

Limiting Constraints on a Global Climate Change Regime:  
Neoliberalism and the Global Order of States

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## Abstract

On 23 June 1988 climate change entered mainstream debate when James Hansen, a NASA scientist in atmospheric physics, appeared before the US Senate Committee on Energy and Natural Resources. He testified that NASA was 99% confident that the accumulation of greenhouse gases in the atmosphere was the cause.

In 1979 Margaret Thatcher was elected Prime Minister of Britain, and in 1980 Ronald Reagan was elected President of the United States. Both were committed to the implementation of neoliberalism as the central guiding principle of economic policy, a movement that had been gathering force since the 1970s.

This thesis argues a fateful coincidence in timing. Neoliberalism was firmly established as a ruling orthodoxy by the time climate change science began to assert political influence. But, this thesis argues, the ideology and practices of neoliberalism were and are incommensurate with efficacious climate change policy. This, it is argued, is because the role of the state fundamentally changed from that of a moderator of market forces to a facilitator of them. Opportunities and motivation for climate-appropriate interventions in the economy, together with political leadership, were compromised. As well there has been a re-fashioning of economic, political, legal and social life that reinforces an image of the individual citizen as self-interested, acquisitive and competitive, an 'entrepreneur' of the self. At risk is the possibility of cooperation, consensus and collective action which is the *sine qua non* of plausible climate change reform.

Similarly I will argue that in the global order of states possibilities of collective action have always been vulnerable to the relentless pursuit of self-interest in what the International Relations literature characterise as a largely anarchic international order, now as well reinforced by neoliberalism in state actors and international institutions. Potential ethical concerns for present and future publics threatened by climate change impacts appear marginalised as drivers of the regime.

As a consequence of historical forces and now a counter-intuitive neoliberal ideology framing debate on climate change the global legal regime for regulating greenhouse gases is proving

dangerously inadequate even in terms of its own modest ambitions. Irreversible impacts are already evident and non-negligible risks of future catastrophes are contemplated.

Drawing in particular on the work of Wendy Brown and David Harvey, this thesis makes the argument that neoliberalism as a governing ideology is fundamentally incommensurate with a plausible and robust climate change regime. Its entrenchment as economic orthodoxy has unfortunately occurred at just that point in history when its incommensurable 'other' in climate change has become manifest but, as the final chapter suggests, there is at present little cause for optimism that the dilemma will soon be resolved under present conditions. It is in fact likely already too late to avoid unhappy outcomes which were, in 1988, still preventable.

## **Declaration**

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and, where applicable, any partner institution responsible for the joint award of this degree.

I give permission for the digital version of my thesis to be made available on the web, via the University's digital research repository, the Library Search and also through web search engines, unless permission has been granted by the University to restrict access for a period of time.

Geoffrey Leane  
September 2021

## **Acknowledgements**

I began this thesis in difficult circumstances having recently separated from my wife and having reluctantly returned to Australia from France after decades of living overseas in various countries. I was in difficult financial circumstances and so am very grateful for the award of a Commonwealth scholarship. As well it has been helpful to have been offered casual teaching in various courses at Adelaide Law School.

As to academic support I am almost entirely beholden to my main supervisor, Associate Professor Peter Burden. He has been supportive both personally and academically and, after the early departure of co-supervisors from the law school, has been in effect my sole supervisor save readings and comments of final drafts from Alex Reilly. Peter was also instrumental in steering my research toward a critique of neoliberalism as a framing context for the climate change regime after my initial research in International Relations theory proved disappointing.

It has been a pleasure to spend these last few years of self-guided research on a topic of extraordinary relevance and import. I feel privileged in finally having the opportunity to complete a PhD late in life and in the congenial environment of Adelaide Law School to whom I am very grateful in providing excellent support and working environment.

# CHAPTER 1: INTRODUCTION

## I THE INQUIRY

Human-induced climate change has been characterised as a ‘super wicked’ problem<sup>1</sup> that likely poses an existential threat to human and non-human life on this planet.

Notwithstanding the high level of consensus in climate change science it is startling that ‘[a]lmost no country or intergovernmental agency has developed policies consistent with th[e] scientific evidence’.<sup>2</sup> At a fundamental level this might present as the consequence of a category mistake – that humans incorrectly perceive themselves as independent and controlling of the natural world and so able to manage any unforeseen consequences of our actions. Such ontological issues are beyond the scope of this thesis but the human ordering systems that regulate our behaviour within that mistake are not.

Rather this thesis offers an explanatory and critical account of two of our present ordering systems that, it is shown, are incommensurate with an efficacious climate change regime. The first is the ruling ideology of neoliberalism, the second is the global order of states. Through a critical account the thesis seeks to contribute toward ‘a generative and useful theorization of our times’<sup>3</sup> in the context of the climate change crisis.

## II THE RATIONALE FOR THE INQUIRY

### *A The Global Legal Regime for Climate Change*

For at least thirty years<sup>4</sup> the world community has been well informed by climate change science and the consequences that will likely result from global warming. The Kyoto

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<sup>1</sup> K Levin et al, ‘Overcoming the tragedy of super wicked problems: constraining our future selves to ameliorate global climate change’ (2012) 45 *Policy Science* 123, 123 – a super wicked problem ‘compris[es] four key features: time is running out; those who cause the problem also seek to provide a solution; the central authority needed to address it is weak or non-existent; and, partly as a result, policy responses discount the future irrationally’. See also, for example, Richard J Lazarus (2009) ‘SuperWicked Problems and Climate Change: Restraining the Present to Liberate the Future’ 94 *Cornell Law Review* 1153, 1160.

<sup>2</sup> Levin (n 1) 129. For a more recent account of climate change trends see, for example, Isabelle Gerretsen, ‘After the turbulent year of 2020, BBC Future takes stock on the state of the climate at the beginning of 2021’ (11th January 2021) <<https://www.bbc.com/future/article/20210108-where-we-are-on-climate-change-in-five-charts>>.

<sup>3</sup> Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (Zone Books, 2015) 121.

<sup>4</sup> A commonly accepted critical moment was 23 June 1988, when James Hansen (then Director of NASA’s Goddard Institute for Space Studies) testified before a US congressional hearing as to the reality of climate change. See Richard D Besel, ‘Accommodating Climate Change Science: James Hansen and the Rhetorical/Political Emergence of Global Warming’ (2013) 26(1) *Science in Context* 137, 137.

Protocol<sup>5</sup> to the United Nations Framework Convention on Climate Change<sup>6</sup> (UNFCCC) was the first collective agreement to reduce greenhouse gas emissions. Developed states agreed to certain binding emission reductions over the first commitment period (2008–2012) of, in aggregate, 5% against 1990 base year levels and in fact realised a 20% reduction by 2015 in those states.<sup>7</sup>

However, from 1990 to 2012 (the end of the first Kyoto ‘assessment’ period) global carbon dioxide (CO<sub>2</sub>) emissions had nonetheless increased by 58%<sup>8</sup> due largely to emissions from developing countries, such as China and India, who were exempt from the first stage of the Kyoto Protocol’s binding targets. By 2017 developing country emissions had reached nearly 60% of the total.<sup>9</sup> CO<sub>2</sub> emissions have risen dramatically since the middle of the twentieth century – from (billion metric tons CO<sub>2</sub>) 0.2 in 1850 to 5.89 in 1950, and to 36.44 in 2019.<sup>10</sup> The Kyoto regime was succeeded<sup>11</sup> by the 2015 Paris Agreement<sup>12</sup> which brought most states within its ambit and which sought to limit global temperature increases to a ‘safe’ 2C degrees or less<sup>13</sup> but ideally 1.5C degrees.

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<sup>5</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, 10 Dec 1997, UN Doc FCCC/CP/1997/7/Add1, 37 ILM 22 (1998). Earlier warnings had been sounded. In 1974 the U.S. CIA had issued a classified report concluding that climate change had begun around 1960, had ‘already caused major economic problems throughout the world’ and would result in future economic and political impacts ‘almost beyond comprehension’ (Nathaniel Rich, ‘Losing Earth: The Decade We Almost Stopped Climate Change’ *New York Times Magazine* (August 1, 2018).

<sup>6</sup> United Nations Framework Convention on Climate Change, May 9, 1992, S Treaty Doc No. 102-38, 1771 UNTS 107. The objective of the Convention (Article 2) was ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.’

<[https://unfccc.int/files/essential\\_background/background\\_publications\\_htmlpdf/application/pdf/conveng.pdf](https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf)

<sup>7</sup> See, for example, <<http://www.un.org/climatechange/blog/2015/02/kyoto-protocol-turns-10-un-says-first-critical-step-must-trigger-new-2015-emissions-curbing-deal/>>.

<sup>8</sup> Mark Beeson and Matt McDonald, ‘The Politics of Climate Change in Australia’ (2013) 59(3) *Australian Journal of Politics and History* 331, 333 (footnote 8).

<sup>9</sup> Daniel Bodansky, Jutta Brunée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press, 2017) 353–4.

<sup>10</sup> For an illustrative graph and quantitative values see, for example,

<<https://www.statista.com/statistics/264699/worldwide-co2-emissions/>>.

<sup>11</sup> See Daniel Bodansky, ‘Reflections on the Paris Conference’ <<http://opiniojuris.org/2015/12/15/reflections-on-the-paris-conference/>> (‘In Paris, the Kyoto Protocol was the dog that didn’t bark, and it looks like it will now go gently into the night’).

<sup>12</sup> Paris Agreement (Dec. 13, 2015), UNFCCC, COP Report No. 21, Addendum, at 21, UN Doc FCCC/CP/2015/10/Add, 1 (29 Jan 2016).

<sup>13</sup> Jutta Brunée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010) 168-170, 176.

## *B Problems with the Climate Change Regime*

Present scientific evidence suggests the international legal regime for managing climate change is not working. The UNFCCC was established in 1992,<sup>14</sup> yet since 1990, there has been a 41% increase in total radiative forcing – the warming effect on the climate by long-lived greenhouse gases.<sup>15</sup> Many commentators suggest bleak prospects for future generations, and even ‘a non-negligible probability of worldwide catastrophe’.<sup>16</sup> Climate change can fairly be said to pose an existential threat to life on this planet.

The only legal requirement from the current Paris Agreement is that states will quantify their own Nationally Determined Contributions (NDCs) and report on them in five-yearly reviews. It has been described as a ‘pledge and review’ regime which caters to the tendency of governments ‘to express lofty aspirations but avoid tough decisions’.<sup>17</sup> Even if all current Paris Agreement pledges were met the likely temperature rise by 2100 would likely be 2.7–3C degrees.<sup>18</sup> The UNFCCC itself reports that ‘[i]n fact, greenhouse gases in the atmosphere are still accumulating at a rate that will soon take us well above the 1.5°C threshold, beyond which some of the worst effects of climate change cannot be avoided: ‘... [o]n current trends, average global temperatures could well rise by 3°C’.<sup>19</sup>

Unpleasant, if not catastrophic,<sup>20</sup> outcomes loom in the present century. If that is the untenable prospect facing humanity – and the perspective here is limited to the anthropocentric – then it behoves us to look to what underlying frameworks of human ordering might be contributing to this apparent inability or unwillingness to address such a dangerous collective challenge. The thesis seeks to illuminate two such frameworks – neoliberal ideology and the global order of states – as systemic constraints which undermine efforts to generate a plausible and effective climate change regime.

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<sup>14</sup> UNFCCC (n 6).

<sup>15</sup> <<https://unfccc.int/news/wmo-greenhouse-gas-levels-in-atmosphere-reach-new-record>>.

<sup>16</sup> Daniel A Farber, ‘Climate Change Justice’ (2012) 110 (6) *Michigan Law Review* (Survey of Books) 985,1001 (quoting Posner and Weisbach).

<sup>17</sup> Robert Falkner, ‘The Paris Agreement and the new logic of international climate politics’ (2012) 92(5) *International Affairs* 1107, 1108.

<sup>18</sup> Raymond Cléménçon, ‘The Two Sides of the Paris Climate Agreement: Dismal Failure or Historic Breakthrough’ (2016) 25(1) *Journal of Environment and Development* 3, 13.

<sup>19</sup> <<https://unfccc.int/news/the-climate-fight-s-next-turning-point>>.

<sup>20</sup> Peter Christoff, *Four Degrees of Global Warming: Australia in a hot world* (Routledge, 2014) 1–10 (suggesting (at 9) a world ‘of almost unimaginable social, economic and ecological consequences and catastrophes’). See also, for example, Raymond Cléménçon (n 18) 12 (‘Without any further policy measures, the world is on track to a 4 degree warming by 2100’).

Roberto Unger, a social theorist, describes a discontinuity between utopian and melancholic social theory wherein we are ‘torn between dreams that seem unrealizable and prospects that hardly seem to matter’.<sup>21</sup> This might aptly describe the present state of the climate change regime as torn between an urgent need for more ambitious commitments<sup>22</sup> and a reality that seems already to have committed us to dangerous paths.<sup>23</sup>

### III SCOPE AND STRUCTURE: OVERVIEW OF THE DISCUSSION

#### *A The Scope of the Inquiry*

Given the scope and ambition of the thesis discussion is necessarily generalist and interdisciplinary, including within its ambit aspects of economics, political and social theory, law and legal theory, international relations and international law. In drawing on ‘deep structure’ theory the thesis accepts the notion of neoliberalism as a metanarrative, albeit unevenly realized in different contexts, and so does not position itself within post-modern scepticism toward totalising ‘master’ narratives, or ‘incredulity toward metanarratives’.<sup>24</sup> Rather it accepts ‘neoliberalism’ as, in Foucault’s terminology, a mode of ‘governmentality’<sup>25</sup> and as a useful heuristic device for de-constructing contemporary contexts for climate change policy. Similarly it accepts for consideration broad explanations of inter-state behaviour in the literature on international relations and international law.

The thesis does not claim that these two limiting contexts are the only influences undermining a plausible regime, though they are of great importance. Nor does the thesis claim that these two contexts are responsible for historic climate change, whose history must go back at least to the Industrial Revolution though its progress has greatly accelerated since the second half of the twentieth century – coincidentally and unfortunately the period of neoliberal ascendancy. Rather the inquiry seeks to examine the ‘how and why’ of these two

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<sup>21</sup> R Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Cambridge University Press, 1987) 331.

<sup>22</sup> Some research suggests that there is only a 5% chance of avoiding a temperature increase of at least 2 degrees (the upper limit of the Agreement’s ambition and the threshold of ‘dangerous’). See A Raftery et al, ‘Less than 2 °C warming by 2100 unlikely’ (2017) 7 *Nature Climate Change* 637, 637.

<sup>23</sup> Christoff (n 20). See also, for example, Raymond Clémenton (n 18) 12 (‘Without any further policy measures, the world is on track to a 4 degree warming by 2100’).

<sup>24</sup> Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (University of Minnesota Press, 1984).

<sup>25</sup> Michel Foucault, *The birth of biopolitics : lectures at the College de France, 1978–1979* (Palgrave Macmillan 2008) (Michel Senellart ed.; translated by Graham Burchell).

limiting contexts as they inform and shape the climate change regime. So whilst much of the analysis deals with theory the motivation is eminently pragmatic – to demonstrate the incompatibility of present ordering systems with efforts to manage the profoundly dangerous threat of human-induced climate change.

Due to practical limitations on the scope of the inquiry the important question of ethical and moral aspects of climate change is only approached tangentially. It raises many difficult and complex issues. If our failure to account for environmental externalities has led us in the case of climate change to ‘market failure on the greatest scale the world has seen’<sup>26</sup> then how ought we respond? For example, what is the nature of our present temporal and spatial obligations toward innocent ‘others’ – future generations and largely blameless present victims in developing countries? As to the latter they suffer the double inequity of being largely blameless for historical emissions but singularly vulnerable to climate change impacts with fewer resources to deal with them. What of claims for reparative justice and compensation, not only for harm done but also for benefits derived?<sup>27</sup> What part of climate change risk is accounted for by emissions from non-culpable parties<sup>28</sup> who nonetheless enjoy the material benefits of past practices? On the question of future emissions what might be appropriate allocation principles – an equal burden on all states,<sup>29</sup> equal per capita entitlements,<sup>30</sup> non-tradeable subsistence levels?<sup>31</sup> What might be a philosophical starting point for a common ethical position – a Rawlsian ‘justice as fairness’ acknowledgement that ‘behind the veil’<sup>32</sup> we do not know if, for example, we will be born in a future generation subject to egregious climate change risks?

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<sup>26</sup> Nicholas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, 2006) 27.

<sup>27</sup> For an overview see, for example, Janna Thompson, ‘Historical Responsibility and Climate Change’ in Lukas H Meyer and Pranay SankLecher (eds) *Climate Justice and Historical Emissions* (Cambridge University Press, 2017) 46; Nicholas Stern (n 26) 33.

<sup>28</sup> One calculation suggests that ‘only 8% of the stock of emissions in 2000 can be traced to the flow of emissions from individuals who are still alive and might be responsible for those emissions’ (Arvind Subramanian, ‘Climate Change Justice’ (2011) 10 (2) *World Trade Review* (Book Reviews) 277, 278).

<sup>29</sup> Stephen M Gardiner, *A Perfect Moral Storm: The Ethical Tragedy of Climate Change* (Oxford University Press, 2011) 425 – see also pp 425–426 discussion of problems associated with this option.

<sup>30</sup> *Ibid* 583.

<sup>31</sup> Stephen M Gardiner, ‘Ethics and Global Climate Change’ (2004) 114 *Ethics* 555, 585.

<sup>32</sup> John Rawls, *A Theory of Justice* (Harvard University Press, 1971). For a reconciliation of the Non-Identity problem with the Rawlsian position see, for example, Jeffrey Reiman, ‘Being Fair to Future People: The Non-Identity Problem in the Original Position’ (2007) 35 (1) *Philosophy and Public Affairs* 69.

On the one hand climate change is said to be ‘at core an ethical issue’,<sup>33</sup> and there is at least consensus among ethicists on the existence of ethical issues and that no state can rationalise high levels of greenhouse gas emissions on the basis of self-interest alone.<sup>34</sup> On the other hand we are faced with the stark reality of a climate change regime that is simply not working. For Donald Brown the ‘lack of action on climate change is more likely caused by the lack of any serious discussion of any ethical responsibility to take action, not the challenges entailed by a number of complex climate change ethical questions’.<sup>35</sup> Stephen Gardiner, another prominent writer on climate change ethics, sees us faced with a ‘perfect moral storm’, comprising asymmetries of power between affluent and poorer nations and between present and future generations, together with under-developed ethical positions in such areas as intergenerational ethics, international justice, scientific uncertainty and human–nature relationships,<sup>36</sup> leaving present generations ‘extremely vulnerable to moral corruption’.<sup>37</sup>

For the purposes of this thesis discussion of ethical issues falls within the ambit of general discussion of the neoliberal reconfiguring of the state and of citizens as *homo economicus*, undermining what one writer calls ‘the importance of mutual commitments, social cohesion, and collective responsibility ... [w]e are diverted from taking up collective social and political concerns ... as citizens engaged with others’.<sup>38</sup> The failure to acknowledge and act on ethical issues is not the outcome of neoliberal ordering but will be shown to be exacerbated by it. So whilst ethical issues ought arguably to be driving climate change policy they are not – indeed as we will see some view the issue of climate change ethics as so difficult and contentious that they need to be set aside from a climate change treaty which, they say, is only possible via a disinterested pragmatism.<sup>39</sup>

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<sup>33</sup> Ethics and Climate Change: UNESCO’S Declaration of ethical principles in relation to climate change (emphasis added) <<https://unfccc.int/event/ethics-and-climate-change-unesco-s-declaration-of-ethical-principles-in-relation-to-climate-change>>. Similarly, UNESCO asserts that ‘[c]limate change is fundamentally an ethical issue ... [and] believes that agreeing universally on ethical principles in relation to climate change will underpin ambitious voluntary commitments by 195 countries, which adopted the 2015 Paris Climate Agreement to combat the threat of global warming’ <<http://www.unesco.org/new/en/social-and-human-sciences/themes/comest/ethical-principles/questions-and-answers/>>.

<sup>34</sup> Donald A Brown, *Climate Change Ethics: Navigating the Perfect Moral Storm* (Routledge, 2013) 243.

<sup>35</sup> *Ibid* 246.

<sup>36</sup> Gardiner (n 29) 7.

<sup>37</sup> *Ibid* 22.

<sup>38</sup> Jeff Sugarman, ‘Neoliberalism and Psychological Ethics’ (2015) 35(2) *Journal of Theoretical and Philosophical Psychology* 103, 106.

<sup>39</sup> Eric Posner and David Weisbach, *Climate Change Justice* (Princeton University Press, 2010) – for example, at 117, ‘it is inconceivable that a climate change treaty would properly address a problem of corrective justice’.

## *B The Structure of the Thesis*

The discussion will begin in Chapter Two with an overview of the development of the global climate change regime and its adequacy in meeting its own ambitions.<sup>40</sup> It will be shown that the regime does not presently meet its ambition, currently modified to restricting global temperature increase to a range of 1.5C – 2.0C degrees.<sup>41</sup> The ambition in this chapter is to demonstrate the inadequacy of the present regime and why it matters.

The discussion will then turn in to the limiting contexts of neoliberalism in Chapters Three and Four and the global order of states in Chapter Five. They are considered as important, albeit partial, explanations for present failures in developing a plausible and effective regime. Finally, Chapter Six will offer a summary of the discussion, some thoughts on possible futures for the climate change regime and a postscript on what might be seen as a relevant template in the management of the COVID-19 pandemic as it appears at the time of writing.

The core of the thesis, however, is an attempt to understand first how neoliberalism presents ideological impediments for an efficacious climate change regime, and second, how the architecture of the global order of states as well presents structural impediments and is similarly influenced by neoliberal ideology.

### *1 Neoliberalism as a Deep Structure Theory Reconfiguring the Role of the State and its Relation to Markets*

Neoliberalism will be presented in Chapter Three as a ‘deep structure’ ideology, that is to say, as ‘[t]he attempt to distinguish in every historical circumstance a formative context, structure, or framework from the routine activities this context helps to reproduce’.<sup>42</sup>

Neoliberalism represents such a deep structure – a hegemonic mode of discourse taking market exchange as ‘an ethic in itself, capable of acting as a guide to all human action, and substituting for all previously held ethical beliefs’.<sup>43</sup> While there are many deep structure

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<sup>40</sup> UNFCCC (n 6).

<sup>41</sup> UNFCCC (n 12) (Article 2.1(a) (‘Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change’)  
>[https://unfccc.int/files/essential\\_background/convention/application/pdf/english\\_paris\\_agreement.pdf](https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf)>

<sup>42</sup> Roberto Unger, *Social Theory: Its Situation and its Task* (Cambridge University Press, 1987) 88.

<sup>43</sup> David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 2.

ideologies operating at any given time in any given society – for example, Christianity or Islam or patriarchy or liberalism – the focus here is on neoliberalism because the interests and values it privileges are globally pervasive and especially undermining of prospects for effective climate change mitigation.

