality of the State* (1997).

¹¹ This is not to deny that the state can be usefully understood for some purposes through the metaphor of personification, or even that the state *really is* a person, or at least possesses some attributes of personhood. See Wendt. Such claims depend on philosophically contestable accounts of personal and group identity, agency, and intentionality that are referenced throughout the book as they bear upon international and constitutional law but need not be definitively resolved. The philosophically unambitious, pragmatic posture of the book is simply to point out what a personified view of the state might lead us to miss about the distinctive moral and behavioral attributes of the state, and about the consequences of law for the human beings who live in them.

organization that, in Max Weber's famous definition, "(successfully) lays claim to the monopoly of legitimate physical violence within a certain territory."¹²

C0P7

The modern state emerged in Europe starting around the turn of the second millennium, outcompeting families, feudal lords, cities, empires, and the church to become the dominant form of political order.¹³ In its origin, the state was primarily a technology of warfare.¹⁴ Confronted with the perpetual threat and reality of armed conflict, kings came to see that they could support large armies by extracting wealth and manpower from populations placed under their control and protection. Power over these nascent states was initially concentrated in the hands of a single ruler and his household—an absolute monarch. Over time, however, increasingly elaborate

¹² Max Weber, Politics as a Vocation, in *From Max Weber: Articles in Sociology* 77, 78 (H.H. Gerth & C. Wright Mills eds., 1946). See generally Walter Scheidel, *Studying the State*, in *The Oxford Handbook of the State in the Ancient Near East and Mediterranean* 5, 9 (Peter F. Bang & Walter Scheidel eds., 2013) (surveying the standard definitions of the state).

¹³ On the historical origins and rise of the state, see, e.g., Martin van Creveld, *The Rise and Decline of the State* (1999); Thomas Ertman, *Birth of the Leviathan* (1997); Joseph R. Strayer, *On the Medieval Origins of the Modern State* (2005); Charles Tilly, *Coercion, Capital, and European States, AD 990–1992* (1992).

¹⁴ See Charles Tilly, *War Making and State Making as Organized Crime*, in *Bringing the State Back In 169* (Peter B. Evans et al. eds., 1985).

bureaucratic apparatuses were built up around the tasks of conscription and taxation. The infrastructure of the state continued to grow as rulers realized they could increase their tax base by creating a legal system and supporting trade. Governance capabilities initially constructed for fiscal and military purposes eventually found new uses, as the state began to provide additional public goods to meet the demands of its citizens and secure their ongoing cooperation. In exchange for taxes and loyalty, groups of constituents in some places insisted upon more direct control over government decisionmaking, giving rise to representative assemblies and the beginnings of democracy. Increasing control over the state by its citizens has pushed it to serve their welfare in more and various ways, by providing education, health care, economic support, and more. As the state has taken on new tasks, its institutional forms have grown ever more complex and impersonal. Bureaucracies, judiciaries, legislatures, and professionalized armies and police forces have long since superseded the personal rule of kings their retainers.¹⁵

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At the end of this line of development stands the modern state, with its bureaucratized and complexly institutionalized system of government and, in many places, democratic rule by broad segments of the population. This version of Leviathan looks nothing like an absolute monarch on steroids. Yet the personified

¹⁵ Though traces of personal rule continue to exist, for example, in the American presidency. See Daphna Renan, *The President's Two Bodies*, 120 *Colum. L. Rev.* 1119 (2020).

image of the state is difficult to give up—in part because it is far from clear what picture or metaphor should take its place. The image of the state as a giant king declaring “L’etat c’est moi” is simple and intuitive. Writing about the British government in the mid-nineteenth century, Walter Bagehot made the case for the indispensability of royalty by arguing that, for most of his fellow citizens, monarchy was the only “intelligible” form of government:

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The nature of a constitution, the action of an assembly, the play of parties, the unseen formation of a guiding opinion, are complex facts, difficult to know, and easy to mistake. But the action of a single will, the fiat of a single mind, are easy ideas; anybody can make them out, and no one can ever forget them. When you put before the mass of mankind the question, ‘Will you be governed by a king . . . or a constitution?’ the inquiry comes out thus—‘Will you be governed in a way you understand, or will you be governed in a way you do not understand?’¹⁶

C0P10

The modern state is indeed more difficult to make intelligible.¹⁷ For Hobbes and subsequent theorists, the state is an immaterial, abstract concept, standing for a

¹⁶ Walter Bagehot, *The English Constitution* 61 (2d ed. 1873).