Neoliberalism has been described by David Harvey as ‘hegemonic as a mode of discourse’, one which not simply valorises the individual pursuit of wealth via markets unconstrained (indeed enabled) by the state, but further manifests

creative destruction ... not only of prior institutional frameworks and powers ... but also of divisions of labour, social relations, welfare provisions, technological mixes, ways of life and thought, reproductive activities, attachments to the land and habits of the heart ... capable of acting as a guide to all human action, and substituting for all previously held ethical beliefs.<sup>44</sup>

Brown characterizes it similarly:

I join Michel Foucault and others in conceiving neoliberalism as an order of normative reason that, when it becomes ascendant, takes shape as a governing rationality extending a specific formulation of economic values, practices, and metrics to every dimension of human life.<sup>45</sup>

Whilst characterisations of neoliberalism, as with any ideology, will differ between authors and contexts the common theme from these quotations is the pervasive reach of neoliberalism into all aspects of society – for Harvey ‘a guide to all human action’, for Brown ‘a governing rationality ... to every dimension of human life’. Just as climate change is said to be ‘radically political’<sup>46</sup> so too must neoliberalism be seen as ‘political’ rather than merely economic. Brian Elliott describes neoliberalism as ‘a set of rigorous procedures and disciplinary practices governing individuals and institutions both from the ‘inside’ of personal consciousness and from the ‘outside’ in the form of social mores and political common sense’.<sup>47</sup> Brown sees neoliberalism as ‘a normative order of reason developed over three decades into a widely and deeply disseminated governing rationality’.<sup>48</sup> Joseph Stiglitz, a Nobel Laureate economist, has said that ‘[n]eo-liberal market fundamentalism was always a political doctrine serving certain interests ... [i]t was never supported by economic theory.’<sup>49</sup>

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<sup>44</sup> Ibid 2–3.

<sup>45</sup> Brown (n 3) 30.

<sup>46</sup> Brian Elliott, *Natural Catastrophe: Climate Change and Neoliberal Governance* (Edinburgh University Press, 2016) 2.

<sup>47</sup> Ibid.

<sup>48</sup> Brown (n 3) 9.

<sup>49</sup> Robert Fletcher, ‘Taking the Chocolate Laxative: Why Neoliberal Conservation “Fails Forward”’ in Bram Büscher, Wolfram Dressler and Robert Fletcher (eds) *Nature Inc: Environmental Conservation in the Neoliberal Age* (University of Arizona Press, 2014) 87,97 (quoting Stiglitz).

As an economic model neoliberalism is driven by claims of economic efficiency and growth. The presumption is that ‘human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade’.<sup>50</sup> Growth is the central feature and (economic) justification of neoliberalism – Elliott, for example, puts it that ‘[n]eoliberal governance has been extremely successful in promoting a growth for growth’s sake agenda’,<sup>51</sup> noting that growth is ‘the underlying imperative of neoliberal capitalism’.<sup>52</sup> The dominant cause of the increasing concentration of CO<sub>2</sub> in the atmosphere is the burning of fossil fuels which are closely related to global growth in energy use and economic activity.<sup>53</sup> Whilst the emission intensity of economic growth is falling, as the global economy grows the absolute level of emissions continues to increase. For CO<sub>2</sub> emissions over the period 1990–2014 the 2014 level of intensity was only 42% of the level in 1990<sup>54</sup> – that is to say, CO<sub>2</sub> emissions per unit of Gross Domestic Product (GDP) fell by more than half. However, for the same period, total CO<sub>2</sub> emissions rose by 63%.<sup>55</sup> This is of course not solely due to neoliberalism’s emphasis on economic growth – the origins of energy-intensive, fossil-fuel driven industrialism and consequent emissions lie much earlier – for example, from the mid-eighteenth-century Industrial Revolution. The point that will be made is that neoliberalism’s singular focus on compounding growth further intensifies already unsustainable practices.

But more than an economic model, as a political model David Harvey characterises neoliberalism as ‘hegemonic as a mode of discourse’, one which not only valorises the individual pursuit of wealth via markets unconstrained (indeed enabled) by the state, but also manifests

creative destruction ... not only of prior institutional frameworks and powers ... but also of divisions of labour, social relations, welfare provisions, technological mixes, ways of life and

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<sup>50</sup> Harvey (n 43) 2.

<sup>51</sup> Elliott (n 46) 57.

<sup>52</sup> Ibid 38.

<sup>53</sup> Australian Academy of Science <<https://www.science.org.au/learning/general-audience/science-booklets-0/science-climate-change/3-are-human-activities-causing>>.

<sup>54</sup> The respective levels (in kg per Purchasing Power Parity \$ of GDP) were 0.768 (1990) and 0.326 (2014) <<https://data.worldbank.org/indicator/EN.ATM.CO2E.PP.GD>>.

<sup>55</sup> From 22,149,402 kt in 1990 to 36,138,285 kt in 2014 <<https://data.worldbank.org/indicator/EN.ATM.CO2E.KT>>.

thought, reproductive activities, attachments to the land and habits of the heart ... capable of acting as a guide to all human action, and substituting for all previously held ethical beliefs.<sup>56</sup>

It is not merely an economic policy. It is a deep structure of thought permeating all aspects of how we live. There are important implications and outcomes for climate change policy, not least because of a reorientation of the role of the state and its relationship with markets.

Drawing substantially on the scholarship of Wendy Brown and David Harvey the focus in this chapter will be to show how neoliberalism reconfigures the role of the state as an enabler and nurturer of markets, fetishizes economic growth, favours a style of *governance* and interest accommodation rather than goal-oriented direction and regulation by *government*.

## *2 Neoliberalism as Infusing Ordering Systems Beyond the State–Markets Relationship*

Drawing in particular on the scholarship of Wendy Brown, Chapter Four will show neoliberalism as a general mode of ‘governmentality’<sup>57</sup> going beyond the relationship between the state and markets.

First, neoliberalism postulates a reconfigured imaginary for the individual subject. Liberal political theory postulated a model of the individual as an unencumbered political agent invested with certain inalienable rights, typically sanctified with constitutional status, and as a freely contracting economic agent bearing indefeasible property rights, pursuing inward-looking visions of the good life.<sup>58</sup> Freedom of economic relations is seen in liberal theory as an extension of more fundamental political freedoms and is only one aspect of them. Neoliberalism, on the other hand, upends this image and reimagines individual freedom as a *consequence* of economic freedoms. Economic freedoms – markets – are seen as the *sine qua non* of individual freedom.

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<sup>56</sup> Harvey (n 44).

<sup>57</sup> ‘Governmentality, first and foremost, is a term coined by philosopher Michel Foucault, and refers to the way in which the state exercises control over, or governs, the body of its populace ... Drawing on a notion of government defined as the “conduct of conduct,” governmentality asks questions beyond simply “who governs” or how, and seeks to expose the relationship between the government of the state, the governing of ourselves, and of others ... [t]he “conduct of conduct” refers to the means by which governance is focused on directing how subjects of government act and behave.’ (Benjamin J Muller, ‘Governmentality and Biopolitics’ *Oxford Research Encyclopedias: International Studies* (2017) <<https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-50>>.

<sup>58</sup> For various accounts and critiques of liberalism see, for example, Michael J Sandel (ed) *Liberalism and its critics* (New York University Press, 1984). For a summary account of liberal rights theory see, for example, Geoff Leane, ‘Rights Discourse: Are We All in This Alone?’ (2001) 8 *Canterbury Law Review* 187,189.

So '[n]eoliberalism expects individuals to think like businesses and to pursue unlimited individual accumulation'<sup>59</sup> – in short, the individual as *homo economicus*. Brown characterizes neoliberal individuals as hyper-individualized 'capital units', embodying 'a perspective of the world that is ahistorical, economistic, materialistic, 'me-oriented', short-termist, and ecologically myopic'.<sup>60</sup> These are unlikely characteristics for a long-term, collective, other-oriented, morally charged project like climate change mitigation. Again, if the rights-empowered liberal is apt to pursue her own conceptions of the good life at the expense of collective interests then under neoliberalism this tendency is further fetishized and takes a more materialist form. The concern is a diminution in the willingness of such neoliberal individuals to concern themselves with interests that must be pursued and agreed upon collectively, and to concern themselves with a temporal and spatial 'other' – in respect of climate change, for example, with concerns for unknown future publics and present innocent victims geographically distant.

A second concern follows from the characterisation of neoliberalism as resulting in a 'hollowed out' state and the cultivation of materialist, self-interested subjects. If both the state and its individual subjects are reconfigured to serve the economic ends of markets then what is also compromised or even lost goes as well to the political, to 'deliberation about justice and other common goods, contestation over values and purposes, struggles over power, pursuit of visions of the good for the whole ... politics, conflict, and deliberation about common values or ends'.<sup>61</sup>

This is the realm of *homo politicus* and of the *polis*, that is to say the realm within which we

realize and develop our distinctive capacities for association, speech, law, action, moral judgment, and ethics ... oral reflection, deliberation, and expression ... moral reflection and association making – these are the qualities that generate our politicalness ... linguistically conveyed moral judgments permit humans to order and govern ... according to deliberations about the good.<sup>62</sup>

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<sup>59</sup> Joanne Swaffield and Derek Bell, 'Can 'climate champions' save the planet? A critical reflection on neoliberal social change' (2012) 21(2) *Environmental Politics* 248, 256.

<sup>60</sup> Brown (n 3) 30.

<sup>61</sup> Ibid 127.

<sup>62</sup> Ibid 88.

A third distinguishing feature of neoliberalism, claims Brown, is the diffusion of neoliberal ideology in the legal system – the domain of *homo juridicus*. For Brown<sup>63</sup>

law becomes a medium for disseminating neoliberal rationality beyond the economy, including to constitutive elements of democratic life ... [m]ore than simply securing the rights of capital and structuring competition, neoliberal judicial reason recasts political rights, citizenship, and the field of democracy itself in an economic register.<sup>64</sup>

She draws on the American context and a number of recent U.S. Supreme Court cases to demonstrate how they represent

assaults on collective consciousness which, together with other neoliberal intrusions on political, social and economic discourses, have eliminated ‘forms of identity and ... political energy’ from a ‘democratic political imaginary’.<sup>65</sup>

As well an even clearer exemplar of neoliberalism in the legal system (not considered by Brown) has been the Law and Economics movement. It has been claimed that ‘no approach to law in recent decades has been more influential than the economic analysis of law’,<sup>66</sup> with its focus ‘solely on economic factors as the underlying explanatory ... determinant of legal principles’, advising courts to rule on the basis of economically efficient outcomes.<sup>67</sup> In the context of climate change it is interesting that two Law and Economics scholars – Posner and Weisbach – do acknowledge that ‘the most important obligation with respect to climate change is to develop a broad, deep, and enforceable treaty that achieves appropriate climate goals’,<sup>68</sup> but they are nonetheless sceptical of success. They endorse a Realist view of international law (Chapter Five), employing rational choice theory in the pursuit of state power and state interests which they say ‘consistently *exclude* one preference from the state’s interest calculation: a preference for complying with international law’.<sup>69</sup>

This last comment on the inefficacy of international law suggests the other limiting context to be considered in this thesis – the international order of nation states as a structural constraint on prospects for an efficacious climate change policy.

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<sup>63</sup> See generally Brown (n 3) Chapter 5 (‘Law and Legal Reason’).

<sup>64</sup> Brown (n 3) 152.

<sup>65</sup> Ibid 153.

<sup>66</sup> Brian H Bix, *Jurisprudence: Theory and Context* (Thomson Reuters, 2015) (7<sup>th</sup> ed) at 207.

<sup>67</sup> Denise Meyerson, *Understanding Jurisprudence* (Routledge Cavendish, 2007) 98–99.

<sup>68</sup> Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, 2005) 170.

<sup>69</sup> Ibid 9 (emphasis added). There is also a connection to an earlier legal theory of Legal Realism which looked to how courts actually make decisions rather than looking to formalist explanations from rules, precedents and so on – see, for example, Bix (n 66) 193.

### *3 The Global Order of States as a Limiting Context for an Efficacious Climate Change Regime*

As Elliott puts it, '[c]limate is the ultimate environmental commons and as such requires thoroughly international modes of political action'<sup>70</sup> and so 'any credible attempts to undermine the causes of climate change must be thoroughly international'.<sup>71</sup> In Chapter Five the architecture of the global order of states is considered as the context within which international climate change strategies and policies must be negotiated and enforced. It is therefore important to understand the structures and driving motivations of the global order. This is the subject matter of the disciplines of both International Relations and International Law. In the former discipline Realism is generally taken to be the most widely accepted (though not the only) explanatory account of state behaviour. It takes states as overwhelmingly the main actors in the international order. As one author puts it,

[d]espite over two centuries of political theory calling for transnational political rule (stemming from Enlightenment-period cosmopolitanism), we still live in a world where nation states remain the exclusive source of ultimate political legitimacy.<sup>72</sup>

In this Realist model the international order is said to be largely anarchic. States are unitary, egoist actors rationally pursuing only self-interest; international law is said to be largely epiphenomenal, hovering over the global order but of little direct influence on state behaviour.<sup>73</sup> There lacks a consensus or central global authority with the motivation, power and legitimacy to dictate and regulate an efficacious global regime in the face of common threats.

If economic motivations in neoliberal ideology, together with a dominating theme of power relations in the global order of nation states, demonstrate characteristic constraints on prospects for a plausible climate change regime then what are the likely prospects for the future?

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<sup>70</sup> Elliott (n 46) 31.

<sup>71</sup> Ibid 18.

<sup>72</sup> Ibid 37.

<sup>73</sup> Jack Donnelly, 'The Ethics of Realism' in Christian Reus-Smit and Duncan Snidall (eds), *The Oxford Handbook of International Relations* (Oxford University Press, 2008) 150, 150. See, also for example, Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503, 507.

#### *4 Conclusions and Possible Futures*

Chapter Six summarises the argument that neoliberalism, together with the problematic structure of the international order of states, is corrosive of plausible climate change policies. Individually and collectively they represent serious if not fatal impediments to efficacious climate change policy.

Some suggestions are ventured on possible futures in terms of utopian and dystopian pathways for climate change action, concluding that a more likely, if melancholic, scenario is of ongoing if not accelerated neoliberal dominance of climate change policy and management, perhaps even to be realised in variants of 'disaster capitalism'.

Finally there is a post-script acknowledging the sudden and dramatic intrusion of the COVID-19 pandemic into all aspects of economic, political and social life. There are arguably analogies to be made with likely future climate change emergencies but, it is argued, this public health emergency is likely short-lived and for a variety of reasons unlikely to precipitate fundamental changes in the global order of states or in the neoliberal orthodoxy that prevails.

# CHAPTER II: THE GLOBAL LEGAL REGIME FOR CLIMATE CHANGE

## I INTRODUCTION

This chapter provides an introduction to climate change and its regulation through a global legal regime. It will present evidence that the regime is presently failing in its own ambition in seeking to realise a future with less than 2 degrees of warming, and ideally 1.5 degrees.<sup>1</sup> The architecture of the legal regime will be shown to demonstrate certain characteristic markers of neoliberalism which will be explored in terms of their commensurability with a plausible and efficacious climate change regime in Chapters Three and Four, and as well anticipating analysis of the global order of states in Chapter Five.

It is difficult to overstate the importance of climate change – it has been called ‘the ultimate challenge for public policy: the fate of the earth quite literally depends upon how society, in this generation, responds’.<sup>2</sup> Examples of the nature of that challenge include the imperative that we cannot continue with the status quo, that causal links between actions and consequences stretch across generations and centuries (CO<sub>2</sub> has a half-life of more than a century), and the uncertainty of consequences in both time and space as we cannot attribute particular harms to specific causes.<sup>3</sup>

Climate change has been characterised as a ‘super-wicked problem’ with four main features: ‘time is running out; those who cause the problem also seek to provide a solution; the central authority needed to address it is weak or non-existent; and, partly as a result, policy responses discount the future irrationally’.<sup>4</sup> The reality has been that ‘[a]lmost no country or intergovernmental agency has developed policies consistent with th[e] scientific evidence’<sup>5</sup> and the result is a ‘governance tragedy ... one inherent to super wicked problems’.<sup>6</sup>

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<sup>1</sup> Paris Agreement, Article 2(1)(a) <[https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf)>.

<sup>2</sup> Lisa Heinzerling and Frank Ackerman, ‘Law and Economics for a Warming World’ (2007) 1 *Harvard Law & Policy Review* 331, 332.

<sup>3</sup> *Ibid* 333–334.

<sup>4</sup> K Levin et al, ‘Overcoming the tragedy of super wicked problems: constraining our future selves to ameliorate global climate change’ (2012) 45 *Policy Science* 123, 123. See also, for example, Richard J Lazarus, ‘SuperWicked Problems and Climate Change: Restraining the Present to Liberate the Future’ (2009) 94 *Cornell Law Review* (2009) 1153, 1160.

<sup>5</sup> K Levin (n 4) 129.

<sup>6</sup> *Ibid*. 129.

A particular focus here (and in Chapters Three, Four and Five) will be on the third aspect of super-wicked problem – that the central authority needed to address it is weak or non-existent, in both neoliberal domestic orders and in the global order of states. To begin it is necessary to briefly sketch the global legal regime for climate change mitigation before turning to its context in international law and international relations in Chapter Five, which will show how the global order is substantially informed by and in turn reproduces a ‘neoliberal’ architecture. Chapters Three and Four will demonstrate the claim that neoliberal ideology itself is incommensurable with efficacious climate change policy.

Growing concern over levels of carbon dioxide in the atmosphere were addressed in the 1992 Earth Summit<sup>7</sup> in Rio, and gave rise to the 1994 United Nations Framework Convention on Climate Change (UNFCCC). All member states of the UN are parties to the Convention<sup>8</sup> – that is to say, the agreement is universal. It represents a beginning to a legal regime in recognising, for example, anthropogenic contributions to greenhouse gases in the atmosphere, notions of climate change as a ‘common concern for mankind’, sustainable development, intergenerational equity, scientific uncertainty and the precautionary principle, equity issues in the notion of common but differentiated responsibilities, and an acknowledgement that reductions should initially be sought from developed economies and those in transition. Initial responsibilities for emissions for developed states took tangible form in the 1997 Kyoto Protocol though not in the subsequent 2015 Paris Agreement. The UNFCCC foregrounded principles and objectives rather than onerous substantive targets, and provided a blueprint for subsequent Conferences of the Parties (COPs).

The various phases of global climate governance have been described as follows:<sup>9</sup> first, (in the 1970s) a recognition of the need to address the problem but without an emphasis on cost-effectiveness; second, (roughly mid-1980s to mid-1990s) a shift recognizing imperatives of economic growth and cost-effectiveness via the Brundtland Commission but including

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<sup>7</sup> United Nations Conference on Environment and Development (UNCED), Earth Summit .  
<<https://www.un.org/en/conferences/environment/rio1992>>

<sup>8</sup> >[https://en.wikipedia.org/wiki/United\\_Nations\\_Framework\\_Convention\\_on\\_Climate\\_Change](https://en.wikipedia.org/wiki/United_Nations_Framework_Convention_on_Climate_Change)>.

<sup>9</sup> David Ciplet and J Timmons Roberts ‘Climate change and the transition to neoliberal environmental governance’ (2017) 46 *Global Environmental Change* 148, 151–153. See also, for example, Joyeeta Gupta, ‘Climate change governance: history, future, and triple-loop learning?’ (2016) 7 *WIREs Climate Change*, 192–210; Yu Hongyuan, ‘Evolution of the Global Climate Governance System and Its Implications’ (2015) 1(3) *China Quarterly of International Strategic Studies* 423, 423.

principles of equity and polluter-pays; third, beginning with the 1997 Kyoto Protocol, including market mechanisms like the Clean Development Mechanism and emissions trading, but representing a ‘top-down regulatory-market approach’;<sup>10</sup> fourth, the 2009 Copenhagen Accord which, whilst widely derided, introduced a ‘pledge and review’ system, privileged ‘governance by disclosure and voluntarism’ and required participation from all countries; fifth, the current 2015 Paris Agreement.

There is said to be a recent shift toward informal bilateral and mini-lateral agreements between states that have arguably reduced the UNFCCC system ‘to merely a cheerleading forum for private and voluntary national action on climate change’.<sup>11</sup> This theme will be further explored in later chapters on the limiting contexts of neoliberalism and the global order of states.

## II THE KYOTO PROTOCOL

The UNFCCC 1997 Conference of the Parties (COP3) produced the Kyoto Protocol, the first attempt to introduce binding targets on industrialised developed states and economies in transition (listed in Annex I) though not initially on developing states (listed in Annex II, including major greenhouse gas emitters such as China and India). Most states, including the European Union (EU) as a group, agreed to emission targets. The ambition for Annex I states was for an overall 5% reduction on 1990 emissions in the initial commitment period 2008–2012. Importantly Annex I states committed to legally binding targets with penalties for non-compliance.<sup>12</sup> If the enforcement branch determined that an Annex I country was not in compliance with its emissions commitment then it would be required to make up the difference during the second commitment period plus an additional 30%. In addition, that country would be suspended from making transfers under an emissions trading program.<sup>13</sup> However, the ‘penalty’ reductions were not legally binding and ‘a party [could] simply refuse to comply ... without consequence’.<sup>14</sup> Alternatively, as in the case of Canada, a state with

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<sup>10</sup> Cipler (n 9) 152.

<sup>11</sup> Ibid 155.

<sup>12</sup> UNFCCC, ‘An Introduction to the Kyoto Compliance Mechanism’ <<https://unfccc.int/process/the-kyoto-protocol/compliance-under-the-kyoto-protocol/introduction>> (‘If the enforcement branch determines that an Annex I country is not in compliance with its emissions limitation, then that country is required to make up the difference during the second commitment period plus an additional 30%. In addition, that country will be suspended from making transfers under an emissions trading program’).

<sup>13</sup> Ibid.

<sup>14</sup> Jon Hovi et al, ‘A credible compliance enforcement system for the climate regime’ (2012) 12(6) *Climate Policy* 741, 743.

knowledge of its inability to meet targets, and facing punitive costs in making up a shortfall and incurring the 30% penalty, was able to simply withdraw from the Protocol at the end of the three year ‘grace’ period.<sup>15</sup>

On the subject of weak enforcement from the centre Chapter Three will demonstrate how a post-WWII Keynesian ‘command and control’-type *government* through law and regulation via state authority gave way in post-1973 neoliberalism to a ‘softer’ regime of *governance* though collaboration and facilitation among stakeholders, both public and private. Regulation and compliance become issues to be negotiated rather than stipulated and enforced. We will see a similar shift when the Kyoto Protocol gives way to the 2015 Paris Agreement.

Whilst other enforcement approaches have been suggested – for example, a more fragmented regime aimed at specific types of emissions and sectoral emitters, or the imposition of trade restrictions for non-compliance,<sup>16</sup> or a system of refundable monetary deposits to guarantee compliance<sup>17</sup> – the subsequent 2015 Paris Agreement in fact backed away from binding emission targets altogether and opted rather for a legally binding commitment to submit emission reduction plans (‘Nationally Determined Contributions’). However, these planned ‘contributions’ to reductions are not themselves binding.