¹⁷ Cf. Michael Walzer, *On the Role of Symbolism in Political Thought*, 82 *Pol. Sci. Q.* 191, 194 (1967) (“The state is invisible; it must be personified before it can be seen, symbolized before it can be loved, imagined before it can be conceived.”).

group of people united by, and capable of acting collectively through, a system of government.¹⁸ Such an intangible entity is hard to picture; the *Leviathan* frontispiece might be as good as it gets. That image, however, is too easily reducible to that of an oversized person. Imagining the state as a person—as a self-directed being with a life of its own—has led to a great deal of confusion about how states behave and misbehave and how they can be governed by law.¹⁹

¹⁸ See generally Quentin Skinner, *From Humanism to Hobbes* ch. 12; F.H. Hinsley, *Sovereignty* (2d ed. 1986). In Hobbes’s specific version, the state arises when a “multitude” of ungoverned people become “one person” by agreeing to be governed by a “sovereign” who represents them.

¹⁹ The mistake is metaphorical, not metaphysical. Although few people, when pressed, would admit to believing the state *really is* a person, there is nothing necessarily wrong with that point of view. Depending on one’s definition of personhood, states (or corporations, algorithms, etc.) might have at least as much of a claim to that status as flesh-and-blood homo sapiens. On some philosophical views, states (among other entities) can act intentionally, rationally, morally, and even consciously. See Wendt. What matters for purposes of this project is not whether the state possesses attributes of personhood, but whether its behavior is descriptively and normatively similar to, or different from, the behavior of flesh-and-blood persons. As the book will show in a number of specific contexts, the answer is often that the state is different. As the book will also emphasize, whatever we might think of the state, we

Working through that confusion has been a central part of the internationalist project. Much of the theory of international law and international relations can be read as an extended interrogation of the Hobbesian metaphor of states as personified Leviathans—or, as Hobbes originally conceived it, of persons as mini-states. Hobbes's account of Leviathan's birth starts from a state of nature in which, owing to the absence of "a common Power to keep them all in awe," the population is subject to the perpetual risk of war "of every man, against every man."²⁰ This dismal picture of the state of nature for men is developed by analogy to the natural environment of states. Hobbes envisions states in the international arena "in the [] posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes; . . . which is a posture of War."²¹ Only the creation of Leviathan can save people from the fate of states that lack their own super-Leviathan and thus continue to struggle in an international state of nature.

cannot ignore the flesh-and-blood persons who continue to exist independently; their interests, rights, and welfare should not be subsumed into the metaphorical body of Leviathan.

²⁰ Leviathan at 88.

²¹ Leviathan at 90.

C0P12

Hobbes's comparison of states and persons—the so-called domestic analogy²²—has been the starting point for the most influential theories of international law and relations.²³ International relations realists continue to embrace Hobbes's perception of world politics as an inherently anarchic domain populated by self-interested states pitted against one another in a competition for power and survival. Drawing a different moral from the analogy, liberal internationalists reason that the only escape from the international state of nature is a global Leviathan—if not a full-fledged world government, at least a robust regime of international law and governance capable of doing for states what states have done for their own citizens.

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But theorists of international law and relations have also recognized that the states-as-persons analogy is, for many purposes, too simple an equation. Hobbes himself recognized the limitations of the analogy. Noting that “there does not follow from [international anarchy], that misery, which accompanies the Liberty of particular men,”²⁴ Hobbes never recommended the creation of a global Leviathan. Picking up on

²² Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* 46–51 (1977).

²³ See generally Chiara Bottici, *Men and States: Rethinking the Domestic Analogy in a Global Age* (2009); Michael C. Williams, *Hobbes and International Relations: A Reconsideration*, 50 *Int'l Org.* 213 (1996); Martin Wight, *An Anatomy of International Thought*, 13 *Rev. Int'l Stud.* 221 (1987).

²⁴ *Leviathan* at 90.

this line of thought, theorists of international relations have continued to make the case that international peace and cooperation can be achieved among states notwithstanding the absence of a super-state standing over them.²⁵ Precisely because “states are different kinds of agents from natural individuals,” the neo-Hobbesian argument goes, they “can more peaceably coexist with other states” under legal and political conditions different from those necessary to create order among persons within states.²⁶

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As the chapters that follow will describe, the recognition that states are “different kinds of agents” has punctuated the theory and practice of international law and relations, serving as a counterpoint and corrective to the states-as-persons heuristic. Doctrines of state sovereignty that were developed on the model of personal autonomy have been challenged on the grounds that “[s]tates are not sources of ends in the same sense as are persons. Instead, states are systems of shared practices and institutions within which communities of persons establish and advance their ends.”²⁷ Realist models of perpetual conflict and competition among states have been called into question by theorists who doubt that states can be usefully understood as self-interested maximizers of their own power with interests or wills of their own.

²⁵ See Bull at 44–49.

²⁶ David Singh Grewal, *The Domestic Analogy Revisited: Hobbes on International Order*, 124 *Yale L.J.* 618, 651.

²⁷ Charles R. Beitz, *Political Theory and International Relations* 180 (1979).