Thus the binding Kyoto ‘command and control’ regime under the authority of, if not of a central ‘state-like’ authority,<sup>18</sup> then at least of a collective agreement to be bound, was replaced in the Paris Agreement by binding promises to simply set self-determined targets – the ‘plan to have a plan’. The importance of this shift will become clear in the following chapters. We will see Kyoto’s legally binding commitments to actual emission reductions, with at least an attempt at enforcement backed by penalties, replaced in Paris by a flexible ‘self-help’ regime in which states are able to accommodate self-interest in this weak ‘plan to have a plan’. States become in effect like market actors able to assert power and pursue self-

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<sup>15</sup> <[https://unfccc.int/files/kyoto\\_protocol/compliance/enforcement\\_branch/application/pdf/cc-eb-25-2014-2\\_canada\\_withdrawal\\_from\\_kp.pdf](https://unfccc.int/files/kyoto_protocol/compliance/enforcement_branch/application/pdf/cc-eb-25-2014-2_canada_withdrawal_from_kp.pdf)>.

<sup>16</sup> Scott Barrett, ‘Climate treaties and the imperative of enforcement’ (2008) 24(2) *Oxford Review of Economic Policy* 239, 239.

<sup>17</sup> Hovi (n 14) 745.

<sup>18</sup> Writing after Kyoto but before the Paris Agreement, one eminent international relations scholar noted that ‘International cooperation on climate change has been underway for decades, yet there *remains no central core* to the emerging regulatory arrangements on climate change’ (emphasis added) (Robert O Keohane and David Victor ‘The Regime Complex for Climate Change’ (2011) 9(1) *Perspectives on Politics* 7, 12.)

interest relatively unconstrained by a strong central authority – what one writer characterises as ‘an anarchical solipsistic world disorder’.<sup>19</sup>

But the Kyoto Protocol too reflects certain neoliberal preferences in mechanisms which facilitate ‘flexibility’ (as opposed to ‘command and control’ mechanisms such as a carbon tax) in achieving targets. For example, Emissions Trading Schemes (ETSs) and the Clean Development Mechanism (CDM). These ‘flexibility mechanisms’, including the CDM, ETS and Joint Implementation (JI) have been characterized as ‘marketization’ measures in the climate regime.<sup>20</sup> They reflect a preference for ‘market’ solutions consistent (as Chapter Three will show) with neoliberal principles.

In practice the CDM, for example, resulted in power asymmetries which led to virtually no gains toward the sustainable development goals which drove the policy.<sup>21</sup> It is a market-based mechanism by which industrial (Annex I) countries can undertake emission-reduction projects (so-called ‘low hanging fruit’) in developing countries to earn emission reduction credits. These can be traded and sold, and used by industrialized countries to meet part of their emission reduction targets under the Kyoto Protocol, thus providing some flexibility to those countries. It was a prototypical instance, consistent with neoliberal ordering, of state authority being transferred to ‘markets’ in order to achieve ‘efficient’ reductions by developed states and industries. In doing so it also imparts both an affirmation of ‘efficiency’ criteria and a measure of legitimacy to emitting greenhouse gases.

Similarly with respect to ETSs, the legal regime is again fashioned as a vehicle for achieving economic efficiencies via market trading in emission permits – rather than, for example, levying carbon taxes on emissions or simply imposing quantitative limits as a ‘Keynesian’ regulatory model might. The ETS concept requires setting a limit on greenhouse gas emissions with permits issued up to that limit. Companies can then trade these permits among themselves according to their relative costs of emission reductions. As a result emissions are arguably legitimised by offering opportunities to profit from their trade, thereby re-fashioning

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<sup>19</sup> John Haskell, ‘From Apology to Utopia’s Conditions of Possibility’ (2016) 29(3) *Leiden Journal of International Law* 667, 676.

<sup>20</sup> Rosemary Lyster, ‘The Idea of (Climate) Justice, neoliberalism and the Talanoa Dialogue’ (2019) 10(1) *Journal of Human Rights and the Environment* 35, 52.

<sup>21</sup> See, for example, Christoph Sutter and Juan Carlos Parreño ‘Does the current Clean Development Mechanism (CDM) deliver its sustainable development claim? An analysis of officially registered CDM projects’ (2007) 84 *Climatic Change* 75–90.

what could or should have been ethical imperatives as market opportunities.<sup>22</sup> As Chapter Three will show this is consistent with neoliberal principles which privilege market ordering rather than regulation by a central authority.

As one commentator puts it, the system ‘implies significant entrustment of competencies to the private sector, with governments increasingly assuming the role of market managers’.<sup>23</sup> Chapter Three will demonstrate this as a typical instance of the condition-providing state in neoliberal governance, in this case going directly to the climate change regime itself and reflecting the influence of neoliberalism on state practice. Again it is legitimised by ‘efficiency’ claims and in turn serves to legitimise the very thing it is supposed to regulate – greenhouse gas emissions.

David Harvey is more dismissive, claiming that carbon trading has created ‘a grand source of speculative gain for hedge funds but done little to curb total global carbon emissions’.<sup>24</sup> From an ethical perspective Michael Sandel, a moral philosopher, saw the outsourcing of the obligation to reduce emissions as ameliorating the moral stigma of emitting excess greenhouse gases, thereby undermining the underlying ethic of shared sacrifice.<sup>25</sup> More generally, he says. ‘[t]he era of market triumphalism has coincided with a time when public discourse has been largely empty of moral and spiritual substance’ themes.<sup>26</sup>

Among the developed industrial (Annex I) economies the United States (the largest developed economy greenhouse gas contributor) did not ratify the Protocol, though 191 states and the EU did so, representing more than 60% of developed economy emissions. Australia did not ratify until 2007, notwithstanding having negotiated a significant increase in emissions, and Canada withdrew in 2012, unable to meet its commitments. Kyoto was never thought of as an ultimate solution, indeed without the U.S. it could not be, but rather a first step and further commitments were intended beyond its initial reporting period (2008–2012). Notwithstanding increasingly ominous scientific commentaries, including the imperative for emissions to peak around 2020 and then fall dramatically by 2050, there was little progress

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<sup>22</sup> This point is made by, for example, Michael J Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Allen Lane, 2012) 75.

<sup>23</sup> Ian Bailey, ‘Neoliberalism, climate governance and the scalar politics of EU emissions trading’ (2007) 39(4) *Area* 431, 431.

<sup>24</sup> David Harvey, *Seventeen Contradictions and the End of Capitalism* (Oxford University Press, 2014) 249.

<sup>25</sup> Sandel (n 22) 75.

<sup>26</sup> *Ibid* 85.

toward further commitments. Negotiations tended to end in agreements to agree in the future, culminating in the stalemate of COP20 in Copenhagen.<sup>27</sup>

Nonetheless the various Kyoto COPs did at least succeed in developing some shared understandings between parties with conflicting interests, most obviously between developed and developing states with their radically different histories on greenhouse gas emissions and huge disparities in material resources. Those shared understandings include the broad objective (to avoid dangerous climate change), a widely shared understanding of the importance of keeping global temperature increases to 2C degrees or less<sup>28</sup> (confirmed again in 2015 in the Paris Agreement),<sup>29</sup> the need for a global regime, and the critical principle of Common but Differentiated Responsibilities (CBDR).<sup>30</sup>

In terms of ethical arguments this CBDR principle could be seen as at least a broad acknowledgement of ethical considerations though not instrumentalized beyond the Kyoto Annex I/Annex II division. As we shall see, however, this division is abandoned in the 2015 Paris Agreement in the name of universal (but non-binding) commitments by all states, thereby reinforcing the ‘common’ responsibilities of all states rather than ‘differentiated’ responsibilities of the CBDR principle. Thus are developing countries (to use Foucaultian terminology) ‘responsibilized’.

At an internal state level, however, these ‘shared understandings’ differ widely between, for example, the U.S. on the one hand, and the EU on the other. Thus ‘the EU, its member states and, arguably, even its public, have actually internalized the goals and principles of the global climate regime to a significant degree ... [t]hese norms have become woven into the legal and policy discourse within Europe, and perhaps even into the identity of the EU as a member of a global climate community.’<sup>31</sup> On the other hand ‘[t]he approach of the United States ... has been one of reluctance and even resistance.’<sup>32</sup>

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<sup>27</sup> Jutta Brunée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010) 140–141 (Copenhagen was widely held to be a failure, though it arguably represented a blueprint for the later (and widely lauded) Paris Agreement of 2015 (COP21)).

<sup>28</sup> *Ibid* 168–170, 176.

<sup>29</sup> <[http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php)> (Article 2).

<sup>30</sup> For a more comprehensive discussion of these shared understandings see Brunée (n 27) 141–177.

<sup>31</sup> *Ibid* 175.

<sup>32</sup> *Ibid*.

One illustration of these diverse perspectives can be seen in the various global financial arrangements to combat climate change.<sup>33</sup> Generally ‘the scale of financing has been underwhelming’<sup>34</sup> and in the instance of the most recent Green Climate Fund (‘the world’s largest dedicated multilateral climate fund’)<sup>35</sup> ‘the US repudiation of its prior commitment has created a US\$2 billion gap in the GFC’s finance’ with respect to which there is little if any legal recourse.<sup>36</sup> On the other hand some countries have elected to increase their contributions as a result (for example, Germany and Norway doubled their contributions) and there has been strong support from EU states, Japan and the UK.<sup>37</sup>

Of the many possible explanations for this difference one may be the historical engagement of EU states with multilateralism as opposed to hostility in the U.S. Senate to international regulation and a proclivity toward unilateralism.<sup>38</sup> Such differences in internal political cultures are bound to drive conceptions of self-interest and therefore behaviours as we will see in the characterizations of the global political order by international relations writers (Chapter Five). For example, the constructivist school of international relations focuses on this process of identity formation informing the behaviour of states. It has been suggested that ‘apparently objective, substantive interests are rarely sufficient to explain positions taken by governments in international negotiations’, including the climate change regime, such that ‘[t]he legacy of colonial exploitation, uneven development and imbalance of power throughout the globe trumps climate-specific indicators’.<sup>39</sup> International law and international agreements bring their own historical and cultural baggage. The evidence can be seen in, for example, the coherence of the so-called G-77 developing countries as a coalition within which diversion from common positions are rare; similarly for the so-called Umbrella Group of developed market economies.<sup>40</sup> This reflects an entrenched divide between industrialized

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<sup>33</sup> For example, the Global Environmental Facility, the Least Developed Countries Fund, the Special Climate Change Fund, the Adaptation Fund and most recently the Green Climate Fund (Abrar Chaudry, ‘Role of Intermediaries in Shaping Climate Finance in Developing Countries – Lessons from the Green Climate Fund’ (2020) 12(14) *Sustainability* (2020) 3. A general overview of climate finance can be found at <<https://www.climatepolicyinitiative.org/topics/finance/> and <https://climatefundupdate.org/the-funds/>>.

<sup>34</sup> Chaudry (n 33) 3.

<sup>35</sup> Luis H Zamarioli, ‘Country Ownership as the Means for Paradigm Shift: The Case of the Green Climate Fund’ (2020) 12 *Sustainability* (5714).

<sup>36</sup> Megan Bowman and Stephen Minas, ‘Resilience through interlinkage: the green climate fund and climate finance governance’ (2019) 19(3) *Climate Policy* 342, 343–344.

<sup>37</sup> Chaudry (n 33) 5.

<sup>38</sup> Brunée (n 27) 175–176.

<sup>39</sup> Joanna Depledge, ‘The Opposite of Learning: Ossification in the Climate Change Regime’ (2006) 6(1) *Global Environmental Politics* 1,4.

<sup>40</sup> *Ibid.*

and developing economies (the so-called North–South divide) most obviously manifest in their division in the Kyoto Protocol into Annex I/Annex II states with differing roles. As we will see, part of the so-called ‘triumph’ of the subsequent 2015 Paris Agreement was to sever this formalized North/South divide though not the underlying sentiments which it represented.

It should also be noted that as the climate change regime evolved so too did the variety of actors engaging with it – as with international relations and international law generally. In addition to states, and groupings of states with like interests, a global network of non-state actors increasingly populated the regime. There are now over a thousand non-profit entities and a variety of ‘epistemic communities, norm entrepreneurs, and other participants ... part of a community of practice ... shar[ing] a repertoire of “climate expertise”’.<sup>41</sup> As well global publics in both developed and developing countries overwhelmingly agree on the causes and need for strong action on climate change.<sup>42</sup> Whilst states remain the primary actors in international law this plethora of actors and interests to be accommodated incline the regime toward practices of ‘governance’ which, we will see below and in the following chapter, is both a core neoliberal practice and a characteristic of the global order of states.

To summarise, notwithstanding some notable exceptions (such as Canada’s withdrawal and non-ratification by the US), and given its limited objectives, the Kyoto regime achieved some substantive successes. The developed states which accepted emission reduction targets aimed for an overall reduction of 5% and in fact realised a 20% reduction by 2015.<sup>43</sup> For example, EU emissions fell by 16%<sup>44</sup> even though for the same period Gross Domestic Product for the EU grew by 44%.<sup>45</sup> That is to say, the ‘emission-intensity’ of economic development was dramatically reduced. But with developing states, including China and India, absolved from reduction commitments, with the U.S. failing to ratify (far less lead), and with Canada

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<sup>41</sup> Brunée (n 27) 142–143.

<sup>42</sup> See, for example, *Ibid* 147 (footnote 113).

<sup>43</sup> See, for example, <<http://www.un.org/climatechange/blog/2015/02/kyoto-protocol-turns-10-un-says-first-critical-step-must-trigger-new-2015-emissions-curbing-deal/>>.

<sup>44</sup> <<https://www.eea.europa.eu/...greenhouse-gas.../greenhouse-gas-inventory-2014-full.pdf>>.

<sup>45</sup> Raymond Cléménçon, ‘The Two Sides of the Paris Climate Agreement: Dismal Failure or Historic Breakthrough’ (2016) 25(1) *Journal of Environment and Development* 3, 14 (‘Global carbon emissions from fossil fuels have significantly increased since 1900. Since 1970, CO<sub>2</sub> emissions have increased by about 90%, with emissions from fossil fuel combustion and industrial processes contributing about 78% of the total greenhouse gas emissions increase from 1970 to 2011.’). See also

renege on its commitments, the overall absolute growth in emissions was substantial.<sup>46</sup> For the period 1990–2010 net global emissions grew by 35%,<sup>47</sup> an indication of the shortcomings of the regime. An additional problem may arise with the so-called Jevons Paradox, which holds that ‘in the long term, an increase in efficiency in resource use will generate an increase in resource consumption rather than a decrease’<sup>48</sup> as, for example, any energy surplus generated will then be consumed in a rebound effect by higher demand.

So global trends remain alarmingly high in spite of promising beginnings from the Kyoto Protocol and the successes of various parties, particularly the EU. Without targets beyond 2012 for some states, and in the absence of the U.S. and the withdrawal of Canada, and with the growing contributions of non-Annex I states, Kyoto came to regulate less than 15% of global emissions.<sup>49</sup> Later COPs failed to produce a satisfactory post-Kyoto regime and the 2009 Copenhagen Accord (COP15), whilst recognising the imperative of a maximum 2C degree rise in temperature, contained only non-binding pledges, merely ‘taken note of’ and then not unanimously.<sup>50</sup> It was widely regarded as a failure – ‘Copenhagen was a disaster and Paris a triumph ... [t]hat is the usual line’.<sup>51</sup> With the Copenhagen Accord widely disparaged as at best disappointing,<sup>52</sup> the Kyoto regime has now effectively been displaced by the 2015 Paris Agreement (COP21), which has different ambitions and mechanisms than Kyoto and requires some critical analysis.

One fundamental principle ought to be kept in mind. The Kyoto Protocol, in assigning binding targets only to developed states, arguably acknowledged a core reality. Those states most responsible historically for greenhouse gas emission, and who most benefitted from them in terms of industrial development, and who consequently were best placed in terms of resources to respond to the climate change challenge, were assigned more onerous responsibilities. There is at least a measure of corrective justice in that, and by implication

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<<https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data>>.

<sup>47</sup> <<https://www.epa.gov/climate-indicators/climate-change-indicators-global-greenhouse-gas-emissions>>.

<sup>48</sup> M Giampietro and K Mayumi ‘Unraveling the Complexity of the Jevons Paradox: The Link Between Innovation, Efficiency, and Sustainability’ (2018) 6(26) *Frontiers in Energy Research* 2.

<sup>49</sup> Center for Climate and Energy Solutions ‘Outcomes of the U.N. Climate Change Conference in Paris’, at <<https://www.c2es.org/international/negotiations/cop21-paris/summary>>.

<sup>50</sup> <[https://en.wikipedia.org/wiki/2009\\_United\\_Nations\\_Climate\\_Change\\_Conference](https://en.wikipedia.org/wiki/2009_United_Nations_Climate_Change_Conference)>.

<sup>51</sup> Daniel Bodansky, ‘Reflections on the Paris Conference’ <<http://opiniojuris.org/2015/12/15/reflections-on-the-paris-conference/>>.

<sup>52</sup> For an account see, for example, Brunée (n 27) 204–214.

lacking in the Paris Agreement with its universal but non-binding ambitions to ongoing reductions.

Given that Kyoto was always intended to be a first step, given that it had binding force supported by enforcement provisions and penalties at least for developed states, and given its successes in the first commitment period, it was at least a forward step. Of particular note, it had a certain centralised authority – not state-like but at least some measure of coercive power to enforce states’ commitments. In that sense it represented a ‘top-down’ approach. The following chapters on neoliberalism take particular note of a devolution of authority from states to markets as a core neoliberal principle and we see an analogous process working in the 2015 Paris Agreement, wherein Kyoto-style centralised authority is relinquished to states, whose binding obligations have been limited to submitted self-generated plans. The move is toward a ‘bottom-up’ approach.<sup>53</sup>

### III THE 2015 PARIS AGREEMENT

#### *A Introduction*

The 2015 Paris Agreement is generally recognized as being a treaty under international law in that it does impose certain binding legal obligations on parties, though it is not a ‘conventional’ treaty in that it is ‘a facilitative rather than prescriptive instrument’.<sup>54</sup> Whilst the Agreement itself is arguably a treaty not all of its provisions, including those on the critical issue of Nationally Determined Contributions (NDCs) which express a state’s planned mitigation ambitions, create legal obligations or even agreement.<sup>55</sup> The issue of adequacy of NDCs will at least present opportunities for ‘naming and shaming’ which affect states’ reputations though the efficacy of this approach is at best controversial.<sup>56</sup> Whether or not

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<sup>53</sup> See, for example, Sharaban Tahura Zaman, ‘The “Bottom-up Pledge and Review” Approach of Nationally Determined Contributions (NDCs) in the Paris Agreement: A Historical Breakthrough or a Setback in New Climate Governance?’ (2018) 5(2) *IALS Student Law Review* 3, 4 ([t]he new approach introduces a stark contrast to the Kyoto Protocol’s top-down approach which is embodied by the legally binding mitigation targets and timelines for developed countries’).

<sup>54</sup> Radoslav Dimitrov et al, ‘Institutional and environmental effectiveness: Will the Paris Agreement work?’ (2019) 10 *WIREs Climate Change* 1,3. Importantly, it does not require ratification by the U.S. Senate.

<sup>55</sup> See generally, Daniel Bodansky, ‘The Legal Character of the Paris Agreement’ (2016) 25(2) *Review of European Community and International Environmental Law* 142–150. Note in particular footnotes 3 (Slaughter) and 4 (Falk), opining that the Paris Agreement raises ‘serious questions as to *whether anything at all had even been agreed*’ (emphasis added).

<sup>56</sup> For discussion of ‘shaming’ as a legitimate and effective tactic see, for example, B Taebi and A Safari, ‘On Effectiveness and Legitimacy of ‘Shaming’ as a Strategy for Combatting Climate Change’ (2017) 23 *Science and Engineering Ethics* 1289–1306. See also Donald Brown ‘Why “Shaming” Is An Important Tool That Could

countries will be willing to prioritise international reputation over domestic economic priorities remains to be seen – certainly the example of Canada reneging on its Kyoto Protocol commitment is not encouraging; nor is the U.S. announcement by the Trump Administration that it would withdraw from the Paris Agreement.<sup>57</sup> The latter decision was subsequently reversed under the Biden Administration<sup>58</sup> but the point regarding the vulnerability and fragility of a state’s commitments remains. If even under ‘binding’ agreements like Kyoto ‘there are no effective sanctions against breaches of commitments, as demonstrated by Canada walking away without penalty from its ... pledges’<sup>59</sup> then the Paris Agreement must be regarded with disquiet.

The explicit differentiation of obligations between developed and developing states at Kyoto ended, to be replaced in Paris by a common framework requiring best efforts of *all* states, including regular reporting and the submission of NDCs (Article 4) toward emission reductions. The NDCs were not quantified (they are not *precise*) and not themselves legally binding (they are not ‘*hard*’ law) though once set the Agreement ‘seeks to discipline state autonomy by establishing strong normative expectations and imposing certain obligations, albeit of conduct on state behaviour in relation to these NDCs’.<sup>60</sup> The implied expectation is that ‘self-imposed, voluntary commitments are more likely to be met than those imposed by the global community’<sup>61</sup> though it has also been argued that this was in reality a reluctant acceptance of the U.S. refusal to countenance binding targets.<sup>62</sup> Similarly other writers conclude that ‘Paris was designed largely for political purposes that suited the interests of the USA ... not to create a dynamic and effective international architecture’.<sup>63</sup>

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Lead to Climate Change Action In Paris And Beyond’ Ethics and Climate

><https://ethicsandclimate.org/2015/11/14/why-shaming-is-an-important-tool-that-could-lead-to-climate-change-action-in-paris-and-beyond/>> (posted 14 Nov 2015); Zaman (n 53) 19.

<sup>57</sup> Brad Plumer, ‘Trump Will Withdraw U.S. From Paris Climate Agreement’ (*The New York Times*, 1 June 2017) <<https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>>.

<sup>58</sup> <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/>>.

<sup>59</sup> Ross Garnaut, ‘Compounding social and economic problems: The limits to adaptation’ in Peter Christoff (ed) *Four Degrees of Global Warming: Australia in a hot world* (Routledge, 2014) 142, 149.

<sup>60</sup> Lavanya Rajamani and Jutta Brunnée, ‘The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement’ (2017) 29 *Journal of Environmental Law* 537, 547.

<sup>61</sup> Julia Dehm, ‘Reflections on Paris: thoughts towards a critical approach to climate law’ (2018) *Revue Québécoise de droit international* 75 (quoting Doelle).

<sup>62</sup> See also Dimitrov (n 54).

<sup>63</sup> Moazzem Hossain et al (eds), *Pathways to a Sustainable Economy: Bridging the Gap between Paris Climate Change Commitments and Net Zero Emissions* (Springer, 2018) 38.

Even if the more optimistic motivation behind voluntarism is granted it is of little consolation if the actual commitments proposed are, as appears so far, inadequate.<sup>64</sup> But most important, ‘the Paris Agreement does not make it binding to have such targets in place at all’.<sup>65</sup> Although Article 4(11) allows amendment to an NDC ‘with a view to enhancing its level of ambition’, failure to meet an NDC, or to downgrade it or submit a less ambitious later one, would not violate a legal obligation though it may violate a normative expectation.<sup>66</sup> Thus the Paris Agreement is described by one author as ‘rooted in the principles of governance by disclosure and voluntarism’.<sup>67</sup>

Crucially though, *all* states (that is to say all 197 states, with 189 states having ratified at the time of writing)<sup>68</sup> were so bound to at least the *process* of submitting NDCs, including China and India. Thus there is at least a universal commitment to (non-binding) plans to reduce emissions, a new dimension after Kyoto though that universality was substantially compromised by the 2017 announcement of the USA of its intention to withdraw its consent<sup>69</sup> (since reversed). This was ironic given that ‘Paris was designed largely for political purposes that suited the interests of the USA’<sup>70</sup> and that ‘[i]nsiders tend to ascribe virtually all the P[aris] A[greement]’s weaknesses and less binding provisions to the United States’.<sup>71</sup>

The demographics of greenhouse gas emissions had changed since the original UNFCCC negotiations in 1990. At that time developed country emissions represented some 70% of global emissions; by 2017 developing country emissions had tripled to become nearly 60% of

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<sup>64</sup> See, for example, UNEP ‘Emissions Gap Report 2020’ <<https://www.unep.org/interactive/emissions-gap-report/2020/>> – notwithstanding a slight fall in emissions due to the Covid-19 pandemic, ‘[t]he world is still heading for a catastrophic temperature rise in excess of 3°C this century – far beyond the Paris Agreement goals of limiting global warming to well below 2°C and pursuing 1.5°C’. Under current policies one estimate of projected warming is 2.7–3.1C degrees <<https://climateactiontracker.org/global/temperatures/>>.

<sup>65</sup> Peter Lawrence and Daryl Wong, ‘Soft Law in the Paris Agreement: Strength or weakness?’ (2017) 26 *RECIEL* 276, 280.

<sup>66</sup> Rajamani (n 60) 549.

<sup>67</sup> Ciplet (n 9) 152.

<sup>68</sup> <<https://unfccc.int/process/the-paris-agreement/status-of-ratification>>.

<sup>69</sup> <<https://unfccc.int/news/unfccc-statement-on-the-us-decision-to-withdraw-from-paris-agreement>>.

<sup>70</sup> Luke Kemp, ‘A Systems Critique of the 2015 Paris Agreement on Climate’ in Moazzem et al (eds) *Pathways to a Sustainable Economy: Bridging the Gap between Paris Climate Change Commitments and New Zero Emissions* (Springer, 2018) 38.

<sup>71</sup> Dimitrov (n 54). See also Radoslav Dimitrov ‘The Paris Agreement on Climate Change: Behind Closed Doors’ (2016) 16 (3) *Global Environmental Politics* 1 – for example, (at 3) the U.S. were ‘adamant against legally binding mitigation and finance ... the EU and the G77 reluctantly accepted’.

the total.<sup>72</sup> Hence it was important to obtain some form of commitment from all states, not just the emissions-dominant Annex I developed states of 1990 and the Kyoto Protocol.

The ‘bottom-up’ flexibility for states to set their own targets was doubtless a crucial incentive in the quest for universal participation though there were also ‘top-down’ process rules ‘to promote accountability and ambition’.<sup>73</sup> Thus a proclaimed virtue of the Paris Agreement is that it reverts to a recognition of national politics in that individual countries are free to fashion their own policies. There is a legal requirement that they do in fact do so and will report on them in five-yearly reviews (Article 4), providing an opportunity for the ‘naming and shaming’ of recalcitrant states,<sup>74</sup> but nothing more. The Agreement includes binding provisions for enhanced transparency and accountability provisions<sup>75</sup> which may serve a similar purpose to legal enforcement. Nonetheless the Paris Agreement lacks the compliance, enforceability and punitive measures of the Kyoto Protocol, though in fact there was 100% compliance with Kyoto not including the U.S. and Canadian withdrawals from the Agreement.<sup>76</sup> The threshold question must be whether or not, five years on from the Paris Agreement, it is likely to realise its ambition.

Compared to Kyoto the Paris Agreement promotes a more ambitious, albeit merely aspirational, goal of less than 2 degrees warming, and ideally 1.5 degrees.<sup>77</sup> The long-term objective is for ‘a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century’ (Article 4), generally interpreted by scientists to mean ‘global net emissions need to reach zero by 2060–2080’.<sup>78</sup> However, *even if* all current pledges under the Paris Agreement were met the likely temperature rise by 2100 is estimated to be 2.7–3C degrees.<sup>79</sup> So on present evidence the ambition of even 2C degrees rise in global temperature is not presently within the grasp of the international community.

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<sup>72</sup> Daniel Bodansky, Jutta Brunée and Lavanya Rajamani *International Climate Change Law* (Oxford University Press, 2017) 353–4.

<sup>73</sup> Center for Climate and Energy Solutions ‘Outcomes of the U.N. Climate Change Conference in Paris’ <<https://www.c2es.org/international/negotiations/cop21-paris/summary>>. See in particular Articles 6, 13 of the Paris Agreement.

<sup>74</sup> *Ibid* (n 56).

<sup>75</sup> Article 13, Paris Agreement.

<sup>76</sup> Michael Grubb, ‘Full legal compliance with the Kyoto Protocol’s first commitment period – some lessons’ (2016) 16 (6) *Climate Policy* 673.

<sup>77</sup> Paris Agreement, Article 2(1)(a).

<sup>78</sup> Cléménçon (n 45) 9.

<sup>79</sup> *Ibid* 13.

It is said that ‘pledge and review’ arrangement like the Paris Agreement ‘ha[ve] rarely worked in other international agreements or in previous international efforts on climate change.’<sup>80</sup> Rather they arguably cater to the tendency of governments ‘to express lofty aspirations but avoid tough decisions’<sup>81</sup> and to reflect the vulnerability of such agreements to national political currents. Thus the Paris Agreement has been described as a process of ‘concerted unilateral mitigation’<sup>82</sup> as opposed to a genuinely multilateral international effort.

But it is important to recognize that neither the Kyoto Protocol nor the Paris Agreement have so far demonstrated success in meeting their goals – in the case of Paris, at least its ambition of a 1.5–2C degree limit to global warming.

### *B The Paris Agreement and Neoliberalism*

The Paris Agreement has been characterized by some writers as ‘a largely neoliberal document’.<sup>83</sup> Kyoto ‘market’ mechanisms (the CDM, ETS and JI) continue in the Paris Agreement. It includes evidence of a shift from states to private actors in regard to ‘the loss and damage provision ... which calls for cooperation on ‘[r]isk assurance facilities, climate risk pooling and other insurance solutions’ and, more particularly, that the Agreement does ‘not involve or provide a basis for any liability or compensation’<sup>84</sup> (seeming to exclude any intimations of corrective justice – issues to be discussed in Chapter Six as aspects of normative drivers of climate change policy).

The shift from enforceable commitments in Kyoto to voluntary plans (NDCs) is significant in removing the power of a quasi-central authority (the Kyoto Enforcement Branch of the Compliance Committee) to pursue compliance regarding the voluntary NDC plans. It indicates a policy shift away from a top-down, quasi-‘government’ regulatory approach in Kyoto to one of bottom-up ‘governance’ in Paris, from ‘management’ to interest accommodation. As Chapter Three will show, the practice of governance is a fundamental characteristic of neoliberalism in domestic ordering systems and as well in the global order,

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<sup>80</sup> Kemp (n 70) 25.

<sup>81</sup> Robert Falkner, ‘The Paris Agreement and the new logic of international climate politics’ (2012) 92(5) *International Affairs* 1107, 1108.

<sup>82</sup> Ross Garnaut (n 59) 149.

<sup>83</sup> See, for example, Lyster (n 20) 51–53; Cipler (n 9) 148.

<sup>84</sup> Lyster (n 20) 52.

lacking as it does a central authority equivalent to an international government. Thus the Paris Agreement has been characterised as a shift to ‘transparency *governance* [which] defines the primary obstacles to sustainability as that of imperfect *information*’ and ‘onerous *regulatory* structures’, signally the replacement of ‘command-and-control and compliance based forms’.<sup>85</sup> Indeed the Paris Agreement itself (Article 15) stipulated that the implementation and compliance committee is to be ‘non-adversarial’ and ‘non-punitive’ and ‘respectful of national sovereignty’ and does not make provision for third parties to ask compliance-related questions.<sup>86</sup> As well the Paris Agreement continues to favour private, market-based policies exemplified in emissions trading which ‘became the preferred solution because of its ideological fit with neoliberal logic’.<sup>87</sup>

Further, as will be suggested in Chapter Five, it may be useful to imagine the world political order of 197 ‘competing’ states as analogous to a private ‘market’ in which actors strive to assert power and interests. Under the Paris Agreement, in the absence of even a ‘soft’ central regulatory authority (for example the Kyoto Protocol’s binding targets), states are now free to pursue self-interest and even to free-ride with only a commitment to submitting a ‘plan to make a plan’. A measure of coercive authority in Kyoto is replaced by a largely unconstrained freedom for states’ emissions policies in Paris. In essentially freeing up this ‘market’ of some 190 self-interested state actors from binding commitments to quantified emissions reductions, the Paris Agreement in effect shapes the climate regime in a kind of neoliberal analogy to market freedom in domestic markets of private actors – that is to say, less government from the centre, greater governance from (state) market actors. As will be seen in the following chapter the analogy is even more obvious in the world trading order in which the central authority (the World Trade Organisation) is committed to a free market of trading among states.

In the context of the global order of states Chapter Five will include discussion of the so-called Realist model of international relations – an anarchic order of self-interested states which itself again resembles domestic markets of private actors pursuing self-interest. In this Realist conception international law is said to be of little practical relevance and even

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<sup>85</sup> Cipler (n 9) 151 (emphasis added).

<sup>86</sup> Peter Lawrence and Daryl Wong ‘Soft Law in the Paris Agreement: Strength or weakness?’ 26 *RECIEL* (2017) 276, 284.

<sup>87</sup> Cipler (n 9) 150 (quoting Newell and Paterson).

characterized as ‘epiphenomenal’. Whilst the Kyoto Protocol had a certain coercive authority with regard to (negotiated) binding targets, for example, in applying penalties for non-compliance, the Paris Agreement lacks such authority. It is important to recognize the reality of the shift to voluntary and self-determined NDCs, for the effect is also to ‘recognize and affirm asymmetries of resources and power between states in governance arrangements’ – that is, radically unequal states are free to pursue self-interest under ‘the minimal constraints of an agreed framework’.<sup>88</sup> In that sense Paris indicates a shift toward this Realist model.

In Chapter Four we will see how another characteristic neoliberal move is the ‘responsibilizing’ of individual actors.<sup>89</sup> Individuals are encouraged to internalise responsibility for problems which they might otherwise assign to others (particularly the state), for example, one’s personal health. In the Paris Agreement unequal state actors are in effect ‘responsibilized’ for emissions (and impacts) irrespective of their unequal historic contributions to emissions and access to resources, and their particular vulnerability to climate change impacts. In the universalism of the Paris Agreement there is a ‘flattening out’ of the unequal *contributions* to climate change that is achieved by the universalizing of *responsibility* to reduce emissions – the contrast is with the Kyoto Protocol which acknowledged unequal contributions and responsibilities via the Annex I and II divide and the principle of Common But Differentiated Responsibilities. Developing states were impliedly excused by virtue of their lack of responsibility for the problem. Now they too are required to submit to the Paris undertakings and in that sense are ‘responsibilized’. There is irony here in that the ‘expedient unilateralism’ of Paris – essentially responsibilizing developing states for climate change – has been characterised as ‘a complete victory for the United States’<sup>90</sup> which had, reflecting domestic political constraints, historically resisted binding targets and insisted on targets for developing states,<sup>91</sup> only to later announce its intention to withdraw from the Agreement entirely.<sup>92</sup>

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<sup>88</sup> Ibid.

<sup>89</sup> The term refers to a process in neoliberal governance which transfers responsibility to individual agents through an ‘appeal of freedom’ – the term comes originally from Michel Foucault *The birth of biopolitics: Lectures at the Collège de France, 1978–79*).

<sup>90</sup> Cléménçon (n 45) 4.

<sup>91</sup> Ibid 6.

<sup>92</sup> Brad Plumer, ‘Trump Will Withdraw U.S. From Paris Climate Agreement’ (*The New York Times*, 1 June 2017) <<https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>>

There is also irony in the fact that the Paris Agreement was in significant part the culmination of shared understandings of principles from the much maligned COP 15 in Copenhagen in 2009.<sup>93</sup> If the Copenhagen pledges ‘were what individual nations decided they could *manage* based on their domestic political circumstances and economic capacity ...[then] expedient unilateralism ha[d] replaced concerted multilateralism’.<sup>94</sup> In other words what was important was not the ultimate goal (emissions limited to satisfy the Paris ambition of 1.5C temperature increase) but rather what states self-chose as ‘manageable’ – in that sense again Paris represents a governance exercise in interest accommodation rather than an authority-driven achievement of a specified goal. We will recognize this as a hallmark of neoliberalism in Chapter Three.

### *C Summary of Paris Agreement*

Generally it may be said that the Paris Agreement ‘merely rationalizes an already emerging system of *domestically* driven climate policy’.<sup>95</sup> Given that states have, as we will see in Chapter Three, themselves largely adopted neoliberal ideology then the claim that the Paris Agreement reflects neoliberal bias is unsurprising in that its constituent neoliberal parties will reflect manifest that bias in their preferences for climate change policy.

One of the myriad difficulties facing any collective response to climate change (as with international law generally) has been the requirement of consensus decision-making. It is vital not only in a pragmatic sense of reaching a response at all but also to principles of legitimacy, shared understandings and commitment which are important for implementation. At its most positive the Paris Agreement was hailed as representing essentially universal consent. In the absence of quantitative binding targets for emission reductions this consensus was celebrated as the Agreement’s greatest virtue. At the time of writing some 190 states (of 197 original parties) had ratified the Paris Agreement.<sup>96</sup>

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<sup>93</sup> See, for example, Bodansky (n 51) (‘countries had become familiar with [the Copenhagen architecture] ... the foundations of the Paris Agreement had already been laid’).

<sup>94</sup> Peter Christoff, *Four Degrees of Global Warming: Australia in a hot world* (Routledge, 2014) 5.

<sup>95</sup> Robert Falkner, ‘The Paris Agreement and the new logic of international climate politics’ (2012) 92(5) *International Affairs* 1107, 1127 (emphasis added).

<sup>96</sup> <[http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php)>.

The Paris Agreement effectively ended the Kyoto regime<sup>97</sup> but it, too, is only a beginning, only ‘the basic structure of the new climate change regime ... nothing is ever fully settled’.<sup>98</sup> In fact the regime is simply not working. Some research suggests that there is only a 5% chance of avoiding a temperature increase of at least 2C degrees (the *upper* limit of the Agreement’s ambition and the threshold of ‘dangerous’), and suggesting a likely temperature increase of 2–4.9C degrees (with median 3.2C degrees).<sup>99</sup> Rather the likelihood given present emission trends is said by some commentators to represent warming of 4 degrees or more,<sup>100</sup> ‘well outside the relatively stable temperatures of the last 12,000 years, which have provided the environmental context for the development of human civilization ... unknown territory for modern humans and probably for our species at any time in the past’.<sup>101</sup> This is the existential threat – the non-negligible risk of catastrophe. Even so, it was pointed out by one sceptical commentator that the Paris Agreement is

implicitly predicated upon an assumption that member states of the United Nations ... will somehow drive down their carbon pollution voluntarily and assiduously without any binding enforcement mechanism to measure and control [carbon dioxide] emissions ... and without any specific penalty gradation or fiscal pressure (for example a carbon tax) to discourage bad behaviour.<sup>102</sup>

Under the Paris Agreement we are arguably given a more or less satisfactory account of certain important shared understandings – notably the 1.5–2C limit to global temperature increase and the principle of CBDR – but little guidance or will as to how to proceed toward the desired substantive outcome. Hard targets like Kyoto at least gave substance to the first steps, as well as concretising CBDR in the notion of Annex I developed economies with firm, binding targets and Annex II developing economies with none. But the reality is that from 1990 to 2012 (the end of the first Kyoto assessment period) global CO<sub>2</sub> emissions nonetheless increased by 58%,<sup>103</sup> not because hard targets did not work (there was 100% compliance) but

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<sup>97</sup> Bodansky (n 51) (‘In Paris, the Kyoto Protocol was the dog that didn’t bark, and it looks like it will now go gently into the night’).

<sup>98</sup> Ibid.

<sup>99</sup> A Raftery et al. ‘Less than 2 °C warming by 2100 unlikely’ (2017) 7 *Nature Climate Change* (2017) 637, 637. Note, however, that this claim is disputed – see, for example, Damian Carrington, ‘Ambitious 1.5C Paris climate target is still possible, new analysis shows’ *The Guardian* (Sep.19, 2017); see also Agence-Pressé, ‘Worst-case global warming scenarios not credible, says study’ *The Guardian* (18 Jan. 2018).

<sup>100</sup> Christoff (n 94) 1–10 (suggesting (at 9) a world ‘of almost unimaginable social, economic and ecological consequences and catastrophes’). See also, for example, Cléménçon (n 45) 12 (‘Without any further policy measures, the world is on track to a 4 degree warming by 2100’).

<sup>101</sup> Garnaut (n 59) 142.

<sup>102</sup> Homero Paltan et al ‘Global implications of 1.5 °C and 2 °C warmer worlds on extreme river flows’ (2018) 13(9) *Environmental Research Letters* <[https://en.wikipedia.org/wiki/Paris\\_Agreement](https://en.wikipedia.org/wiki/Paris_Agreement)> (footnote 89).

<sup>103</sup> Mark Beeson and Matt McDonald, ‘The Politics of Climate Change in Australia’ (2013) 59(3) *Australian Journal of Politics and History* 331, 333 (footnote 8).

because of the structural limitations of the Protocol as a first step. Now with the Paris Agreement one commentator puts it that ‘the world now has a global climate agreement with no specific legally binding provisions to hold countries accountable to doing much of anything except to come back every 5 years to report on their climate action’.<sup>104</sup> That such an agreement could have been hailed as a ‘triumph’ surely speaks rather to the manifest inadequacies of the climate change regime than to any imagined virtues of the Paris Agreement.

At the time of writing progress on the Paris Agreement, most recently the subject of a UN Climate Change Summit (COP 25) in 2019<sup>105</sup>, has been slow and disappointing<sup>106</sup> notwithstanding further evidence of increased urgency.<sup>107</sup>

#### IV CONCLUSIONS

This chapter introduced the legal regime for climate change, first in the Kyoto Protocol and second in the current Paris Agreement, and to demonstrate the failure so far to provide a plausible path to realising its ambition to restrict global warm to non-dangerous levels (thought to be 1.5–2C degrees). Neither the ‘top-down’ Kyoto Protocol nor the voluntary ‘bottom-up’ Paris Agreement have yet demonstrated an ability to realise that goal.

A second enquiry has been to demonstrate neoliberal influences on the evolving regime. It is notable that in the matter of the NDCs through which states are currently required to manifest

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<sup>104</sup> Cléménçon (n 45) 18 – in summary, the Paris Agreement ‘defines no emissions peak year, no specific emissions reduction timeline, and no concrete plans to phase out of fossil fuel subsidies, to stop construction of new coal-fired power plants, and to substantially and transparently increase financial support to developing countries’. A fairly typical summation on the Paris Agreement from the academic literature would be Zaman (n 53) 19 – ‘it is very unlikely that states will progressively continue to adopt adequate, enhanced mitigation pledges and implement costly mitigation policies for the sake of moral compulsion, reputation, global leadership and international momentum’.

<sup>105</sup> The scheduled November 2020 COP 26 has been delayed a year due to the COVID-19 pandemic.

<sup>106</sup> See, for example, Somini Sengupta and Lisa Friedman ‘At U.N. Climate Summit, Few Commitments and U.S. Silence’ (*The New York Times*, Sept.23, 2019) – quoting the Head of the World Resources Institute: ‘most of the major economies fell ‘woefully short’ of expectations’; Nicholas Beuret, ‘UN Climate Action Summit missed a key ingredient: climate action’ (*The Conversation*, Sept. 25, 2019) – ‘the summit was an abject failure’, ‘none of the major carbon polluters made any significantly improved commitments’, ‘a near complete absence of commitment to immediate action’, ‘we’re still on track for a catastrophic 3C to 4C of global heating by 2100’); Hossain (n 63) 39: ‘As an agreement and a system, it is universal, but largely useless’.

<sup>107</sup> Adam Morton, ‘Countries must triple climate emission cut targets to limit global heating to 2C’ (*The Guardian*, 23 Sept. 2019) – ‘an assessment backed by the world’s major climate science bodies has found commitments to cut greenhouse gas emissions must be at least tripled and increased up to fivefold if the world is to meet the goals of the 2015 Paris climate agreement ... current plans would lead to a rise in average global temperatures of between 2.9C and 3.4C by 2100, a shift likely to bring catastrophic change across the globe’.

their emission reduction ambitions, it appears that ‘a majority of states rely on market mechanisms to implement their NDCs’<sup>108</sup> and that ‘the view of the state as *market facilitator* is widespread in the NDCs’.<sup>109</sup> This is precisely the re-configured role of the state as market facilitator we will see in the account of neoliberal principles in Chapter Three, which will demonstrate its corrosive effect on climate change policy.

Similarly, to the extent that effective climate change action will require individual citizens ‘to loosen their attachments to their lifestyles, consumption habits and social status’,<sup>110</sup> then the re-fashioning of individuals as neoliberal ‘capital units’ described in Chapter Four offers little cause for optimism. Rather the evidence will be of a ‘broad citizenry who will not act collectively to protect themselves’<sup>111</sup> as ‘people are not yet inclined to respond to a threat that is not tangible, yet by the time it becomes tangible it will be too late’.<sup>112</sup>

It will further be argued in Chapter Five that another challenging organising context within which any climate change regime must operate is the fractious and largely ungoverned international order itself. It too will be shown to manifest problematic neoliberal practices which, together with its ongoing structural limitations, are claimed to be incommensurate with an effective climate change regime.

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<sup>108</sup> Maria Jernäs et al, ‘Cross-national patterns of governance mechanisms in nationally determined contributions (NDCs) under the Paris Agreement’ (2019) 19(10) *Climate Policy* 1239, 1239.

<sup>109</sup> Ibid 1247 (original emphasis).

<sup>110</sup> Clive Hamilton ‘*Review Essay: Theories of Climate Change*’ (2012) 47(4) *Australian Journal of Political Science* 721, 724 (referencing Beck).

<sup>111</sup> Ibid .

<sup>112</sup> Ibid 725 (quoting Giddens).

## CHAPTER III: NEOLIBERAL IDEOLOGY AND THE ROLE OF THE STATE

The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back ... But, soon or late, it is ideas, not vested interests, which are dangerous for good or evil. (John Maynard Keynes)<sup>1</sup>

### I INTRODUCTION

This chapter will present a characterisation of neoliberalism as a ‘deep structure’ of thought in order to explain how such hegemonic discourses<sup>2</sup> shape and reify our political, economic and social arrangements. It is the consequences of these neoliberal arrangements for climate change policy which drives the enquiry, as will the analysis of the global order of states in Chapter Five. It is also a critique of neoliberalism in its aim to ‘concentrate upon discourse and upon the hidden ideologies, attitudes and structures which lie behind discourse’.<sup>3</sup>

Chapter Five will offer an explanatory account of the global order of states and of neoliberal ideology and practices in that order. First, however, in this chapter the ambition is to go beyond descriptive accounts of neoliberalism to show how it undermines possibilities for a successful response to this ‘super wicked’ problem of climate change. Much of the seemingly inexplicable and irrational inability of our present arrangements to successfully meet the challenge of climate change can be discerned in the principles and practices of neoliberalism. It is necessary to make this incommensurability explicit in the ways in which neoliberal ideology shapes our economic, political and legal individual identities and roles, and even our individual identities. If neoliberalism poses the threat to climate change reform that is claimed in this thesis then it may be useful to bear in mind a quotation from Milton Friedman, a major figure in the promotion of neoliberal market fundamentalism: ‘[o]nly a crisis – actual

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<sup>1</sup> John Maynard Keynes, *The General Theory of Employment, Interest and Money* (Palgrave Macmillan, 1936) 383–384.