Frameworks of international humanitarian law that derive principles of just war among states from the legal and moral rules regarding self-defense and harm to innocents that apply to ordinary people in “the familiar world of individuals and rights”²⁹ are tempered by the recognition that in many respects “[s]tates are not in fact like individuals (because they are collections of individuals) and the relations of states are not like the dealings of private men and women.”³⁰ Assessments of the costs and benefits of international legal compliance for states are confronted by the complication that “states do not possess their own “projects and life plans” and do not “experience welfare or utility” because states are not, in fact, persons, but merely “vehicles through which [actual persons] pursue their goals.”³¹ For centuries, theorists and practitioners of international law have been attentive to the special nature and status of states and to the ways that legal, moral, and political frameworks of analysis designed around ordinary persons might be a bad fit for Leviathan.

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One might have expected constitutional law, the second major regime of law for Leviathan, to follow a similar path. Sharing common origins in the rise of the modern state, constitutional and international law were originally conceived as conjoined efforts to regulate state power, internally and externally. For Hobbes and other early theorists of the sovereign state, what made these two regimes deeply

²⁹ Michael Walzer, *Just and Unjust Wars* 61 (1977).

³⁰ *Id.* at 72.

³¹ Eric A. Posner & Jack L. Goldsmith, *The Limits of International Law* 193 (2005).

similar to one another—and deeply different from ordinary, state-run legal systems—was their mutual aspiration to impose law on a creature that was supposed to be law’s source rather than its subject.³² Hobbes himself saw no possibility of accomplishing the self-contradictory project of legally constraining sovereign states that, by definition, could be subject to no greater power. Even if law for states could be something more than an oxymoron, moreover, it was far from clear how it could possibly work in the absence of a Leviathan standing above the state, capable of authoritatively specifying the content of law and enforcing compliance. Law *for* states, international and constitutional alike, confronted a set of unique theoretical and practical challenges that did not apply to, or had already been solved by, regimes of law *by* states, for ordinary people.

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Yet constitutionalists have almost entirely lost sight of this unifying, Hobbesian perspective.³³ Indeed, most American constitutionalists would be puzzled if not appalled by the suggestion of any deep connection to international law. After all, constitutional law is supposed to be the ultimate expression of self-government by the American people and the foundation of our indisputably legitimate and effective

³² Hinsley at 126–213.

³³ For a parallel project of recovering the understanding of constitutional, or more broadly “public law,” as a special form of law for states, see Martin Loughlin, *Foundations of Public Law* (2010); see also *Questioning the Foundations of Public Law* (Michael A. Wilkinson & Michael W. Dowdle eds., 2018).

legal system. International law, in contrast, is perceived by many in this country as a vehicle for foreign interference with American sovereignty and self-government, and a dubious attempt to cloak political power relations in the guise of law. Constitutional law, in short, is *real* law, securely embedded in and backed by the state. International law, floating outside of the state, is fake.

C0P17

This misapprehension has stunted the development of constitutional thought. As the chapters that follow will show, many of the most persistent theoretical and practical difficulties of constitutional law follow from the inability of its designers and practitioners to fully appreciate that, in common with their internationalist counterparts, they are constructing a regime of law for states—using similar tools to solve similar problems, stemming from the substitution of states for persons as the subject of law. Rather than dismissing international law as fake, constitutionalists would do better to follow in its path, coming to appreciate the distinctive difficulties of imposing law upon Leviathan, and recognizing what Leviathan actually is.

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Laying out that path is the project of this book. More ambitiously, the project is to bring together international and constitutional law to develop a unified theory of law for states—or, with apologies and credit to Hobbes, *Law for Leviathan*. Hobbes turned out to be wrong about the impossibility of imposing positive law on the sovereign state. As the development of international and constitutional law has proven, states can, in fact, be subject to law. But Hobbes was right to see that states could not be subject to the familiar form of law created and implemented by and through states for the purpose of governing the lives of ordinary people. Because

Leviathan is different from an ordinary person, law for Leviathan must also be different. The chapters that follow describe the distinctive structural, functional, and moral features of that form of law.

COS2 **What Follows**

COP19 The rest of the book is divided into three parts and eight chapters. Part I (“Law for States”) is about the basic structural differences between legal systems created by and for the state. From Hobbes through the present, law has been paradigmatically understood as a product of the state. The authority to make and enforce law stems from state sovereignty. And law is made and enforced is by through the institutional apparatus of the state: legislatures and courts authoritatively promulgate, refine, and disambiguate legal rules, while executive enforcement authorities, possessed of the state’s monopoly on the legitimate use of coercive force, ensure compliance. Legal systems that cast the state as the subject rather than the source of law are, necessarily, different. In the absence of any super-state capable of subjecting Leviathan to law, it is far from clear how systems of law for states can replicate the normative, institutional, and functional features of a real legal system. Hobbes dismissed the prospect out of hand.