<sup>2</sup> Wendy Brown defines ‘discourse’ as ‘an order or ensemble of normative speech acts that constitute a particular field and subjects within it; in discourses, norm and deviation are the means by which subjects and objects in any field are made, arranged, represented, judged, and conducted’ (Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (Zone Books, 2015) 117.

<sup>3</sup> David Armstrong, Theo Farrell and Helene Lambert, *International Law and International Relations* (Cambridge University Press, 2007) 101 (quoting critical legal scholar David Kennedy).

or perceived – produces real change ... [w]hen that crisis occurs, the actions that are taken depend on the ideas that are lying around'.<sup>4</sup> It was in such a crisis – the apparent inability of the Keynesian economic model of top-down economic management of economic policy to manage stagflation in the 1970s – that neoliberalism presented as an alternative 'idea lying around'. The final chapter will ponder the question of whether climate change too presents such a crisis and whether there are plausible alternative ideas lying around.

In this chapter the discussion will employ the concept of 'deep structures'<sup>5</sup> of thought as a useful heuristic tool in discussing the role of hegemonic discourses in shaping our ordering arrangements. Those discourses constitute a formative context for our political, economic and social arrangements in such a way as to give a fairly coherent (if always incomplete) account of them. Thus, for example, liberal political theory as a deep structure gives a relatively coherent account of the ordering arrangements – political, economic, legal, social – of liberal democratic states. They include the celebration of individual rights and freedoms, democratic voting rights, economic rights in contractual relations and the sanctity of property, competition in (relatively) free markets, and so on. These normalised structures, or routines, are the surface manifestations of the deep structure liberal theory which informs them from 'below' as it were.<sup>6</sup>

Neoliberalism did not spring fully formed from the imaginations of its practitioners. It is called *neoliberalism* because of its ideological provenance (the substantive noun 'liberal'), and it is called *neoliberalism* because it departs in important ways from that provenance (the qualifier 'neo'). The evolution of neoliberalism as a deep structure can be traced through its roots in liberalism itself, its historic trajectory (which happened to coincide with that of climate change awareness), and the forms it has taken in economic, political, legal and social life. A closer analysis of those forms and their consequences will describe a reconfigured market-enabling state, a reconfiguration of the individual subject, a diminished political sphere, and a reoriented direction in law – all with important consequences for how we come to the issue of climate change.

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<sup>4</sup> Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Penguin, 2007) 6 (quoting Friedman).

<sup>5</sup> Examples would include 'world-altering formations, including capitalism, socialism, liberalism, feudalism, Christianity, Islam, and fascism' (Wendy Brown, *In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West* (Columbia University Press, 2019) 17).

<sup>6</sup> For a more complete account of deep structure theory see, for example, Geoffrey WG Leane, 'Ways Not to Think About Social Theory: Rethinking Environment, Law and Society' (1997) 12 *Canadian Journal of Law and Society* 193.

## II DEEP STRUCTURE THEORY

Deep structure theory identifies and de-constructs dominant ideologies to demonstrate their constructedness, their gravitational force on our ways of social ordering and, in transformative social theory, to imagine alternative structures. Whilst the term comes originally from linguistics, ‘deep structure’ will be used here in the sense that it is employed in social theory, for example, by Roberto Unger,<sup>7</sup> a prominent social theorist, philosopher, Harvard legal academic and sometime Minister in the Brazilian government.

It will be useful to imagine a horizontal line above which we can view the institutions and routines of everyday life in a given society – all the institutional forms of business organisation, government and other political, social and cultural arrangements. ‘Below’ that line we can discern ideological ‘deep structures’ which inform and shape these arrangements and routines.<sup>8</sup> Arrangements ‘above the line’ are not *ad hoc* and random but rather are substantially motivated and shaped by particular dominant ‘world views’ or ‘paradigms’ or ‘normative frameworks’ or ‘meta-narratives’ – ‘deep structures’ of thought. Each has its own provenance, its own ideological drivers and its own (sometimes conflicting) manifestations. Various deep structures are at work in any era and they may overlap, contradict, wax and wane.

The ‘surface’ moves (‘above the line’) may be seen to flow in a pre-determined, necessitarian way from the ideological deep structures (‘below the line’) which aspire to provide if not a totalizing explanation for them then at least a credible and plausible explanatory account, even a unifying theory. Thus, deep structure theory is ‘the attempt to distinguish in every historical circumstance a formative context, structure, or framework from the routine activities this context helps to reproduce’.<sup>9</sup> Examples of such deep structures of thought typically at work in the liberal democracies of the industrialised West with which we are particularly concerned here might be the gender relations of patriarchy, the religious doctrines of Judeo-Christianity, the economic relations of capitalism, and importantly for present purposes, the political arrangements of ‘liberalism’ and, since the 1970s, ‘neoliberalism’.

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<sup>7</sup> See, for example, Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Cambridge University Press, 1987) 15–17.

<sup>8</sup> Leane (n 6) 194.

<sup>9</sup> Roberto Mangabeira Unger, *Social Theory: Its Situation and Its Task* (Cambridge University Press, 1987) 88.

There are, however, qualifications to deep structure theory. First, no descriptive account of a deep structure ('below the line') can capture or even explain all of its manifestations ('above the line'). 'Discourses – be they neoliberal or whatever – should not be treated as literally constitutive or as simplistically creating realities and identities'.<sup>10</sup> Nor can any metanarrative capture the entirety of who we are – there is more to us than the institutional and social arrangements that enfold us.<sup>11</sup> We may be context-dependent but we can also be context-challenging and context-transcending. The deep structure is not a totalising explanation,<sup>12</sup> but it can offer a coherent explanatory account.

A second weakness of deep structure theory is the tendency to forget that there is no pre-determined form, no closed list, of institutional arrangements ('above the line') that must necessarily manifest the deep structures which inform them. An important example for present purposes would be the respective roles of the state and of markets in economic life. As we will see, one form of liberalism has been the Keynesian planned economy with a powerful and intrusive state; as we shall see, the neoliberal state on the other hand rather favours a re-defined and very limited role for government and a celebration of markets as the vehicle for realising individual freedoms. Similarly, legal protection of certain fundamental individual rights may receive powerful, formal, written constitutional protection against intrusion by the state in some liberal democracies (for example, the U.S. and Canada) whilst in others (the U.K, Australia, New Zealand) ordinary legislation (or even common law) is considered sufficient (though not offering protection against majoritarian legislatures). History, experience, founding myths and so on will influence institutional forms.

A third weakness is that transformative reforms can be difficult to imagine far less implement given the power and tenacity of deep structures. Mere tinkering with 'above the line' arrangements may lead to petty reforms that don't challenge the underlying deep structure

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<sup>10</sup> Jarko Pyysiäinen, Darren Halpin & Andrew Guilfoyle, 'Neoliberal governance and "responsibilization" of agents: reassessing the mechanisms of responsibility-shift in neoliberal discursive environments' (2017) 18(2) *Distinktion: Journal of Social Theory* 215, 220.

<sup>11</sup> See, for example, Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton University Press, 1990) 159–160 (discussing Unger on deep structure theory – as individuals we are context-dependent but we are also context transcendent and it is the latter that produces surprises in history that may undermine deep structure theory).

<sup>12</sup> See, for example, Brown (n 2) 117: 'A political rationality, such as neoliberalism, is that by which we are ubiquitously governed even as there will also be discourses crosscutting and incompletely contoured or controlled by such a rationality'.

which exerts a gravitational pull on the perceived range of possibilities ‘above the line’. Small reforms may be the enemy of big reforms – ‘programs without vision’. On the other hand attempts to replace a corrosive deep structure may be seen as destabilising and revolutionary, mere utopian fantasising<sup>13</sup> – ‘visions without programs’. This is an issue in climate change debates. Naomi Klein, for example, notes ‘that by failing to fight these big battles that stand to shift our ideological direction and change the balance of who holds power in our societies, a context has slowly been created in which any muscular response to climate change seems politically impossible’.<sup>14</sup>

This metaphor of deep structure theory will be helpful in discussion of neoliberalism which, whilst rooted in the deep structure of liberalism, diverges from it in sufficiently radical ways as to form a deep structure ideology itself. As we will see, it does so in its institutional forms *vis a vis* the state and markets, in its vision of individual freedom and the very nature of the individual, and in its reconfiguration of the *polis* as a discursive space. Indeed as we will see neoliberalism presumes that individual freedom flows *from* the pre-condition of unencumbered markets whereas classical liberalism first declares the primacy of individual freedom and sees economic freedoms as a reasonable *corollary* but not a pre-condition of individual freedom. In this neoliberalism does indeed represent a radical re-fashioning of liberalism, a fundamental re-configuring of the deep structure (‘below the line’) and of its institutional forms (‘above the line’). In hindsight, as we will see, this was possible through a certain conjunction of events which can be discerned in the history of neoliberalism’s ascension.

Humanity’s relationship to Nature may also be characterised through various deep structures. For example, in Judeo-Christian theology there is a Creation story that ‘places God as the Creator at the centre of the natural world, with humans made in His image and therefore the inheritor of a physical world placed for his human purposes’.<sup>15</sup> This image was more

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<sup>13</sup> See Unger (n 9) 202: ‘For lack of a credible view of how social worlds get remade we come to measure the realism of a proposal by its closeness to whatever exists. The utopian plans we then devise turn out on closer inspection to be merely the announcement of a longing.’

<sup>14</sup> Naomi Klein, *This Changes Everything: Capitalism vs The Climate* (Simon & Schuster, 2014) 25; as to utopian longings see also (at 8) (‘the urgency of the climate crisis could form the basis of a powerful mass movement, one that would weave all these seemingly disparate issues into a coherent narrative about how to protect humanity from the ravages of both a savagely unjust economic system and a destabilized climate system’); and (at 23) (‘a world view will need to rise to the fore that sees nature, other nations, and our neighbours not as adversaries, but rather as partners in a grand project of mutual reinvention’).

<sup>15</sup> Leane (n 6) 205.

concretely articulated in the Elizabethan concept of the so-called Great Chain of Being, which can be seen as guiding human relations with Nature via a divine hierarchical plan which placed all terrestrial life at the service of humans, albeit in the service of community and God.<sup>16</sup> Thus is the exploitation of Nature not merely condoned but blessed. The exploitation of Nature was, however, constrained in some degree by a lingering respect for Nature as ‘God’s work’. The absence of this latter conception in Modernity no doubt exacerbates our increasingly instrumentalist view of Nature<sup>17</sup> wherein the natural world provides what were once thought to be inexhaustible resources for our increasingly efficient matching of material ends and means for the satisfaction of needs and desires and sinks for our waste. We are deeply rooted in and dependent on the natural world, and yet spiritually radically separated from it.<sup>18</sup> Our relations with Nature have morphed from immanence (humans as inextricably woven into the fabric of the natural world in all its manifestations) to transcendence (humans as asserting dominance over nature, instrumentalized through the practices of science and technology and organization).<sup>19</sup> The contradictions and implications for our natural environment, and for present purposes climate change, are increasingly evident and urgent.

At the level of political theory we can look to the history of liberalism as a formative ideology in the industrialised states of the ‘developed’ world. They have been the most prolific contributors to climate change and its most generously rewarded beneficiaries as well as the most resource-capable for mitigation efforts. For those states one can view liberalism as a near-totalising descriptor of not only political, legal and economic organisation but even of social relations.<sup>20</sup>

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<sup>16</sup> See, for example, S Presser, ‘Some Realism about Orphism or the Critical Legal Studies Movement and the New Great Chain of Being: An English Legal Academic’s Guide to the Current State of American Law’ (1984–1985) 79 *Northwestern University Law Review* 869, 892: ‘all life on earth is inextricably linked, in fine gradations, in a divinely-sanctioned hierarchical order, descending from God, through the angels, to man and to all the lesser species’.

<sup>17</sup> Leane (n 6) 203–207.

<sup>18</sup> Ibid 193 (at footnote 11 (quoting Roberto Unger)).

<sup>19</sup> Ibid 204–205.

<sup>20</sup> Roberto Mangabeira Unger, *Knowledge and Politics* (Free Press, 1975) 118; similarly (at 8) ‘[T]hough liberal theory is only an aspect of modern philosophy, it is an aspect distinguished by both the degree of its influence and the insight it conveys into the form of social life with which it was associated. All other tendencies have defined themselves by contrast to it; so it offers the vantage point from which to grasp the entire condition of modern thought.’ See also, for example, T Axworthy, ‘Liberalism and Equality’ in S Martin and K Mahoney (eds), *Equality and Judicial Neutrality* (Carswell, 1987) 43, 43; M Simon, ‘Introduction to Hegel and Legal Theory Symposium’ (1989) 10 *Cardozo Law Review* 847; R Stewart, ‘Regulations in a Liberal State: The Role of Non-commodity Values’ (1983) 92 *Yale Law Journal* 1537; I McNeil, ‘Bureaucracy, Liberalism and Community: American Style’ (1984–1985) 79 *Northwestern University Law Review* 900.

Again, deep structure explanations cannot be totalizing – there will always be gaps, contradictions, tensions and surprises in any deep structure explanation,<sup>21</sup> and deep structure contexts will not necessarily be consistent or even coherent in different places and times.<sup>22</sup> Further, a postmodern reading leads us to doubt the stability of our grounds for ‘knowledge’, mediated as it always is through unstable language signs.<sup>23</sup> As well the unhappy outcomes of any ideology must be acknowledged – for example, Modernity<sup>24</sup> (itself a deep structure mode of thought) stands accused of a multitude of ‘sins’.<sup>25</sup> Importantly for our purposes this postmodern loss of confidence in modernity and its motivating grand narratives includes, in Jean-Francois Lyotard’s very definition of postmodernity, an ‘incredulity toward metanarratives’,<sup>26</sup> that is to say, of deep structure theory. One might reasonably extend that scepticism to the deep structure narrative of neoliberalism to be discussed here. That is to say, those structures need not be totalising, may be less stable and coherent than we imagine, and may be more amenable to de-construction and re-construction than we appreciate. Paradigms do change. Nonetheless their influence, whilst not consistently and uniformly realised, is profound as we shall see. So what does it mean to call neoliberalism a ‘deep structure’ of thought?

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<sup>21</sup> See, for example, Andrew Altman, ‘Critical Legal Studies: A Liberal Critique’ (Princeton University Press, 1990) 159–160 (discussing Unger on deep structure theory – as individuals we are context-dependent but we are also context transcendent and it is the latter that produces surprises in history that may undermine deep structure theory). As Unger has put it, ‘they are us, but we are more than them’.

<sup>22</sup> For a general discussion see David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) Chapter 3. See also Brown (n 2) 20–21 (neoliberalism ‘is a loose and shifting signifier ... it takes diverse shapes and spawns diverse content and normative details ... globally ubiquitous, yet disunified and nonidentical with itself in space and over time ... [a]lertness to neoliberalism’s inconstancy and plasticity cautions against identifying its current iteration as its essential and global truth’).

<sup>23</sup> See generally, for example, Richard Tarnas, *The Passion of the Western Mind: Understanding the Ideas That Have Shaped Our World View* (Ballantine Books 1<sup>st</sup> ed., 1993) 395–410.

<sup>24</sup> “‘modernity’” as a historical category is marked by developments such as a questioning or rejection of tradition, the prioritization of individualism, freedom and formal equality, faith in inevitable social, scientific and technological progress, rationalization ... a movement from feudalism ... toward capitalism and the market economy, industrialization, urbanization and secularisation, the development of the nation-state, representative democracy, public education’ (Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin Books, 1977) 170–177 (translated by Alan Sheridan)) (emphasis added).

<sup>25</sup> Tarnas (n 23) 400: ‘Under the cloak of Western values too many sins have been committed. Disenchanted eyes are now cast onto the West’s long history of ruthless expansionism and exploitation – the rapacity of its elites from ancient times to modern, its systematic thriving at the expense of others, its colonialism and imperialism, its slavery and genocide, its anti-Semitism, its oppression of women, people of color, minorities, homosexuals, the working classes, the poor, its destruction of indigenous societies throughout the world, its arrogant insensitivity to other cultural traditions and values, its cruel abuse of other forms of life, its blind ravaging of virtually the entire planet’.

<sup>26</sup> *Ibid* 401.

Certain fundamental aspects of liberalism will echo in critiques of neoliberalism, albeit in different degrees and forms. For example, liberalism's focus on individual freedom and rights has long been criticised as producing citizens alienated from community and each other, eroding propensities to act collectively.<sup>27</sup> Neoliberalism will be shown to amplify that alienation from collectivist motivations further through its reconfiguration of individual citizens as competing capital units seeking to optimise income and capital accumulation. Such individuals will be even less likely than their liberal antecedents to factor self-sacrifice for collective ends into their calculations of self-interest such as likely must be a condition of plausible climate change policy. Similarly the imperative of economic growth (and its concomitant greenhouse gas emissions) is common to both liberal and neoliberal economic models, but again accelerated under neoliberalism through the (claimed) efficiencies of markets.<sup>28</sup>

The values and normative assumptions of liberalism have dominated our political, economic, legal and social existence.<sup>29</sup> The genesis of neoliberal thought can be traced from that deep structure of liberalism to become itself a deep structure. So it is important to sketch the outlines of liberalism itself.

### III LIBERALISM

Liberalism ... is a type of consciousness that represents and prescribes a kind of social existence ... it overruns the boundaries of the realm of ideas and lays roots in an entire form of culture and social organization ... it ... is a deep structure of thought. (Roberto Unger)<sup>30</sup>

The essence of liberalism is individual freedom, particularly from interference from the state. It was given early expression by, for example, Jeremy Bentham and J.S. Mill.<sup>31</sup> Early versions of liberalism tended to the utilitarian in advocating for the greatest good for the greatest number as a general ordering principle.<sup>32</sup> The goal is to maximise the common good.

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<sup>27</sup> See, for example, Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press, 1982).

<sup>28</sup> Brian Elliott, *Natural Catastrophe: Climate Change and Neoliberal Governance* (Edinburgh University Press, 2016) 38 (growth is 'the underlying imperative of neoliberal capitalism').

<sup>29</sup> Unger (n 20).

<sup>30</sup> Ibid 118.

<sup>31</sup> JS Mill, *On Liberty and Other Writings* (Cambridge University Press, 2007) 13: 'the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.'

<sup>32</sup> For example, Bentham's fundamental axiom: 'it is the greatest happiness of the greatest number that is the measure of right and wrong' (JH Burns and HLA Hart (eds), *Bentham, Jeremy. A Comment on the Commentaries and a Fragment on Government* (The Athlone Press, 1977) 393. On utilitarian liberalism see

In broad terms liberalism inclines (in varying degrees) toward notions of *individualism* (as opposed to collectivism), *egalitarianism* (all individuals are of equal moral worth), *universalism* (all citizens are equally endowed with certain political and legal rights) and a *telos of progress* (that human ordering can evolve toward ever-closer approximations of an ideal society).

As an ordering principle for social and political life, liberalism focuses on the individual citizen rather than the community.<sup>33</sup> If individuals are free, the theory goes, to organize and pursue their personal life projects according to their own visions of the good life, their own values, their own route to maximum utility, then society as a whole will achieve the collective good, that is to say, maximum community welfare. The individual is the supreme unit of social welfare. Aggregate welfare is simply the arithmetic sum of individual welfares, and can be maximised only by allowing, in fact nurturing, optimal conditions for the individual pursuit of welfare, individually perceived.<sup>34</sup> The individual is not only the unit of supreme social welfare, but is also the medium through which collective welfare – the greatest happiness for the greatest number – can be achieved. In idealised economic relations individuals would exercise free agency in their consumption choices, with producers responding to them as required, thus realising a free ‘market’ economy. To the extent that such markets approximated the ideal then they would achieve allocative efficiency.

Historically liberalism as articulated by, for example, Mill took this utilitarian form. Individuals were best left free to determine their own life choices, subject to the corresponding freedoms of others, but the ultimate goal was to maximise total utility, or happiness, for the collective. Free individuals were appropriate agents for optimising collective welfare rather than ends in themselves, though it was a negative form of freedom in that it signified freedom from the state and from community. But there came an important shift in liberal principles signifying individuals as not merely agents of collective welfare but as ends in themselves.

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generally, for example, Y Kaneko, (2013) (1)(1) ‘Three Utilitarians: Hume, Bentham, and Mill’ *IAFOR Journal of Ethics, Religion & Philosophy*); Martha C Nussbaum, ‘Mill between Aristotle & Bentham’ (2004) 133 (2) *Daedalus* 60–68; Tim Mulgan, *Understanding Utilitarianism* (Taylor & Francis Group, 2014) Chapter 2.

<sup>33</sup> The discussion here is taken from Leane (n 6) 207–215.

<sup>34</sup> Geoff Leane, ‘Rights Discourse: Are We All in This Alone’ (2001) 8 *Canterbury Law Review* (2001) 187, 189.

This later development in liberal political theory took the label of Kantian, or deontological, liberalism.<sup>35</sup> In this conception the individual exists and is defined *prior* to community rather than being constituted by it. Individuals are not merely the communal manifestation of utility maximisers – a medium through which collective welfare can be optimised – but rather are self-realising ends in themselves.<sup>36</sup> The individual is sovereign – there is respect for the inherent dignity of persons. Actions are judged according to their rightness rather than their consequences. This conception of the individual human resonates with broader, post-Enlightenment and Modernist conceptions of humans as autonomous, rational, freely choosing and self-defining subjects.<sup>37</sup>

Typically in ‘Kantian’ liberal democracies individual citizens are protected from an intrusive state by constitutionally entrenched Bills of Rights – protecting, for example, free speech, freedom of religion, freedom of association, legal and equality rights, and democratic rights to vote.<sup>38</sup> A critique, one that will amplify in later discussion of the neoliberal individual, is that such arrangements will tend to reproduce atomized, rights-bearing individuals who are significantly alienated from community and from each other. Thus ‘liberalism has been criticized for discouraging political participation, valorizing private self-interest, propagating inequality’.<sup>39</sup> As we will see the critique is further accelerated in neoliberalism. At risk here are collective interests and values and ‘other-concern’, this to say, public values that might, indeed surely ought, to drive climate change policy. The presently situated rights-bearing individual risks alienation from a communally situated self including, for example, a future-oriented self concerned with future communities suffering the consequences of inadequate climate change policy in the present.