COP20 A long line of Hobbesian skepticism has continued to cast doubt on international law, emphasizing precisely the deficiencies that follow from the foundational absence of the state. Constitutional law is equally a system of law for states of the sort that Hobbes imagined impossible. Oddly, however, it has seldom been subject to the same doubts or understood as different in kind from ordinary,

state-run legal systems. Part I of the book presents constitutional law as equally a regime of law for Leviathan, showing how, like international law, it has had to make do without the resources of the state it is trying to regulate.

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Chapter 1 (“Law Without the State”) describes the related challenges of legal settlement and legal enforcement. An effective system of law requires the validity and content of legal norms to be authoritatively specified and broadly complied with. If subjects are free to decide for themselves what the law is, or ignore it, then law will fail in its essential function of making its subjects do things they would not otherwise want to do. That is precisely the kind of worry that has long afflicted international law, as critics wonder why a global super-power like the United States would bow to a rule of international law that disserved its interests, rather than changing, disregarding, or interpreting it away. We might equally wonder, however, why a president of the United States would choose to abide by constitutional limitations that stand in the way of doing what he and a majority of the country believe would be best. When President Obama’s chief counter-terrorism advisor made it known that the administration “had never found a case that our legal authorities . . . prevented us from doing something that we thought was in the best interest of the United States to do,” he was talking about constitutional law as much as international law. If ordinary domestic law, administered and enforced by states, can rely on enforcement by a

“gunman writ large,”³⁴ international law and constitutional law, imposed upon states, both raise the question of why “people with guns obey people without guns.”³⁵

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While constitutionalists have paid much less attention to these kinds of questions than their internationalist counterparts, the answers available to them are, unsurprisingly, similar. A lingering line of Hobbesian skepticism connects international realists with constitutional theorists who doubt that constitutional rules and rights serve as anything more than “parchment barriers,” and who see constitutional courts as doing little more than ratifying the preferences of the politically powerful. At the same time, however, both internationalists and constitutionalists have also recognized the possibility—and plausible reality—of widespread legal compliance. International institutionalists and Madisonian constitutionalists have demonstrated how compliance might be a product of decentralized enforcement and cooperation by self-interested actors within the system. And international relations constructivists and like-minded constitutional theorists have highlighted the possibility that illegal behavior might become undesirable or

³⁴ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 603 (1958); see generally Frederick Schauer, *The Force of Law* (2015).

³⁵ Stephen Holmes, *Lineages of the Rule of Law*, in *Democracy and the Rule of Law*, 19, 24 (Jose Maria Marvall & Adam Przeworski eds., 2003); accord Niccolò Machiavelli, *The Prince* 71 (Leo Paul S. de Alvarez trans., 1981) (1532) (“[T]here cannot be good laws where there are not good arms.”).

unimaginable to actors who have internalized legal norms and institutions or been swayed by their legitimacy. Proceeding on parallel tracks, internationalists and constitutionalists are developing similar explanations of how law for states can achieve some measure of settlement and compliance even in the absence of a crown-wearing, sword-wielding Leviathan standing above.

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Chapter 2 (“Law Versus Sovereignty”) describes how international and constitutional law have negotiated the common challenge of state sovereignty. Accompanying and facilitating the rise of the modern state, the concept of sovereignty was conceived to justify the political authority of the state’s government over its subject populations and, at the same time, to establish the autonomy and self-governance of states in the international realm. It is no coincidence that the international system of sovereign states, formally recognized by the Peace of Westphalia in 1648, took shape at the same time Hobbes was developing the concept of sovereignty in *Leviathan*. Sovereignty, as Hobbes and other early theorists of the state conceived it, denied the existence of any higher power standing over Leviathan—including the power of law, constitutional or international.

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Even as these regimes of law for states have taken hold, they have been forced to wrestle with Hobbesian doubts. International law from its inception has struggled with the apparently self-contradictory project of attempting to impose law upon states that it simultaneously conceives as sovereign. The way out of this dilemma has been the foundational principle that sovereign states can be bound by international law only with their consent. But as the consent requirement has been stretched, strained, and

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selectively abandoned, skeptics have assailed international law as an illegitimate threat to state sovereignty. Recent waves of populist and nationalist resistance to globalism testify to the force of these criticisms.

Those who distrust or disparage international law, Americans in particular, often hold up constitutional self-government as the contrasting ideal. In fact, however, the Hobbesian understanding of sovereignty is no less a problem for constitutionalism. Indeed, reconciling constitutional constraints with a commitment to sovereignty has been the central challenge of constitutional theory since the American Founding. Following in the footsteps of international law, American constitutional law has attempted to solve the problem of sovereignty by invoking sovereign consent—relocated, for constitutional purposes, from the government to “We the People.” The shift to popular sovereignty paved the way for law to be imposed on government. But this concept of sovereignty raised no less difficult questions about how the people themselves could be bound by constitutional rules and rights that conflicted with present-day popular will. The perpetual challenge of constitutional theory has been to explain why constitutional limitations on democratic decisionmaking serve not as constraints on popular sovereignty but as popular sovereignty’s true expression.

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Whether constitutional law’s attempts to square the circle of sovereignty and legal obligation are any more convincing than international law’s is open to debate. But the robust existence of these regimes of law for Leviathan might also lead us to question what is left, or worth preserving, of the Hobbesian conception of

sovereignty. Sovereignty for Hobbes was grounded in the analogy of states to free and autonomous persons in the state of nature, who could only be subject to political or legal authority with their consent. Recognizing the limitations of that analogy, and the costs it has inflicted on the actual human beings who have for centuries struggled to overcome sovereignty, might lead us to suspect that “artificial man” of Leviathan has created an artificial problem for regimes of law governing the state.

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Part II (“Managing State Power”) turns to the distinctive challenge of regulating state power through law and catalogs the array of techniques that have been developed for that purpose by international law and constitutional law alike. This part begins by replacing Leviathan with a different metaphor for the state: not an “artificial man,” but a manmade technology. Like artificial intelligence or nuclear power, the technology of the state comes with enormous potential benefits for human welfare, but also the risk of catastrophic harms. One approach to managing such a powerful and potentially dangerous technology is to make and enforce rules about how it can be used. Another approach is directed at its *users*, selecting for trustworthy or well-motivated controllers and creating channels of accountability and influence over their decisionmaking. Yet a third approach, much cruder, is to limit the development of the technology in the first place, or dismantle it, sacrificing the potential benefits in order to avoid the downside risks. Constitutionalism makes use of all three of these strategies. But it has done so with too little understanding of how the different approaches to managing state power relate to one another and the trade-offs among them. Drawing on parallels from international law and relations, the first pair of

chapters in Part II develop a framework for thinking about how best to build, control, and *unbuild* the power of the state.

C0P28

Chapter 3 (“State Building and Unbuilding”) starts with project of building state power. From the post–World War II Marshall Plan to the post-9/11 state-building projects in Iraq and Afghanistan, building stronger states and fixing failed ones has been perceived as a foreign policy imperative. Hobbes would have approved. A state that did not build and consolidate power was destined to devolve into conflict and civil war, returning its inhabitants to the state of nature, where life was “solitary, poor, nasty, brutish, and short.” As history has painfully demonstrated, however, building stronger states comes with risks of its own, both domestically and internationally. Before embracing the Marshall Plan, the U.S. government had seriously considered Treasury Secretary Henry Morgenthau’s “Program to Prevent Germany from Starting a World War III,” which called for decimating and dismantling—*unbuilding*—the German state. A similar ambivalence between building and unbuilding state power has been a pervasive feature of American constitutionalism since the Founding, when Federalist state-building ambitions met Anti-Federalist fears of distant and tyrannical government. The same arguments about the risks and rewards of state power, and the costs and benefits of building and unbuilding it, have run through contemporary debates over the presidential powers, the administrative state, and constitutional federalism. On the home front, Americans have resolutely resisted Hobbes’s advice, intentionally designing for ourselves a state built, if not to fail, at least not to fully succeed.

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Chapter 4 (“Rights and Votes”) considers the prospects for successfully controlling state power once it has been built, focusing on the two primary tools designed for doing so. As the technology analogy suggested, strategies for controlling power can be aimed at uses or users. Particular uses of state power can be specified or prohibited through legal rules and restrictions, protecting vulnerable subjects against abuse—the strategy of “rights.” Alternatively, the users of state power can be selected or influenced through a system of politics that empowers vulnerable subjects to protect their own interests—the strategy of “votes.” This simple way of assimilating rights and votes will be jarringly counterintuitive to many constitutionalists. Constitutional rights and political representation are conventionally cast as opposing forces. Theorists of political liberalism and justice tend to view rights as extrapolitical limitations on democratic decisionmaking. Constitutional lawyers, likewise, have been long obsessed with what they see as an inherent conflict between constitutional rights and democracy, or “countermajoritarian” judicial review and democratic majority rule. Internationalists, in contrast, have been more inclined to see political power and legal protections as working in parallel. The political techniques of international relations, leveraging diplomatic, military, and economic power, and the legal prohibitions, obligations, and governance regimes created by international law, have long been understood as joint and substitutable strategies for protecting the interests of states and their peoples against the threatening power of other states.

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Constitutional law has much to learn from this perspective. Viewing rights and votes as comparable tools for protecting vulnerable groups against state power raises

questions about why constitutional designers, courts, and political actors have chosen to press for one rather than the other, or for particular combinations. While rights and votes are broadly substitutable, they work in different ways, with characteristic advantages, disadvantages, and domains of feasible implementation. In some contexts, rights and votes function not just as substitutes but as complements: political power can increase the value of rights, and the other way around. Finally, rights and votes can both be understood as forms of political “voice” and compared to the alternative strategy of “exit,”³⁶ through federalism or outright secession. In fact, the sovereign state itself can be understood as a kind of exit strategy, shielding its citizens from power of other states, perhaps more securely than rights or votes ever could.