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<sup>35</sup> In Michael Sandel ‘s classic definition, the ‘core thesis’ of deontological liberalism can be stated as follows: ‘society, being composed of a plurality of persons, each with its own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not *themselves* presuppose any particular conception of the good; what justifies these regulative principles above all is not that they maximise the social welfare or otherwise promote the good, but rather that they conform to the concept of *right*, a moral category given prior to the good and independent of it’ (original emphasis) (Sandel (n 27) 1).

<sup>36</sup> Leane (n 34) 191.

<sup>37</sup> For a general account of the Modern world view see, for example, Tarnas (n 23) Part V.

<sup>38</sup> See, for example, 1982 *Canadian Charter of Rights and Freedoms* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>39</sup> Sean Phelan and Simon Davies, ‘Liberalism and Neoliberalism’ (*Oxford Research Encyclopedias*, 2018) 6 <<https://oxfordre.com/communication/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-176>>.

In either the utilitarian or Kantian forms of liberalism there are implications going to innocent present and future victims of climate change – the ability to maximise collective utility will be compromised by climate change consequences, and the rightness of present actions may be said to be a function of, *inter alia*, their impacts on innocent others. Individual conceptions of the good life, and of the common good, ought surely to take into account climate change responsibility and notions of justice.

For present purposes this deep structure liberal ideology (‘below the line’) will suggest certain arrangements and institutional forms (‘above the line’) – for example, *individual* freedoms may be articulated politically in constitutionally entrenched Bills of Rights and *political* freedoms in voting rights; *economic* freedoms may be realised in a system of market capitalism and may be legally protected in Contract law and Property law; *legal* relations may be articulated in the rule of law whereby all are equally endowed and responsabilised legal subjects; and certain modes of *social* life (the individual prized above community) through which they are free to pursue their individual conceptions of the good life which are individual but might be presumed to be morally worthy and supportive of human flourishing. These institutional embodiments of liberalism are created, legitimised and reiterated, indeed reified, through law. Whilst individual freedom remains the core value other values may co-exist – for example, certain particular forms of political life in ‘republican’ democracies (favouring limited government), or enhanced levels of economic and social equality in ‘social’ democracies pursuing substantive re-distributive policies (favouring more expansive roles for government).

It will be recalled that no deep structure theory can be totalising in capturing every aspect of individuals and their life-ways and arrangements ‘above the line’. As we have seen, the ‘unencumbered self of Kantian liberalism is in conflict with the situated self of communitarianism’.<sup>40</sup> We are born into communities, we live in them, and we are shaped by them – our ‘families, cities, causes, tribes, nations, vocational groups, clubs, classes, and so on’.<sup>41</sup> Our language of independent, freely choosing selves endowed with a broad range of rights and freedoms is balanced in human communities by a language of responsibility to communal others.<sup>42</sup> As we will see in Chapter Four, whilst these communal drives may be

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<sup>40</sup> Leane (n 34) 194.

<sup>41</sup> Ibid 193.

<sup>42</sup> Ibid.

diminished under Kantian liberalism they will weaken still further under neoliberalism and, as Wendy Brown demonstrates, the language of ‘responsibility’ becomes one of the ‘responsibilized self’ as individuals, now characterized as *homo economicus*, must manage their own commercialized destinies as what she calls ‘capital units’. In this narrowing of imaginative horizons we will see how individuals are further removed from communal connections and a collectivist identity which might evoke concern for, for example, climate-change-affected others (present and future).

Fundamental liberal values such as individual freedom and responsibility, private ownership, and a market economy, typically buttressed by a suite of individual rights and freedoms, provide hospitable grounds for the evolution of neoliberalism wherein the emphasis moves to re-invent the liberal subject as an overwhelmingly *economic* entity. An economic individualism becomes even more deeply embedded in neoliberalism as citizens compete, with the blessing of the state, for income and wealth accumulation and prospects for consensus on common threats like climate change diminish, particularly as long as such threats remain distant in time and geography.

In looking to the evolution of neoliberalism we will see its historic opportunity arising out of the perceived failure of ‘Keynesian’ economic management via a powerful state in post-WWII liberal states. The role of the state in liberalism has proven malleable. It has been, in varying degrees, a protector of individual freedoms, a macro-economic manager, an infrastructure provider, and a regulator of market economies. This latter role with respect to markets is facilitated by, for example, legal protections for private property rights (enabling liberal subjects to enjoy the fruits of their labours) and the enforcement of contracts (for the smooth functioning of economic relations). Following WWII, liberal democratic states tended to follow a largely Keynesian economic model, also known as ‘embedded’ liberalism,<sup>43</sup> in which the state played a substantial and intrusive role in managing the economy; for example, in implementing infrastructure projects, in assuming responsibility for unemployment by manipulating taxes, public expenditure projects and interest rates to dampen or stimulate

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<sup>43</sup> The use of the term ‘embedded’ is ‘to signal how market processes and entrepreneurial and corporate activities were surrounded by a web of social and political constraints and a regulatory environment that sometimes restrained but in other instances led the way in economic and industrial strategy’ (Harvey (n 22) 11).

demand, as well as initiating various social insurance and welfare policies.<sup>44</sup> Through the judicious use of fiscal policy it sought to fine-tune the economy in pursuit of full employment without inflation. As will see, this became problematic in the early 1970s and provided an opportunity for proponents of neoliberalism.

In historical terms the Keynesian model supplanted an earlier model of free-market capitalism which was fatally challenged by the Great Depression of the 1930s.<sup>45</sup> Under post-war Keynesian arrangements important spheres of social and economic life were largely insulated from market forces, and as a corollary were open to debate and argument in the political arena. Those policies took different forms in different states,<sup>46</sup> but generally the state asserted a significant, even intrusive, presence in social and economic life and was thus subject to the challenges of public argument around those policies. As we will see this macroeconomic management of the economy under Keynesian theory proved anathema to early neoliberals, perhaps even illiberal in its interference in markets.

Kantian liberalism, notwithstanding its celebration of an ‘independent, freely choosing self’,<sup>47</sup> can be reconciled with a powerful Keynesian state which provides citizens with, for example, public goods like education and healthcare. Such goods can introduce an element of relative equality – a broader field of ‘rights’ – for citizens at the start of life’s pursuit of individualized conceptions of the good life. There is no assurance of equal outcomes but equal opportunity, and some protection from the vicissitudes of life, is important. Hence it is sometimes referred to as ‘Keynesian reformist liberalism’<sup>48</sup> in that there is a ‘belie[f] that creating the conditions which would allow each individual to have the means to exercise their free will requires *collective* action’.<sup>49</sup> The state must situate individuals reasonably equally

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<sup>44</sup> See, for example, Gavin Kendall, ‘From Liberalism to Neoliberalism’ in L Buys, J Lyddon and R Bradley, (eds) *Social Change in the 21st Century 2003 Conference Refereed Proceedings* (Centre for Social Change Research, School of Humanities and Human Services QUT, Australia) 3.

<sup>45</sup> See, for example, William Mitchell and Thomas Fazi, *Reclaiming the State: A Progressive Vision of Sovereignty for a Post-Neoliberal World* (Pluto Press, 2017) 18.

<sup>46</sup> European models varied between the UK (social service and health), the Scandinavian model (working from a higher tax base), the middle-European model (less social services but other areas enhanced) and Southern Europe (lower levels of support) – see Kendall (n 44) 3–4. For an analysis of how neoliberalism took hold in Western states see, for example, David Harvey (n 22) 43–54 (the U.S.), 55–62 (the UK).

<sup>47</sup> Leane (n 34) 193.

<sup>48</sup> Andrew Ives, ‘Neoliberalism and the concept of governance: Renewing with an older liberal tradition to legitimate the power of capital’, (2015) 14 *Mémoire(s), identité(s), marginalité(s) dans le monde occidental contemporain* 4 (mis en ligne le 26 août 2015, consulté le 10 mars 2019)

<<http://journals.openedition.org/mimmoc/2263> ; DOI : 10.4000/mimmoc.2263 3#text>.

<sup>49</sup> *Ibid* 6 (emphasis added).

through certain entitlements (such as education and health care) as they pursue their conceptions of the good life. There may not be equality of outcomes but there must minimally be reasonable equality of opportunity – a level playing field.

The degree to which the Keynesian state attempted to regulate markets, in the sense of correcting aberrations, is a more difficult question. Such aberrations might include the tendency of producers to seek monopoly or oligopoly power, or through sophisticated marketing to create inauthentic ‘wants’ (as opposed to needs) in consumers, who take on an ‘acquisitive/possessive individualism’ or ‘hedonistic atomism’.<sup>50</sup> But such state-sponsored efforts seek to protect individuals from predatory market behaviours which constrain authentic choices about the good, whereas in neoliberalism the shift as we will see is to expand the model of unconstrained markets to almost the entire range of human activities and to rejecting the intrusive state. From protecting individuals the emphasis moves to protecting, as well as creating and nurturing, markets in all domains of human activity. As we will see the legitimising rationale is to expand the field of choice for individuals, though as we will see there are much broader consequences for the life-ways of individuals, for the state and (for present purposes) for climate change policy.

Having looked to the fundamental principles of liberalism itself, its shift to a Kantian form, and its practice in post-war Keynesianism, there remains the question of how neoliberalism came to assert itself as a deep structure in its own right.

#### IV THE HISTORICAL EVOLUTION OF NEOLIBERALISM

The historical evolution of neoliberalism as economic theory goes back to a group of lawyers and economists working in Germany in the 1920s and after WWII.<sup>51</sup> They were associated with the journal *Ordo* and were known as the *Ordoliberalen* and later as the Mont Pèlerin Society.<sup>52</sup> The *Ordoliberalen* were motivated by a perceived drift in liberalism toward collectivism. They feared that ‘a socialist account of liberal capitalism had become the dominant strand of historical interpretation’.<sup>53</sup> Examples included ‘the British Keynesian

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<sup>50</sup> Leane (n 34) 190.

<sup>51</sup> Kendall (n 44) 7.

<sup>52</sup> For a brief overview see, for example, Rachel S Turner, ‘The rebirth of liberalism: The origins of neoliberal ideology’ (2007) 12(1) *Journal of Political Ideologies* 67, 74–79.

<sup>53</sup> *Ibid* 69.

state, [American] New Deal progressivism ... and National Socialism and state corporatism in Germany'.<sup>54</sup>

In the American context the criticism was of Roosevelt's New Deal, war-time planning and large-scale post-war economic and social programs. The perceived danger lay according to Foucault's reading in 'the inevitable sequence; economic interventionism, inflation of government apparatuses, over-administration, bureaucracy, rigidification of all the power mechanisms, and, at the same time, the production of new economic distortions, which would lead to new interventions', though the American movement extended these notions 'to domains which are not exclusively or not primarily economic'.<sup>55</sup>

The *Ordoliberalen* identified various failures of liberalism, in particular the absence of 'appropriate cultural, legal and social frameworks that would guarantee the correct working of the market', wherein the market was understood as 'an *artificial game* of competitive liberty' guaranteed by '*intervention* into the vital conditions for the market-game'.<sup>56</sup> It was the 'frameworks' within which markets would operate that concerned the *Ordoliberalen*; they sought 'intervention not *on* the market but on the *conditions* of the market'.<sup>57</sup> Those market conditions included the rule of law, cultural contexts and institutional frameworks; indeed, anticipating later discussion of the neoliberal subject, the proposal was that 'the whole ensemble of individual life be structured as the pursuit of a range of different enterprises : a person's relation to his or her self, his or her professional activity, family, personal property, environment, etc., are all to be given the ethos and structure of the *enterprise* form'.<sup>58</sup>

In liberalism the 'transcendent human subject' – the unencumbered, freely choosing self – is viewed as existing 'prior to, and thus serv[ing] as, the basis of exchange'; the *Ordoliberalen*, however, re-cast this individual freedom as 'the *result* of competitive markets that are constructed and maintained by the state ... where classical liberalism saw freedom as the *precursor* for 'the market', neoliberalism sees freedom as the *result* of the latter'.<sup>59</sup>

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<sup>54</sup> Ibid 70.

<sup>55</sup> Michel Foucault, *The Birth of Politics: Lectures at the Collège de France 1978–1979* (Picador, 2004) 323.

<sup>56</sup> Gavin Kendall (n 44) 7 (emphasis added).

<sup>57</sup> Josh Bowsher, 'Omnus et Singulatum': Establishing the Relationship Between Transitional Justice and Neoliberalism' (2018) 29 (1) *Law and Critique* 83, 87 (quoting Read) (emphasis added).

<sup>58</sup> Kendall (n 44) (quoting Rüstow) (emphasis added).

<sup>59</sup> (Bowsher (n 57) 87 (emphasis added).

This is a hugely important inversion, for in liberal theory *individual* freedom *ab initio* was at its very heart and *economic* freedom was a ‘natural’ corollary, whereas for the *Ordoliberalen* individual freedom derived from *economic* freedom in *markets*. That is to say, free markets were the condition for individual freedom, not the other way around. Note the ‘paradox that *the meaning of freedom is to surrender one’s will to market forces*’.<sup>60</sup>

This neoliberal reconfiguration meant the promotion of

policies geared to reconstructing the moral and cultural order to promote and reward entrepreneurial behaviour, opposing bureaucratic initiatives which stifle the market mechanism ... thus collapsing the distinction between the economic, social and political in what constitutes a marketisation of the state.<sup>61</sup>

In such manner neoliberalism is said to promote a ‘virulent economism’<sup>62</sup> that pushes the discipline of economics well beyond its traditional focus on the production and consumption of material goods. Now ‘social needs will be met when the market is allowed to allocate public goods, without interference from the state’.<sup>63</sup>

These ideas were later furthered by the so-called Chicago School economists who were influenced in turn by F. A. Hayek,<sup>64</sup> an Austrian-British economist and philosopher. A like-minded group of intellectuals – including Hayek, von Mises, Rüstow, Dicey, Polyani, and Milton Friedman – formed the Mont Pèlerin society in 1947. They sought to cleanse generally liberal views of collectivism mediated through the state.<sup>65</sup> Von Mises, for example, held that ‘[m]arket mechanisms enable adjustments in price that were responsive to the situated knowledge and choices of individual economic actors ... rather than beholden to the illusory, and ultimately dangerous, figure of an all-knowing state.’<sup>66</sup> Friedman, an economist at the University of Chicago, was to become the populariser of their ideology in the U.S. via

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<sup>60</sup> Joshua Ramey, ‘Neoliberalism as a political theology of chance: the politics of divination’ (2015) 7 (1) *Palgrave Commun* 7 <<https://doi.org/10.1057/palcomms.2015.39>> (original emphasis).

<sup>61</sup> Mark Olssen, ‘Understanding the Mechanisms of Neoliberal Control: Lifelong Learning, flexibility and Knowledge Capitalism’ (2006) 25(3) *International Journal of Lifelong Education* 213, 218 (referencing Lemke), 219.

<sup>62</sup> Bowsher (n 57) 88.

<sup>63</sup> Rosemary Lyster, ‘The Idea of (Climate) Justice, neoliberalism and the Talanoa Dialogue’ (2019) 10(1) *Journal of Human Rights and the Environment* 35, 45.

<sup>64</sup> See, for example, Harvey (n 22) 19–20. For a brief summary of Hayek’s contribution see, for example, Kendall (n 44) 12–13.

<sup>65</sup> See, for example, Nico Vorster ‘An Ethical Critique of Milton Friedman’s Doctrine on Economics and Freedom’ (2010) 26(9) *Journal for the Study of Religions and Ideologies* 163, 165.

<sup>66</sup> Phelan (n 39) 10.

his books and television appearances in the 1980s.<sup>67</sup> (By way of contrast the foremost global spokesperson on climate change at the time of writing is a singular charismatic teenager of direct and accusatory speech, dubious charm and a number of personality disorders whose influence spread through social rather than traditional media).<sup>68</sup>

These early neoliberals took the *Ordoliberalen* notion of the ‘social’ as needing to promote the economic and proposed that the social be re-formed *as* the economic – ‘[w]hile the *Ordoliberalen* regarded the market as a rather fragile entity, for the Chicago economists, by contrast, the market was so robust that its rationality could be extended to the social – including crime, family life, work life, and so forth.’<sup>69</sup>

Neoliberalism represents an ideology of ‘treating economic efficiency as the primary calculus of public values’.<sup>70</sup> Once rational human behaviour is reduced to economics then ‘government becomes nothing more or less than *economic* government’.<sup>71</sup> Thus many economists moved beyond the traditional view of the discipline as ‘not merely a set of insights about the production and consumption of material goods but also a science of human behaviour’, governed by the idea that ‘everything has its price’.<sup>72</sup> Markets are said to mirror the preferences of individuals since ‘[t]he price system allocates goods according to people’s preferences; it doesn’t assess those preferences as worthy or admirable or appropriate to the circumstances’.<sup>73</sup> These ‘preferences’ are in significant degree manipulable, for example through advertising, particularly regarding petty ‘wants’ as opposed to authentic needs. Whilst not central to this thesis the point goes also to environmental (and climate change) issues in that natural resources, including fossil-fuel energy sources, that are consumed in the production of even petty wants further exacerbates sustainability problems. As well their

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<sup>67</sup> A ten-part television series titled *Free to Choose* was broadcast by the U.S. Public Broadcasting Service . The companion book to the series (co-authored with his wife, Rose Friedman), also titled *Free To Choose*, was the bestselling nonfiction book of 1980 and has since been translated into 14 languages (Milton Friedman and Rose Friedman, *Free to Choose: A Personal Statement* (Harcourt Brace, 1979)).

<sup>68</sup> See <[https://en.wikipedia.org/wiki/Greta\\_Thunberg#Social\\_media\\_activism](https://en.wikipedia.org/wiki/Greta_Thunberg#Social_media_activism)> re Greta Thunberg.

<sup>69</sup> Kendall (n 44) 9.

<sup>70</sup> Phelan (n 39) 23.

<sup>71</sup> Kendall (n 44) 9 (emphasis added).

<sup>72</sup> Michael J Sandel, *What Money Can’t Buy: The Moral Limits of Markets* (Allen Lane, 2012) 48–9 (‘[i]n all domains of life, human behaviour can be explained by assuming that people decide what to do by weighing the costs and benefits of the options before them, and choosing the one they believe will give them the greatest welfare, or utility ... if this idea is right then everything has its price ... explicit ... or implicit’.

<sup>73</sup> *Ibid* 48.

contribution to collective happiness, or utility, might be questioned in the context of utilitarian arguments for neoliberalism.

In the context of liberal contestation of utilitarian versus deontological (Kantian) motivations neoliberalism – in its relentless focus on markets, efficiency and accumulation – aligns with the utilitarian.<sup>74</sup> Utilitarians such as Bentham privileged the greatest happiness, or utility, for the greatest number. Similarly neoliberalism seeks that goal through maximum wealth creation, at the same time claiming to open up an enhanced field of individual freedoms. Neoliberalism enshrines markets, as opposed to state power, as the proper context for economic transactions. The goal is efficiency in the application of scarce resources to meet consumer demand as expressed in market pricing mechanisms. Although, as we will see below, it appears that the state now conforms to a diminished role as market-enabler that does not mean a minimal state, for even as an enabler of markets ‘[c]ompetition necessitates a constant intervention on the part of the state, not on the market, but on the conditions of the market’.<sup>75</sup> It is the *role* for the state that has changed – it remains intrusive but in different ways and for different ends.

Nor is the state less intrusive in the lives of citizens – indeed, as the following chapter will show, it seeks to ‘economise’ social life in furtherance of neoliberal valorising of economic imperatives. Far from being neutral or detached with respect to individual perceptions of the good life – as deontological liberals would insist – the neoliberal state in fact promotes a distinctively economic emphasis to the good life, what will be discussed below as *homo economicus*. It manifests an ontological vision of the neoliberal subject that is overwhelmingly an economic one. This re-shapes the classical image of ‘a natural kind of freedom that exists prior to, and thus serves as, the basis of exchange’ into a subject that is ‘the result of competitive markets that are constructed and maintained by the state’ – individuals must constantly assess and re-invest in their own ‘human capital’.<sup>76</sup> It may be that early neoliberal thinkers like Hayek saw economic freedom as the door to open other individual freedoms but, as the following chapter will show, those other freedoms have in fact been attenuated under the practices of neoliberal states. Indeed critics such as Harvey

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<sup>74</sup> See, for example, Paulo Henrique Martins, ‘Neoliberalism and Crisis of the Republican Pact’ in A Scribano et al (eds) *Neoliberalism in Multi-Disciplinary Perspective* (Palgrave Macmillan, 2019) 24, 28, 30–31.

<sup>75</sup> Bowsler (n 57) 87.

<sup>76</sup> *Ibid.*

have not only noted neoliberalism's lack of economic success but have further characterised the neoliberal experience as a redistributive one as wealth has increasingly accrued to elite minorities.<sup>77</sup> Far from enhancing accumulation (and hopefully personal freedoms) in neoliberal subjects it has seemingly achieved the opposite.

Whilst locating neoliberalism in liberal political theory generally is not germane to this thesis its place ought at least to be noted in that its utilitarian motivations (optimum wealth accumulation through efficient market practices) and its ontological ambitions (neoliberal subject reconfigured to the economic) do, as we shall see, have important implications for the development of a plausible and efficacious climate regime. In characterising the common (utilitarian) Good as economic, and in reconfiguring ontological conceptions of the good life for individuals as *ab initio* economic, neoliberalism rewrites the utilitarianism of, for example, Bentham.

This single-minded 'economic' approach, or 'marketisation' of the individual subject, is intended to be all-encompassing and can (indeed, according to the neoliberals *should*) be applied to *all* aspects of human behaviour 'regardless of what goods are at stake'.<sup>78</sup> Individuals may well not be consciously aware of such motivations 'but those with a keen eye for the price signals implicit in *every* human situation can see that *all* our behaviour, however remote from material concerns, can be explained and predicted as a rational calculus of costs and benefits'.<sup>79</sup> Eric Hobsbawm, a Marxist historian, characterises the core principle of neoliberalism as the belief that 'the efficient conduct of society's affairs can only be by the search for *personal* advantage, i.e. by behaving like businessmen'.<sup>80</sup>

It should be noted that neoliberal theory arguably rests on two highly contestable presumptions, for 'the so-called free market that neoliberal policies seek to implement and harness is extremely difficult – if not impossible – to realize' and its 'theory of essential human nature ... is fundamentally flawed'.<sup>81</sup> Whatever the merit of those arguments the

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<sup>77</sup> Harvey (n 22) Chapter 6 (for example, at 159, '[t]he main substantive achievement of neoliberalization, however, has been to redistribute, rather than to generate, wealth and income').

<sup>78</sup> Sandel (n 72) 49 (quoting Becker).

<sup>79</sup> Ibid 50 (quoting Becker) (emphasis added).

<sup>80</sup> Eric Hobsbawm, *Interesting Times* (Abacus, 2002) 277 (emphasis added).

<sup>81</sup> Robert Fletcher, 'Taking the Chocolate Laxative: Why Neoliberal Conservation "Fails Forward"' in Bram Büscher, Wolfram Dressler and Robert Fletcher, *Nature Inc: Environmental Conservation in the Neoliberal Age* (University of Arizona Press, 2014) 95–96.

purpose here is rather to parse the implications of neoliberalism for the issue of climate change in particular. For present purposes the point is that, as we shall see, whether operating as a form of ‘false consciousness’ concealing its underlying reality or as a hegemonic discourse seeking to realise a particular and transformative view of human nature, neoliberalism has been functioning as a ‘deep structure’ from the last quarter of the twentieth century. It will be recalled from Chapter Two that this is also, through unhappy coincidence, the period in which awareness of the climate change threat was gathering force with the evolving science.

The period from the end of WWII until 1973 saw an extended period of economic prosperity, even perhaps ‘the longest period of consistent economic growth in world history’.<sup>82</sup> It was the so-called ‘golden age of capitalism’, guided by Keynesian economic policies.<sup>83</sup> An indication of the interventionist policies of the state can be seen in the 1945 election in Britain of a Labour government under which ‘[i]mportant firms were nationalized, including the Bank of England and much of the coal, steel and transport industries, bringing more than 20% of industry under government control’.<sup>84</sup> This ‘golden age’ is said to have ended in 1973 with war in the Middle East and a quadrupling of oil prices, setting the scene for change.

There ensued a period of economic stagnation and inflation (‘stagflation’) and a loss of confidence in Keynesianism as a viable model for addressing stagflation – though one alternative was to assert more state control and regulation, for example, in some European states and even the U.S.<sup>85</sup> But more generally there was ‘a reaction against Keynesianism in the context of economic stagnation among the world’s richest and most powerful capitalist economies during the 1970’s’.<sup>86</sup> As to macroeconomic management, Keynesian fiscal policy (based on government spending and taxation patterns, depending on need) gave way to

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<sup>82</sup> Keith Suter, ‘The Long Boom’ *Global Directions* (<<http://www.global-directions.com/Articles/Business/TheLongBoom.pdf>>).

<sup>83</sup> Harvey (n 22) 10–12.

<sup>84</sup> Peter Hall, ‘The Changing Role of the State in Liberal Market Economies’ in Stephan Leibfried et al (eds), *The Oxford Handbook of Transformations of the State* (Oxford University Press, 2015) 426, 430.

<sup>85</sup> Harvey (n 22) 12–13; William Mitchell and Thomas Fazi *Reclaiming the State: A Progressive Vision of Sovereignty for a Post-Neoliberal World* (Pluto Press, 2017) 18–21.

<sup>86</sup> James McCarthy, Scott Prudham ‘Neoliberal Nature and the nature of neoliberalism’ 35 *Geoforum* (2004) 275, 276.

demand management through monetary policy (led particularly by Friedman, who advocated using the money supply to maintain price stability – that is, to avoid inflation).<sup>87</sup>

In addition to stagflation there was a ‘collapse of [the] Bretton Woods system of international trade and exchange ... exchange rates were floated and capital controls abolished, giving money and capital the freedom to move across national boundaries’, the result of public policy choices by economic policy elites and state officials rather than market pressures.<sup>88</sup>

Thus in light of the perceived shortcomings of Keynesianism by the 1970s, there was an opportunity to resort to (in Friedman’s words) other ideas that might be ‘lying around’.<sup>89</sup> The idea of far reaching and unconstrained markets deriving from the *Ordoliberalen* were now ready to be taken up and applied by the Chicago School economic theorists in the 1970s, and in turn by economic and political elites.<sup>90</sup> As noted earlier the *Ordoliberalen* also had an ideological motivation in their desire to retreat from post-War mass movements of socialism and earlier fascism.

A neoliberal form of the state was first implemented in Chile in 1973 after a coup against democratically elected President Pinochet, supported by the American political and corporate establishment and informed by the neoliberal economic theories of a group of University of Chicago economists.<sup>91</sup> Modified versions followed, *inter alia*, in Thatcher’s Britain,<sup>92</sup> Reagan’s U.S., India (1980s), Sweden (1990s), Australia (1983 Labour Government), and New Zealand (1985 Labour Government). One version of the ascendancy of neoliberalism identifies 1978–80 as a turning point which saw a decisive confluence of events – the 1978 re-direction of the Chinese economy toward market socialism by Deng Xiaoping, the 1979

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<sup>87</sup> Mitchell (n 45) 38–39: ‘Friedman almost single-handedly resurrected the pre-Keynesian view that market economies are inherently stable in the absence of major unexpected fluctuations in the money supply, and consequently that governments should intervene in the economy as little as possible and, more specifically, should eschew the use of discretionary fiscal and monetary policies’.

<sup>88</sup> Olssen (n 61) 217.

<sup>89</sup> From a quote by Milton Friedman, one of the Chicago School economists promoting market fundamentalism: ‘[o]nly a crisis – actual or perceived – produces real change ... [w]hen that crisis occurs, the actions that are taken depend on the ideas that are lying around’ (quoted in Klein (n 4) 6).

<sup>90</sup> David Harvey (n 22) 19–25.

<sup>91</sup> *Ibid* 7–8. For a more fulsome account see Klein (n 4) Ch.3.

<sup>92</sup> Though there is some evidence that the adoption of monetarist policy pre-dated Thatcher; see William Mitchell (n 45) 41–42.

installation of Paul Volcker at the US Federal Reserve, the 1979 election of Thatcher in the UK, and the 1980 election of Reagan in the U.S.<sup>93</sup>

The late seventies have thus been labelled ‘the great turn’.<sup>94</sup> It should be noted that neoliberal economic and political reforms have inevitably been implemented in different ways and at different times in different contexts, so that ‘neoliberalism is less a coherent totality ... than a loose conglomeration of institutions, ideas, and policy prescriptions from which actors pick and choose depending on prevailing political, economic, social, historical, and institutional conditions’.<sup>95</sup>

As to the macroeconomic impact of neoliberalism, it is surprisingly difficult to find verifiable measures of economic success. Harvey, for example, notes (even before the 2008 global financial crisis and subsequent years of gradual recovery) actual decreases in global growth rates since the 1960s and 1970s (the ‘Keynesian’ era), and even economic collapse in some states, for example, Chile.<sup>96</sup> Ironically the economic record of neoliberalism as an engine of growth is actually not particularly good.<sup>97</sup> In the formative decades of neoliberalism (1973–2000) the growth rate in world Gross National Product (GNP) was half that of the post-WWII ‘Keynesian’ period 1950–1973.<sup>98</sup> Rather, Harvey argues, ‘[t]he main substantive achievement of neoliberalization ... has been to redistribute, rather than to generate, wealth and income.’<sup>99</sup> For Harvey neoliberalism has been about ‘the restoration of class power’,<sup>100</sup> ‘a *political* project to re-establish the conditions for capital accumulation and to restore the power of economic elites’.<sup>101</sup>

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<sup>93</sup> For a general account of the geographic (and uneven) spread of neoliberalism see, for example, Harvey (n 22) Ch.4.

<sup>94</sup> Josh Bowsher (n 57) 84.

<sup>95</sup> John L Campbell and Ove K Pedersen, *The Rise Of Neoliberalism And Institutional Analysis* (Princeton University Press, 2001) 3.

<sup>96</sup> Naomi Klein (n 4) 85.

<sup>97</sup> See, for example, Harvey (n 22) 154, 156 citing lower global growth rates in the 1980s and 1990s compared to the 1960s and 1970s. See also

<[https://www.imf.org/~media/Websites/IMF/imported.../ft/.../\\_chapter5pdf.ashx](https://www.imf.org/~media/Websites/IMF/imported.../ft/.../_chapter5pdf.ashx)>.

<sup>98</sup> Francis Wheen, *How Mumbo-Jumbo Conquered The World: A Short History of Modern Delusions* (Harper Perennial, 2004) 260 (citing IMF, ‘The World Economy in the Twentieth Century’): ‘the period between 1950 and 1973 was by far the most successful of the twentieth century. This was an era characterized by capital controls, fixed exchange rates, strong trade unions, a large public sector and a general acceptance of government’s role in demand management. The average annual growth in ‘per capita real GNP throughout the world was 2.9 per cent – precisely twice as high as the average rate since then’.

<sup>99</sup> Harvey (n 22) 159.

<sup>100</sup> *Ibid* 31.

<sup>101</sup> *Ibid* 19. See also, generally, pp. 9–19, 31–38 (original emphasis) .

Similarly, according to Harvey, ‘neither Britain nor the US achieved high levels of economic performance in the 1980s ... the overall result was an awkward mix of low growth and increasing income inequality’.<sup>102</sup> During the 1980s and 1990s data indicated that ‘neoliberalization has broadly failed to stimulate worldwide growth’<sup>103</sup> although reduction and control of inflation had been successful.<sup>104</sup> Similarly, ‘contrary to what the proponents of neoliberalism assert, market deregulation does not necessarily yield more efficient economic behaviour than do other institutional arrangements’,<sup>105</sup> and generally the ‘neo-liberal era [is] marked by slower growth rates’.<sup>106</sup>

Consequently, according to some, the motivations of the rise of neoliberal economic policies has arguably not been the popular cliché of the ‘rising tide lifts all boats’ but rather has been the restoration of previous wealth concentrations in elites in the U.S. and the U.K. and growing concentrations in, for example, Russia, China and Mexico.<sup>107</sup> Thus Harvey claims that neoliberalism has been successful in wealth *re-distribution* (toward elites) rather than wealth *generation*.<sup>108</sup>

Similarly Brown argues that, contrary to claims of reducing public spending by the state (as a percentage of GNP), Reagan in the U.S. ‘simply altered *who* benefitted from state intervention rather than reducing state intervention *per se*’.<sup>109</sup> In this view neoliberalism is said to be, in outcome if not by design, a class project of wealth re-distribution.<sup>110</sup> Brown puts it differently in a later book. She sees neoliberalism as preferring a strong state in the sense of its power, commitment and focus being on its market-enabling role: ‘[t]he neoliberal state had to be lean, nonsovereign, and laser focused’.<sup>111</sup> Yet another reading holds that neoliberalism produces ‘perverse economic consequences and pronounced social

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<sup>102</sup> Ibid 88.

<sup>103</sup> Ibid 154. See also Wheen (n 98).

<sup>104</sup> Harvey (n 22) 154–156 (though note that Harvey’s Marxist account of neoliberalism is hardly sympathetic).

<sup>105</sup> Campbell (n 95) 3.

<sup>106</sup> Hall (n 84) 426.

<sup>107</sup> Harvey (n 22) 14–19. See also, for example, William Mitchell and Thomas Fazi, *Reclaiming the State: A Progressive Vision of Sovereignty for a Post-Neoliberal World* (Pluto Press, 2017) 51–56.

<sup>108</sup> Harvey (n 22) 159 (emphasis added).

<sup>109</sup> Brown (n 2) 95 (original emphasis).

<sup>110</sup> See also, for example, Hall (n 84) 435: ‘the development of monetarist economic doctrine and then rational-expectations economics offered a basis for scepticism about the effectiveness of government, lending credence to political platforms whose ulterior motivation was to bring about an irreversible shift in power from organized labor to capital ... Thatcher and Reagan accomplished that task’.

<sup>111</sup> Brown (n 5) 63.

externalities’ that require non-market interventions in order to avoid consequent social unrest – a ‘double movement’.<sup>112</sup>

Whatever the merits of neoliberalism’s obsession with markets as efficient wealth maximisers the point for present purposes is its instrumental rationality in pursuit of economic ends. Growth is the central feature and (economic) justification of neoliberalism – ‘[n]eoliberal governance has been extremely successful in promoting growth for growth’s sake agenda’<sup>113</sup> for growth is ‘the underlying imperative of neoliberal capitalism’.<sup>114</sup> Whether or not its claim to be a better wealth maximiser than Keynesianism is justified – Harvey thinks not – it nevertheless is singularly focused on economic growth. Unfortunately the dominant cause of the increasing concentration of CO<sub>2</sub> in the atmosphere is the burning of fossil fuels which are closely related to global growth in energy use and economic activity.<sup>115</sup> Thus neoliberalism, even more than its predecessors, joins the individual citizen and the collective society in hyper-actualizing the very imperatives of endless compounding growth and competition which has resulted in climate change as an ‘externality’ to that growth (Chapter Two), with dire consequences which by definition it is unable to address in a world of finite resources and sink limits. It is simply incommensurable with the demands of efficacious climate change measures as a half century of experience is making clear.

It is important to note that whilst ‘emission *intensity*’ of economic growth is falling, as the global economy continues to grow the *absolute* level of emissions continues to increase. For CO<sub>2</sub> emissions over the period 1990–2014 the 2014 level of intensity was only 42% of the level in 1990<sup>116</sup> – that is to say, CO<sub>2</sub> emissions per unit of Gross Domestic Product (GDP) fell by more than half. However, for the same period, total CO<sub>2</sub> emissions rose by 63%.<sup>117</sup> This is of course not solely due to neoliberalism’s emphasis on economic growth – the origins of energy intensive industrialism and consequent emissions lie much earlier – for example, in the mid-eighteenth century Industrial Revolution. The point is that neoliberalism’s singular focus on compounding growth continues to magnify already unsustainable practices.

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<sup>112</sup> Fletcher (n 81) 94 (referencing Polanyi).

<sup>113</sup> Elliott (n 28) 57.

<sup>114</sup> Ibid 38.

<sup>115</sup> Australian Academy of Science <<https://www.science.org.au/learning/general-audience/science-booklets-0/science-climate-change/3-are-human-activities-causing>>.

<sup>116</sup> The respective levels (in kg per Purchasing Power Parity \$ of GDP) were 0.768 (1990) and 0.326 (2014) <<https://data.worldbank.org/indicator/EN.ATM.CO2E.PP.GD>>

<sup>117</sup> From 22,149,402 kt in 1990 to 36,138,285 kt in 2014 <<https://data.worldbank.org/indicator/EN.ATM.CO2E.KT>>.

Notwithstanding questions about neoliberalism's economic successes, a more general reading from Foucault suggests that rather than concealing underlying material interests neoliberalism represents a hegemonic discourse, 'a whole way of thinking' that constructs a certain reality rather than conceal it.<sup>118</sup> That is to say that neoliberalism is not just about economics. For Foucault such discourses are generated within what he terms 'political rationalities' which 'posit ontological qualities and relations of citizens, laws, rights, economy, society, and states'.<sup>119</sup> It is from this catalyst that Brown (below) generates her critique of neoliberalism and from which can be drawn certain consequences for climate change.

The point for Foucault and in the literature on neoliberalism generally is that neoliberalism is foremost a *political* project. By the mid-1970s a movement away from central planning was gaining ground and neoliberal orthodoxy was further articulated in, for example, the 'Washington Consensus' in the 1990s. This was a program imposed on troubled developing economies by the IMF, the World Bank and the U.S. Treasury.<sup>120</sup> Guiding principles included deregulation, privatization of state enterprises, liberalization of trade and inward direct foreign investment, avoidance of government deficits, and a strong regime of property rights. But above all was the celebration of markets, of *laissez-faire* capitalism, and a diminution of the role of the state in managing economy activity.

Generally '[t]here has everywhere been an emphatic turn towards neoliberalism in political-economic practices and thinking since the 1970s'.<sup>121</sup> The paradigm shift is most commonly associated with Thatcher's Britain, Reagan's U.S., but also dramatically and violently in Chile and Iraq,<sup>122</sup> radically in New Zealand, often by left or centre-left governments (Sweden, Australia, New Zealand, Russia) and notwithstanding earlier failures Latin America.<sup>123</sup> Indeed 'neoliberalism has ... attempted to transform some of the most basic political

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<sup>118</sup> Fletcher (n 81) 94–95 (referencing Foucault).

<sup>119</sup> Brown (n 2) 116.

<sup>120</sup> Harvey (n 22) 29: 'Stiglitz refers to ... a "purge" of all Keynesian influences from the IMF in 1982. The IMF and the World Bank thereafter became centers for the propagation and enforcement of 'free market fundamentalism' and neoliberal orthodoxy. See also John Williamson, 'What Washington Means by Policy Reform' in John Williamson (ed), *Latin American Readjustment: How Much has Happened* (Washington: Institute for International Economics, 1989) <quoted in [https://en.wikipedia.org/wiki/Washington\\_Consensus](https://en.wikipedia.org/wiki/Washington_Consensus)>.

<sup>121</sup> Harvey (n 22) 2.

<sup>122</sup> Ibid 7. See also generally Klein (n 4) and particularly Ch.17 (re Iraq) and 59–66 (re Chile).

<sup>123</sup> Dawissson Belem Lopes, 'Why is neoliberalism back in Latin America?' (Al Jazeera, July 15, 2017) available at <<https://www.aljazeera.com/indepth/opinion/2017/07/neoliberalism-latin-america-170711085354385.html>>.

economic settlements of the postwar era ... integral to these changes has been a shift away from Keynesian economic ideas ... to a more conservative discourse'.<sup>124</sup>

In summary, we have seen how neoliberalism has evolved out of liberalism itself as a context-defining ideology, initially as an alternative to the Keynesian form of liberal economic and political arrangements which dominated in the post WWII order. More important that resistance took the form of a well-developed political ideology in its claim that individual freedoms were to be realised through unconstrained market freedoms in economic life. It had an ongoing intellectual heritage dating from the 1920s and was to find its historical moment in the 1970s.

It is notable that neoliberalism did not become entrenched through any bottom-up groundswell of demand but rather from a top-down imposition of a fundamentally revised liberalism by economic and political elites, in some cases by force and even violence,<sup>125</sup> and sometimes by centre-left governments (Australia, New Zealand). Its promise of economic efficiency and enhanced growth was to be realised by minimising the state's role in macroeconomic management. In that sense it was inevitably 'political' but it was political in more profound ways as the following chapter will show – in reconfiguring the self-image of individual citizens into fundamentally economic units and in narrowing the discursive space – the *polis* – through which public argument might occur on essentially collectivist issues like climate change.

## V THE IDEOLOGY OF NEOLIBERALISM

The challenge in this section is to understand how neoliberalism as a hegemonic discourse insinuates itself in the economic, political, social and cultural fabric of its host societies. The motivation is to demonstrate how neoliberal principles and practices undermine regimes seeking to mitigate the threat of climate change. The claim to be demonstrated is that, as with the global order of states (the subject of Chapter Five), this is an ordering system which is incommensurate with a plausible and efficacious climate change regime. The ongoing failure of the climate regime to realise its ambitions is, in significant part, a consequence of these systemic failures and does not augur well for the future (Chapter Six).

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<sup>124</sup> Campbell (n 105) 1.

<sup>125</sup> For a detailed treatment of how 'consent' was realised, especially in the vanguard Western industrial democracies of the U.S. and the U.K., see Harvey (n 22) Chapter 2 ('The Construction of Consent').

Drawing substantially on the scholarship of Wendy Brown it will be shown that the architecture of neoliberalism makes it a deep structure ideology in its own right rather than merely an incremental extension of liberalism. As a deep structure of thought neoliberalism reconfigures the shape and role of the state itself, its citizens and the political, economic, social and legal arrangements which flow from its principles. In Foucault's terminology it is the 'unspoken order of the times'.<sup>126</sup>

The role of the state is central to neoliberal architecture as it evolves not merely in influence and authority but in its very nature and purpose. If the nature and purpose of the state are amenable to reconfiguration so too are those of individual citizens. Both have important implications for political life and the legal system, and for argumentation and consensus about such collective issues as climate change and the possibilities and obligations for its mitigation. Naomi Klein puts it that 'we have not done the things that are necessary to lower emissions because those things fundamentally conflict with deregulated capitalism, the reigning ideology for the entire period we have been struggling to find a way out of this crisis'.<sup>127</sup> There is profound incompatibility.

The discussion will draw on David Harvey's widely cited<sup>128</sup> book *A Brief History of Neoliberalism*<sup>129</sup> and on Wendy Brown's more detailed exegesis<sup>130</sup> of neoliberalism's impact on the role of the state and its relationship with markets and modes of 'governance', and (in Chapter Four) the reconfiguration of individuals as *homo economicus* and their depiction as 'capital maximising units', the impoverishment of politics (*homo politicus*) and the influence of neoliberalism in law (*homo juridicus*).

### *A Neoliberal Ideology*

Neoliberalism's challenge to the role of the state is perhaps its most salient characteristic. The post-war Keynesian state was powerful and intrusive— in macroeconomic management via

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<sup>126</sup> Quoted in Tom Butler-Bowdon, *50 Philosophy Classics: Thinking, Being, Acting, Seeing: Profound Insights and Powerful Thinking from Fifty Key Books* (Nicholas Brealey Publishing, 2013) 106.

<sup>127</sup> Klein (n 14) 18.

<sup>128</sup> <<https://scholar.google.com/citations?user=EBvugA0AAAAJ&hl=en>>.

<sup>129</sup> Harvey (n 22).

<sup>130</sup> Brown (n 2).

monetary policy (manipulation of interest rates), fiscal policy (such as infrastructure projects) and provision of public goods (such as education, health, transport, utilities) as well as a strong regulatory role in the economy,<sup>131</sup> all to be undertaken ostensibly in the ‘public interest’ and in particular where private economic interests were thought inappropriate. Many ‘goods’ were held to be the domain of the collective or community (manifest in the state at various levels of government) and not properly a field for private exploitation and profit.

The logic of neoliberalism, on the other hand, is that the state could not possibly duplicate the myriad decisions and transactions of multitudes of private actors in complex and hyperactive markets, what Foucault calls ‘the labyrinths and complexities of the economic field’,<sup>132</sup> therefore the only appropriate response should be to stand back and allow, indeed pro-actively facilitate, those markets to self-actualise. For Friedman, the major functions of the state should only be ‘to preserve law and order, to enforce private contracts, to foster competitive markets’.<sup>133</sup> The presumption is that the outcome is the best of all plausible worlds in the sense of maximising the economic capitals of rational, self-interested individual (and therefore collective) entrepreneurial subjects (discussed below). The ideology owes much to F.A. Hayek (discussed above, and more closely analysed in a later critique of Hayek by Wendy Brown).<sup>134</sup>

Most importantly, whilst liberalism had taken market freedoms as flowing from the *a priori* freedom of individuals to pursue their own conceptions of the good life – that is, to answer the question ‘what is the best way to live?’ – neoliberalism rather saw markets as the *source* of individual freedoms. Free markets would make us free. The good life, and authentic freedom, for individual citizens would flow from a voluntary system of exchange relations between freely choosing actors unconstrained by the dead hand of the state. It is therefore incumbent on the state to nurture markets as the wellspring of individual freedoms. This is the idealised realm of *homo economicus* (Chapter Four). The rights-bearing individual of deontological (Kantian) liberalism becomes the capital-accumulating economic unit of

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<sup>131</sup> (Lyster (n 63) 45): The regulatory role with regard to the environment would typically cover ‘planning, pollution, the conservation of biodiversity and natural resource management ... directed at protecting human and non-human functioning and capabilities’ and in regard to climate change would include ‘legislation to: reduce greenhouse gas emissions; engage in land use planning and environmental impact assessment to reduce vulnerability and exposure; institute appropriate building codes; impose emergency management protocols across all sectors; protect biodiversity; and legislate for post-disaster compensation regimes’.

<sup>132</sup> Foucault (n 55) 292.

<sup>133</sup> Milton Friedman *Capitalism and Freedom* (University of Chicago Press, 2002) at 2.