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Chapter 5 (“Balancing Power”) goes on to consider yet another approach to managing state power, one that has long been central to both international and constitutional statecraft. Proceeding from the premise that “power can only be controlled by power,”³⁷ internationalists and constitutionalists alike have looked to the balance of powers among and within states as a safeguard against hegemonic oppression. From Hobbes to Henry Kissinger, realist approaches to international relations have held that the best hope for stability and peace among inherently power-seeking, self-interested, and rivalrous states is to maintain a balance of power among

³⁶ See Albert O. Hirschman, *Exit, Voice, and Loyalty* (1970).

³⁷ Scott Gordon, *Controlling the State* 15 (2009).

them.³⁸ Internal to the state, casting the different branches and units of government as similarly self-aggrandizing entities pitted against one another in a contest of “[a]mbition . . . counteract[ing] ambition,” constitutionalists since Madison have converted the balance of powers strategy into a system of “checks and balances.” In the constitutional arena as in the international one, competition among power-seeking Leviathans is supposed to create a self-enforcing equilibrium of balanced power kept safely within bounds.

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Yet the constitutional version of balance of power, upon closer inspection, turns out to be deeply, and doubly, misguided. The first problem, long recognized by internationalists, is that Hobbesian realism cannot provide anything like a full account of state behavior. As institutionalists and liberals have emphasized, states cannot be usefully understood merely as power-mongering Leviathans pursuing their own interests in perpetual conflict. State behavior is driven by the interests of the actual people who control what the state does, and those interests often point in the direction of cooperation rather than competition. Constitutionalists have been slower to recognize that the same is true at the level of government institutions in domestic politics. Whether the branches of government will compete with one another or cooperate in the service of shared political goals depends on whether the parties and coalitions that control them are allies or rivals. That is why, in American politics,

³⁸ As it happens, Hobbes’s first published work was the first English translation of Thucydides from the Greek.

Madisonian competition between the president and Congress all but disappears during periods of party-unified government, and Madisonian checks and balances come into play only when the separation of powers coincides with a separation of parties.

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An even more fundamental problem with the constitutional theory of power-balancing is that it has never been clear what beneficial function institutional checks and balances are supposed to serve. The international balance of powers among states is supposed to preserve peace and provide security by preventing a powerful state from attacking and conquering its weaker neighbors. There is no obvious analogy when it comes to the constitutional system of government, however. The kind of security that matters in constitutional law is the security of political interests and groups in society who need protection against domination by powerful rivals. But balancing power at the level of government institutions will do little to guard against that kind of danger. Constitutional law's concern with checking and balancing power would be better redirected to the distribution of power at the democratic level, among the various groups and interests that compete for control over these institutions. Madison's warning that "the accumulation of all powers . . . in the same hands" is "the very definition of tyranny,"³⁹ makes better sense as applied to the hands of actual persons than the metaphorical hands of Leviathan.

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The moral of this chapter, and of Part II more broadly, is that constitutionalists need to look past the image of Leviathan as a self-directed being possessed of its own

³⁹ The Federalist No. 51 at 298 (James Madison) (Clinton Rossiter ed., 2003).

will, power, and will to power. They would do better to shift focus to Leviathan's subjects and controllers—the people who possess power *over* the power *of* the state.

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Part III (“Bad States”) considers the moral and legal frameworks used to assess and rectify state wrongdoing. For this purpose, as well, the state is commonly imagined as a personified Leviathan whose conduct can be evaluated, blamed, and corrected using the same metrics and methods commonly applied to real-life persons. Theorists and practitioners of international law and relations thus derive principles of just war from the legal and moral rules regarding personal self-defense; argue that states should pay reparations to the victims of wartime atrocities and climate change on the model of corrective justice; and blame and sanction states for violating rules of international law as if states themselves were wrongdoers and susceptible to punishment. Constitutional law treats government in all the same ways. The rights of citizens are designed to protect against the kinds of harms that concern personal morality and private legality; rights claims are adjudicated on a common-law model of corrective justice; and government institutions and officeholders are blamed and sanctioned as if they had personally misbehaved and could be made to pay the consequences.

C0P36

Yet there is little reason to believe that normative frameworks developed to govern the conduct of ordinary persons continue to make sense when transposed to states and governments. As theorists of international law and relations have long recognized, Leviathan is nothing like an ordinary person, morally or behaviorally. Moreover, fixating on the pseudo-person of Leviathan risks ignoring the actual people

who bear the consequences of their state's conduct. Neither of these points has clearly registered with constitutionalists, however. As this part describes, a plethora of problematic features of constitutional liability, ranging from the myopically libertarian cast of constitutional rights to morally and instrumentally misguided applications of group punishment, follow from constitutional law's unreflective personification of Leviathan.

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Chapter 6 ("Personal Morality and Political Justice") makes the case that personal morality and legality are a poor fit for the state. In developing the analogy between states and persons, Hobbes was tempted to equate their moral and legal natures: "[B]ecause commonwealths once instituted take on the personal qualities of men," he was led to think, "what we call a natural *law* in speaking of the duties of individual men [becomes] the *right of Nations*, when applied to whole commonwealths."⁴⁰ Constitutional law has unwittingly followed the same path. The doctrine, jurisprudence, and adjudication of constitutional rights more or less duplicates the standard frameworks of personal morality and private legality, oriented around localized harms to individual interests and emphasizing negative responsibility and intentional wrongdoing. The upshot is that constitutional law focuses on discrete, small-scale harms to individuals while blinding itself to big-picture, systemic injustices, from racial and economic inequality and subordination to the degradation

⁴⁰ Thomas Hobbes, *On the Citizen* 156 (Richard Tuck & Michael Silverthorne eds. & trans., 1998).

of democracy into effective oligarchy. And even the myopic rights that are constitutionally cognizable cannot be framed in any conceptually or morally coherent manner when they are understood on the model of harms inflicted by ordinary persons on one another.

C0P38

Moral and political philosophers have taken a different view of state wrongdoing—and, not coincidentally, a view of the state as different from ordinary persons. Political morality pointedly demands that the state treat its citizens with equal concern and respect. Ronald Dworkin tellingly refers to this principle as the “special and indispensable virtue of sovereigns.”⁴¹ The virtue is special because it does not apply to ordinary persons, who are morally permitted to display greater concern for their own lives and the lives of people close to them than for the lives of distant strangers. Leviathan is morally special in other ways, as well. John Rawls begins his landmark *Theory of Justice* by identifying the domain of justice as the basic structure of society, comprising the major political and legal institutions of the state. Because the principles of justice do not apply to “individuals and their actions in particular circumstances,” Rawls draws what has been described as a “division of moral labor.”⁴² The state alone is subject to the systemic demands of justice, while

⁴¹ Ronald Dworkin, *Sovereign Virtue* 6 (2000).

⁴² John Rawls, *A Theory of Justice* 3, 7, 54–55 (1971). See Liam Murphy, *Institutions and the Demands of Justice*, 27 *Phil. & Pub. Aff.* 251, 257–64 (1998).

individuals are subject to a different set of more localized and limited legal and moral obligations in their personal lives.

C0P39 It is this division of moral labor that constitutional law appears to have missed. In constructing a theory of justice distinctively suitable to the state, Rawls was working from the sound methodological premise that “[t]he correct regulative principle for anything depends on the nature of that thing.”⁴³ Constitutional law’s conceptual and moral failures reflect its inability to appreciate the distinctive nature of Leviathan.

C0P40 Following on the question of how the wrongdoing of states should be assessed, Chapter 7 (“No Body and Everybody”) addresses the question of who, exactly, should be blamed or punished for the state’s wrongdoing. The formal answer provided by international and constitutional law is, Leviathan itself. But even if it makes moral or practical sense to hold the abstraction of the state responsible for wrongdoing, there is no meaningful sense in which the state itself can be punished or penalized. Sanctions pass through the immaterial body of Leviathan and land upon the real people who are Leviathan’s subjects. That is true even in cases where most or all of these people bear no personal responsibility for the wrongdoing of their states or political leaders and have no ability to prevent that wrongdoing from occurring. For Hobbes, the citizens of a state are the collective “authors [] of every thing [Leviathan] saith, or doth, in their name,” and perhaps for that reason should “own[] all [these]

⁴³ Id. at 29.

actions.”⁴⁴ But contemporary observers of international law, seeing economic sanctions and missile strikes pass through the target of the state and land on innocent human beings, have not been entirely convinced. Some go so far as to describe international law as a “primitive” legal system, premised on collective responsibility and indiscriminate punishment of the innocent and guilty alike.⁴⁵

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Constitutional law is no less primitive in this regard, but it has proceeded oblivious to its own pervasive use of what are, in effect, collective sanctions. Pretending that governments can be made to pay for their constitutional wrongdoing, constitutional law ignores the fact that the costs are passed on to innocent citizens. Constitutional sanctions miss their target from an instrumental perspective, as well, failing to deter government from violating constitutional rights and even in some cases encouraging constitutional violations. As international law has learned the hard way, the image of an embodied Leviathan that can be blamed and punished too often masks the moral and functional consequences of legal responsibility imposed upon the state.

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That image has distorted political and legal thought in other ways, as well. As Chapter 7 goes on to describe, the fiction of an embodied Leviathan that can be made to feel pain by dispossession of its money feeds perpetual fears of a Leviathan state, or Big Government, intent on engorging its girth or purse by swallowing up the

⁴⁴ Leviathan at 114.

⁴⁵ See Oona A. Hathaway & Scott J. Shapiro, *The Internationalists* 269–70 (2017).

wealth and resources of its subjects (who desperately try to protect themselves by “starving the beast.”) This is not just political rhetoric; it is also the premise of public choice models of the state and constitutional attacks on the “empire-building” administrative state. In reality, however, just as states and governments have no intrinsic interest in avoiding the kinds of losses that sanctions impose, they have no intrinsic interest in growing richer or bigger. What matters to states, and what matters *about* states, is not their corporeal size, but the consequences they create for the lives of their citizens. Here again, fully seeing the state requires looking through the artificial body of Leviathan to notice the living and breathing persons inside.

C0P43

The book concludes, in Chapter 8 (“New Leviathans”) by looking further beyond Leviathan. After a triumphant run of half a millennium since Hobbes, the state appears to be in some ways weakening, if not withering away. Increasingly usurping the state’s functions are a proliferation of international, regional, and nongovernmental organizations engaged in “global governance.” At the same time, the power of states to control their economies and societies has been challenged and rivaled by Big Tech and other multinational corporations, which have increasingly come to resemble privatized, nonterritorial Leviathans. As power flows to entities above and independent of the state, the historical processes of state formation appear to be running in reverse, eroding the Westphalian order. This final chapter explores what might be different in a world in which states have ceded power to these alternative governors, global and corporate. As far as the design of legal regimes goes, the answer may be, not so much. Nascent efforts to manage the power of global

governance institutions and Big Tech firms have conceived of these bodies as new Leviathans and proceeded to draw upon the now-familiar tools for managing the power of the old-fashioned state. Even if the Hobbesian state is on the road to retirement, *Law for Leviathan* is likely to live on.

C0P44

Before proceeding, it may help in setting expectations to mention several limitations on the scope and ambition of the project. The book unfolds by showing that a relatively familiar set of features and ideas thought to be idiosyncratically characteristic of international law, politics, and theory are, in fact, inescapably applicable to constitutionalism, as well. As a consequence, the book has more to offer, measured both by depth of engagement and original contribution, to constitutionalists than to internationalists, whose ideas are borrowed and used but not much improved. Despite that imbalance of intellectual trade, the hope is that the book's broader conception of the differences between law by and for states will be at least somewhat illuminating to legal and political theorists of all stripes. At the very least, internationalists might take some satisfaction in seeing how far they have advanced beyond their constitutional counterparts in clearly identifying and resourcefully negotiating the challenges of imposing law upon Leviathan. In this regard, at least, it is constitutionalism that has been more "fake."

C0P45

Constitutionalists, for their own part, may be disappointed to discover that the book is parochially focused on *American* constitutional law and theory.⁴⁶ As the burgeoning study of comparative constitutionalism has highlighted, constitutional systems of law and government along the world vary along a number of significant dimensions—including the specificity, recency, and interpretive priority of constitutional text; the institutional configuration of the judiciary and its approach to judicial review; the basic architecture of the structure of government and the democratic process; the separation and division of powers among the branches and units of government; and the content and scope of rights. While some comparative observations are noted throughout the book, there is no comprehensive consideration of constitutional systems or ideas from other countries.

C0P46

Having acknowledged that major limitation, a hubristic hypothesis is that much of what the book has to say about American constitutionalism will be true of constitutionalism in other countries, as well. All systems of constitutional law confront the same basic challenges of imposing law on the sovereign state; settling and enforcing law without the state and its ordinary governance apparatus; building, constraining, and otherwise managing state power using the same essential toolkit;

⁴⁶ And perhaps as well on a distinctly American outlook toward international law. See generally John F. Witt, *The View from the U.S. Leviathan: Histories of International Law in the Hegemon* (January 22, 2022).

and normatively assessing and effectively sanctioning political misbehavior by government and its collective constituents. Accordingly a theory of law for Leviathan holds some promise for uniting not just international and constitutional law but also different systems of constitutional law with one another, even if that project is barely begun by this book.

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Finally, readers of all stripes may be frustrated by the book's failure to offer conclusive answers to some of the questions it raises. What ultimately explains legal compliance in systems of international and constitutional law, and how much compliance have these systems actually achieved? To what extent have originalists, living constitutionalists, or internationalists succeeded in reconciling legal constraints with popular sovereignty, and is there any reason to care? Do realists, institutionalists, or constructivists have more to contribute to our understanding of state behavior and legal order? What particular balance of power among states in the international arena, or among groups and interests within states, should law and politics be trying to achieve? Is there any way of justifying collective obligations and sanctions that fall upon people just by virtue of their membership in a political community? What is the right approach to thinking about the moral agency or survival prospects of the state? Rather than trying to resolve such questions, the book is invested in showing how they arise in parallel in international and constitutional thought; stem from the common project of constituting and controlling state power; and cannot be definitively settled without coming to terms with what Leviathan is and what we want it to be.