<sup>134</sup> Brown (n 5) 96–108 for example.

neoliberalism. The role of the state must be to optimise the conditions within which markets, and therefore individuals, would thrive. Hence the ‘marketisation’ of the state itself, so that ‘government becomes nothing more or less than *economic* government’.<sup>135</sup> The state’s role becomes that of a condition-provider for markets. So the role of the state shifts – no longer a master of markets but rather a facilitator-servant of them. The liberal subject as a rights-bearing individual pursuing her personalised conceptions of the good life, including of necessity protection of her property and contractual relations, is thus re-oriented in neoliberalism. Freedom of market relations becomes the *sine qua non* of other personal freedoms.

The neoliberal state must withdraw from all but essential services and proceed to marketise and privatise previously public goods such as health care and education which are now envisioned as investments by individuals in the long-term project of the neoliberal subject as a ‘brand’ (discussed below) along with the removal of market-distorting subsidies and systems of welfare support. Such measures go to the ‘responsibilising’ of individual subjects as ‘entrepreneurs’ enhancing their competitive status as capital-accumulating units. The state is now to devote itself to a new role as ‘condition-provider’ for markets within which capital units, corporeal and corporate, can thrive. The role of the condition-providing state is to enable the play of these individual ‘capital units’ – Brown calls them units of ‘entrepreneurial and self-investing capital’.<sup>136</sup> At a policy level the tools which the condition-providing state may employ include market-liberalising legal regimes of contract and property law, deregulation, privatisation policies, tax policy, anti-trust laws, and free trade initiatives. The state is ‘legitimated by its effectiveness in promulgating efficient means to ends ... [t]hus, the contouring of all knowledge to economic usefulness ... and of all government to economic health’.<sup>137</sup> ‘Efficiency’ becomes the supreme value.

The efficient matching of means and ends is often labelled ‘instrumental rationality’ as opposed to ‘value-rationality’. The latter enables a choice of some motivating value to which instrumental rationality may be applied. The distinction is critical in the following analysis. Instrumentally rational action is motivated only by a desired outcome (in the case of neoliberalism, the efficient matching of means and ends in the pursuit of wealth creation). It

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<sup>135</sup> Kendall (n 44) 9.

<sup>136</sup> Brown (n 2) 41.

<sup>137</sup> Ibid 253 (footnote 79).

is said to ‘produc[e] an increasingly calculating and unscrupulous character ... devoid of moral and ethical values’ and eventually asserting an unprecedented dominance that ‘will eventually overwhelm everything in its path’.<sup>138</sup> This is important to recall when the analysis in Chapter Four turns to the reconfigured neoliberal subject and to ethical implications of climate change.

As a consequence one might expect that the re-imagined, condition-providing state would become smaller than its Keynesian predecessor as it de-regulates, privatizes and entrusts more and more service provision to market operators. Public spending as a proportion of Gross Domestic Product (GDP) ought, one would expect, to fall. In fact that is not necessarily the case. Brown argues that, contrary to claims of reducing public spending by the state (as a percentage of GNP), Reagan in the U.S. ‘simply altered *who* benefitted from state intervention rather than reducing state intervention *per se*’.<sup>139</sup> For example, in the UK public sector total spending to GDP was last recorded at 38.5% (2017–18 fiscal year) versus an average of 39.13% percent from 1956 until 2018.<sup>140</sup> Similarly in Australia government spending as a percentage of GDP rose over the decades after 1973.<sup>141</sup> One author puts it that ‘neoliberalism does not so much involve deregulation as re-regulation of economic activity’,<sup>142</sup> for example in public–private partnerships.<sup>143</sup>

The key to understanding this apparent contradiction lies in another aspect of the changing role of the state – the move from ‘government’ to ‘governance’. As Harvey puts it, ‘the shift from government (state power on its own) to governance (a broader configuration of state and key elements in civil society) has been marked under neoliberalism’.<sup>144</sup> The critical element in the shift, for present purposes, is not in the economic quantum of government but in the style of governance. In the context of a ‘super wicked’ problem like climate change robust leadership, policy direction and authoritative action and regulation (that is to say, government) from the state is surely a prerequisite. The shortcomings of governance as a

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<sup>138</sup> Peter D Burdon, ‘Realizing Earth Democracy: Governance from below’ in Laura Westera and Mirian Vilela (eds), *The Earth Charter, Ecological Integrity and Social Movements* (Routledge, 2014) 27 (referencing Max Weber).

<sup>139</sup> Brown (n 2) 95 (original emphasis).

<sup>140</sup> <<https://tradingeconomics.com/united-kingdom/government-spending-to-gdp>>.

<sup>141</sup> The relevant percentages were: 1973 (14.63%), 1983 (18.68%), 1993 (18.93%), 2003 (17.56%), 2013 (17.84%), 2017 (18.52%) <[https://www.theglobaleconomy.com/Australia/Government\\_size/](https://www.theglobaleconomy.com/Australia/Government_size/)>.

<sup>142</sup> Campbell (n 95) 3.

<sup>143</sup> Harvey (n 22) 77.

<sup>144</sup> Ibid.

management style – a shift to interest accommodation among myriad self-interested actors (including the state) – will become evident in the case of a collective problem like the climate change regime. Leadership by governments representing collective interests is, it will be argued, to be preferred to the massaging of (often conflicting) interests in a neoliberal market culture. In Chapter Five we will see Koskenniemi express similar misgivings about a shift to governance in international law. He feared the movement toward a ‘managerialist vocabulary’ threatened the special quality of international law as a ‘public vocabulary connected with a horizon of transcendence, the expression of a kind of secular faith ... a placeholder for the languages of goodness and justice, solidarity and responsibility’.<sup>145</sup> Here we will see a threat to domestic government as a special placeholder of collective interests, identity and solidarity as, for example, it imports certain values along with the instrumental tools of governance.

### *1 Neoliberal Governance*

In Chapter Five, in the context of the global order of states, it will be argued that a shift toward governance reflects a more general embrace of neoliberalism, and further that the Paris Agreement was part of that embrace. It was said by some writers that Paris signalled ‘a decisive shift ... towards a governance model ... [that] is strongly linked to neoliberal principles that have dominated global governance over recent decades’.<sup>146</sup> This section will look more closely at ‘governance’ as an operating principle in neoliberalism generally and what implications it may have for the climate change regime.

‘Governance’ is a general term for which it is difficult to find a singular definition. The task here is to characterize the nature of governance in counterpoint to ‘government’ and what implications might follow for climate change policy. So what do we mean by ‘governance’?

Foucault, for example, used the term ‘governmentality’ to characterize the neoliberal shift in the role of the state. This represents ‘a shift away from sovereignty and its signature – ‘do this or die’ – to what [he] called governing through ‘the conduct of conduct’ – ‘this is how you live’ ... it represents a shift away from the power of command and punishment targeting

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<sup>145</sup> Martti Koskenniemi, ‘Miserable Comforter: International Relations as New Natural Law’ (2009) 15 (3) *European Journal of International Relations* 395, 415.

<sup>146</sup> Peter Lawrence and Daryl Wong, ‘Soft Law in the Paris Agreement: Strength or weakness?’ 26 *RECIEL* (2017) 276, 277.

particular subjects and toward the power of conducting and compelling populations “at a distance”<sup>147</sup> More crudely it is a shift from ‘hard’ law to ‘soft’ regulation – not regulation by the imposition of specific and coercive rules but rather a negotiated regime in which private interests are accommodated and compliance is negotiated. The risk is of clearly defined objectives – for example, 1.5C degrees of warming, or ‘net zero carbon emissions by 2050’ – devolve into vague ambitions which can be ‘managed’ as conditions (that is to say, the balance of power among varying interests) vary. It has the ring of reasonableness yet somehow the ongoing pursuit of instrumental ‘efficiency’ and bargains waters down the hard objective. Article 2 of the Paris Agreement, for example, merely calls on states to ‘pursue efforts to limit the increase to 1.5 °C’<sup>148</sup> – the language is telling.

Some important elements of governance, in particular the practice of interest accommodation, are captured in a definition from the Commission on Global Governance:

Governance is the sum of many ways individuals and institutions, public and private, *manage* their common affairs. It is a continuing process through which conflicting or diverse interests may be *accommodated* and *co-operative* action taken ... [it] includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have *agreed* to or perceive to be *in their interest*.<sup>149</sup>

This is a kind of ‘networked’ governance which, in greater measure than ‘government’, is characterized by a plurality of actors, representing diverse and possibly conflicting interests which are to be ‘accommodated’ or ‘managed’ by mutual arrangement rather than directive from a sovereign authority. Conflict and disagreement – the stuff of politics – tends to be washed away. Governance ‘emphasises stakeholder consultation, co-operation, and a multi-party approach that produces technocratic solutions to problems that have been cleaved away from any of their political implications’.<sup>150</sup> The state is to work together, indeed collaborate, with private interests as complementary partners.

The critique is broadly that ‘[t]he main problematic of governance is the accommodation and articulation of conflicting *interests*, not the achievement of a *goal*, which is external to the

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<sup>147</sup> Brown (n 2) and particularly at 117.

<sup>148</sup> <<https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement>> (emphasis added).

<sup>149</sup> The Commission on Global Governance, *Our Global Neighbourhood* (Oxford University Press, 1995) 4 (emphasis added).

<sup>150</sup> Bowsher (n 57) 89.

process itself'.<sup>151</sup> The counterpoint to this 'soft' notion of interest accommodation is top-down, 'command and control', regulatory authority – that is to say, *government*, ideally taking the form of intelligent, well-informed, goal-oriented decision making in the public interest (present and future publics in the case of climate change) rather than for private advantage. If *government* orders and enforces compliance in (ideally) the public interest, *governance* typically negotiates and accommodates private interests. The Keynesian state is thereby re-engineered in a variety of new ways.<sup>152</sup>

Brown similarly claims a convergence of opinion that

governance signifies a transformation from governing through hierarchically organized command and control – in corporations, states, and nonprofit agencies alike – to governing that is networked, integrated, cooperative, partnered, disseminated, and at least partly self-organized ... it is governing without Government ... as well as a practice born from 'hollowing out the state'.<sup>153</sup>

Although not exclusively a neoliberal conception, Brown claims governance has become neoliberalism's primary administrative form, the

political modality through which it creates environments, structures constraints and incentives ... [c]ontemporary neoliberalism is unthinkable without governance ... [g]overnance is not only or by nature neoliberal, but neoliberalism has both mobilized and increasingly saturated its formulations and development.<sup>154</sup>

Thus, says Brown, '[g]overnance replaces hierarchical, top-down mandates and enforcement with horizontal networks of invested stakeholders pursuing a common end'.<sup>155</sup>

The move is from Keynesian 'command and control' by government to negotiated 'consent' among stakeholders in governance. We have seen in Chapter Two how such a shift occurred in the replacement of the 1987 Kyoto Protocol (with legally enforceable targets for emission

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<sup>151</sup> Massimo De Angelis, 'The Political Economy of Global Neoliberal Governance' (2005) 28(3) *Review* 229, 232 (emphasis added).

<sup>152</sup> These include 'the privatization of public utilities and welfare functions; the opening up of health services, social insurance and pension schemes to markets; educational reforms to introduce competition between colleges and universities; the introduction of new forms of management into the civil serviced modelled upon an image of methods in the private sector; new contractual relations between agencies and service providers and between professionals and clients; and a new emphasis on the personal responsibilities of individuals, their families and their communities to take active steps to secure their own future well-being' (F Isin, 'Governing Toronto Without Government: Liberalism and Neoliberalism' (1998) 56 *Studies in Political Economy* 169, 172–173).

<sup>153</sup> Brown (n 2) 123.

<sup>154</sup> *Ibid* 122.

<sup>155</sup> *Ibid* 126 (quoting Salamon).

reductions, backed by a Compliance and Enforcement branch) by the 2015 Paris Agreement (requiring only a commitment to submit voluntary, self-determined emission reduction plans but no requirement to actualise them). The former is at least an approximation of government, given the absence of a sovereign authority in the global order, whilst the latter barely even qualifies as governance as states are left to make their own arrangements with domestic stakeholders free of compulsion to actually implement them should it be inconvenient. Analogising the global order of states to a market of private interests, they are essentially left to self-regulate and self-monitor under the light regulation of the UNFCCC.

In effect ‘governance reconceives the political as a field of negotiation, accommodation, management and administration and reconceives the public realm as “a domain of strategies, techniques and procedures through which different forces and groups attempt to render their programs operable”’.<sup>156</sup> Rather than leadership through top-down government, horizontal neoliberal governance manifests as a pluralist struggle among competing interests, a kind of interest-group liberalism<sup>157</sup> that seeks to assuage the various and possibly conflicting interests among ‘stakeholders’. This may be appropriate in some contexts but surely not in one as collective, urgent and goal-oriented as the climate change regime with its need for leadership beyond the economic.

The language of *governance* is seductively benign and consensual (‘cooperation’, ‘accommodation’, ‘networked’, ‘partnered’) in comparison to the more authoritarian language of *government* (‘command and control’, ‘hierarchy’, ‘enforcement’, ‘punishment’). The different characteristics of the regimes are very important:

in terms of its purpose and rationale, in the case of policy we have a type of government action that has clearly defined objectives and clearly defined means ... [o]n the other hand, the purpose and rationale of governance is not so clear-cut and ‘linear’ ... [t]he main problematic of governance is the accommodation and articulation of conflicting interests, *not the achievement of a goal*, which is external to the process itself.<sup>158</sup>

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<sup>156</sup> Ibid (quoting Meehan).

<sup>157</sup> On interest-group liberalism see, for example, T Lowi, *The End of Liberalism: The Second Republic of the United States* (Norton, 2<sup>nd</sup> edit, 1979) 22: ‘[P]luralism [was] the intellectual core of the new liberalism which would eventually replace capitalism as the public philosophy ... the new public philosophy, interest-group liberalism, is the amalgam of capitalism, statism, and pluralism.’ At 36: ‘[T]he zeal of pluralism for the group and its belief in a natural harmony of group competition tended to break down the very ethic of government by reducing the essential conception of government to nothing more than another set of mere interest groups.’

<sup>158</sup> De Angelis (n 151) 232 (emphasis added).

A stabilization of greenhouse gases in the earth's atmosphere at such a level as to limit global warming of 1.5 degrees (the ambition of the 2015 Paris Agreement) would be an example of such a goal. The absence of enforceable commitments (other than to submit a plan) suggests the absence of means. The evidence of ongoing failure suggests the consequences – recall from Chapter Two that *even if* all current pledges under the Paris Agreement were met the likely temperature rise by 2100 is estimated to be a disastrous 2.7–3C degrees.<sup>159</sup>

On the one hand *government* has at its disposal a variety of policy instruments with which to achieve such a goal as limited warming – for example, absolute limits for individual emitters, limits along with market trading in emissions, a carbon tax, subsidies and expenditure on renewable energy sources, aid to developing countries to pursue low emission development. This is the domain of the Keynesian ‘command and control’ state pursuing, for example, efficacious climate change policies. Rather than penalty-driven government policy instruments a ‘*governance*’ regime would look very different. It would likely include consultation with ‘stakeholders’ (particularly major emitters), cooperation and negotiation of an agreement in which diverse and likely conflicting interests are ‘accommodated’. ‘Achievable’ targets may be set on advice from emitters, ‘credits’ may be awarded to lessen burdens, ‘phase in’ periods may be set, there will likely be self-monitoring and self-reporting by emitters (and, globally, by states), and the management processes will be ongoing and revisable as interests evolve. In short, the present regime. De-stabilizing conflict may thereby be avoided but goals will likely morph into generalised aspirations. In this world of governance it is not only difficult for public authorities to make and enforce hard decisions – for example, a reorientation of economies away from fossil fuel energy – it is no longer even appropriate.

Under governance modalities hard decisions – decisive resolution of incommensurable interests – are apt to be avoided and goals are compromised. The hard work of politics doesn't get done. Contestation and resolution of diverse interests is replaced by negotiated consensus.<sup>160</sup> Politics is reduced to managerialism – ‘practical, technical approaches to problems’, ‘what works’ – and thus is washed away the ‘politically, ethically, or otherwise

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<sup>159</sup> Raymond Cléménçon, ‘The Two Sides of the Paris Climate Agreement: Dismal Failure or Historic Breakthrough’ (2016) 25(1) *Journal of Environment and Development* 3, 13.

<sup>160</sup> Brown (n 2) 127.

normatively inflected dimensions of policy'.<sup>161</sup> In Chapter Five we will hear the same critique from Koskenniemi. Value rationality is dissolved into instrumental rationality.<sup>162</sup>

The dilution of political authority in turn leads to 'the elimination of the need for legal, political, or ethical interference from the state'<sup>163</sup> – the very subject matter of government. Indeed consensus-based governance can begin to substitute for law and hard regulation and 'permit closer compartment between the law and business interests'.<sup>164</sup> This reconceptualizing of 'command and control' regulation to 'light touch regulation' is a hallmark of neoliberalism and marks a preference for governance based on disclosure and negotiation. Brown further argues that there is as well an erosion of democratic values (discussed further below). The themes of inclusion and participation in governance may appear to resonate with 'democratic' values but they lack the 'capacity to *decide* fundamental values and directions' necessary to democratic argument.<sup>165</sup> Whilst Brown might arguably be overstating her case the concern is that for a 'super wicked' problem like climate change, going as it does to the fundamentals of economic, political and social ordering, decisive government leadership is both necessary and appropriate – this is simply not something that can be left to self-seeking private interests in largely anarchic markets.

At a practical level the drivers of neoliberal governance are reflected in certain tools and techniques of managerial practices such as 'best practice' and 'benchmarking' which, together with their economic imperatives, incorporate as well certain unacknowledged norms and values along with those of instrumental rationality and competitiveness. It will be seen in Chapter Five that it is the 'concealed ideologies' behind managerialism in international law that concern Koskenniemi. It is in these unacknowledged managerialist ideologies and values that we notice the absence of other value rationality drivers that are of concern in climate change policies – value-rational drivers like ethics and morality, empathy, communality, solidarity, sustainability, together with a visionary politics capable of reimagining deep structures that are fit for purpose.

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<sup>161</sup> Ibid 130.

<sup>162</sup> Ibid 119.

<sup>163</sup> Ibid 141.

<sup>164</sup> Ibid.

<sup>165</sup> Ibid 128 (emphasis added).

## 2 Neoliberal Governance Techniques

There is a relevant aphorism from the world of business to the effect that ‘what can be measured gets done’, or alternatively ‘if you can measure it you can manage it’.<sup>166</sup> In fact the full proposition is said to be: ‘[w]hat gets measured gets managed – even when it’s pointless to measure and manage it, and even if it harms the purpose of the organisation to do so’.<sup>167</sup> A corollary might be that ‘we can’t measure what matters’ and that ‘the easy-to-measure drives out the hard, even when the latter is more important’ and finally that ‘what gets measured, matters ... measures set incentives that drive people’s behaviours’.<sup>168</sup> This is the domain of instrumental rationality, of measurable means and ends in the pursuit of efficiency. The concern is that the ‘what matters’ that we can’t measure is the domain of *homo politicus*. This is the world of value-rationality, that is to say, ‘deliberation about justice and other common goods, contestation over values and purposes, struggles over power, pursuit of visions of the good for the whole ... politics, conflict, and deliberation about common values or ends’.<sup>169</sup>

This is also the world of climate change politics, with its challenging ethical dimensions such as notions of responsibility, accountability, obligations to others (Chapter Five), its ontological questions of the nature of humanity and its relation to the natural world, its reflections on appropriate life ways – indeed its challenge to notions of the good life properly understood. As the following chapter will show, neoliberalism has a particular ontological perspective in reconfiguring individuals as *homo economicus*.

As to what can and will be measured and how, in the processes of governance, the metrics through which governance operates can be found in, for example, the exemplary practices of ‘benchmarking’ and ‘best practices’ as tools in the pursuit of economic activity. One author puts it that ‘the rationalising process of quantification that neoliberalism relies upon contributes decisively to its legitimation and the establishment of its authority beyond dissent’.<sup>170</sup>

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<sup>166</sup> The quote has been attributed to, among others, the management consultant Peter Drucker and to William Thomson, Lord Kelvin: ‘If you cannot measure it, you cannot improve it.’ <<http://billhennessy.com/simple-strategies/2015/09/09/i-wish-drucker-never-said-it>>.

<sup>167</sup> See Simon Caulkin, ‘The rule is simple: be careful what you measure’ (*The Guardian*, 10 Feb. 2008) (quoting Ridgway) (<https://www.theguardian.com/business/2008/feb/10/businesscomment1>).

<sup>168</sup> Ibid (quoting Mintzberg).

<sup>169</sup> Brown (n 2) 127.

<sup>170</sup> Sophia Hatzisavvidou, ‘Inventing the environmental state: neoliberal common sense and the limits to transformation’ (2020) 29(1) *Environmental Politics* 96, 99.

Benchmarking ‘refers to the practice of a firm or agency undertaking internal reforms on the basis of studying and then importing the practices of other, more successful firms or agencies ... [they] are set by industry leaders, and benchmarking represents the process of non-leaders understanding, distilling, and then implementing the practices that make those leaders successful’.<sup>171</sup> The appearance is of a low-cost, efficient and indeed admirable practice for making things ‘work better’ – look to others who do it well or better.

But benchmarks are promiscuous in the sense of being disseminated across time and space, that is, ‘imported’ in the absence of their historical or sectoral contexts – how things have been done traditionally or recently, or how they could or should be done, or simply how they are done elsewhere. They are transposed between institutions, industries and sectors free of their contexts.<sup>172</sup> For example, they may move freely between public, private and non-profit institutions in creating enterprise models. The underlying assumption is that all organizations will be pursuing the same end promoted by the benchmarking – that is, ‘competitive advantage in the marketplace’ through superior performance.<sup>173</sup>

But notwithstanding their assumed detachment from contexts of time and place, benchmarks nonetheless carry with them the ends and values with which they are infused, that is to say, typically market values and instrumental efficiencies,<sup>174</sup> and thereby the risk of erasing or foreshortening other purposeful activities and norms that do not go to competitive economic advantage. There is risk of ‘mission drift’ as the gravitational pull of ‘competitive advantage’ distracts newly ‘enterprised’ public and non-profit institutions, for example, from their goals and constituencies<sup>175</sup> and values which may differ from, or perhaps are at odds with, the gravitational pull of economic efficiency.

Similarly, Brown claims, notions of ‘best practice’, grounded in ‘expertise’ and ‘neutrality’, will tend to marginalise prior traditions and mandates but also ‘partisanship and contestation

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<sup>171</sup> Brown (n 2) 136 (quoting Camp).

<sup>172</sup> Ibid 136–7.

<sup>173</sup> Ibid 137.

<sup>174</sup> Ibid 138.

<sup>175</sup> Ibid 139.

over purposes, values and ends’ and in that sense go beyond ‘unpolitical’ to ‘antipolitical’ – in short, the dissolution of the essences of politics’.<sup>176</sup>

Again the language is benign, even aspirational – ‘best practices’ suggesting a desire to equal or even be the best.<sup>177</sup> There is, however, also an element of competition (‘this compared to that ... how do we measure up, do better?’) consistent with fundamental competitive elements of markets. Immanent in such seemingly neutral practices are the unarticulated norms that drive them and which, lacking contestation, become incorporated in the host. The referenced benchmark or best practice imports with it a motivating ideology that may or may not be relevant or appropriate. So benchmarks and best practices may derive from notions of economic efficiency in a given context but be wrongfully employed in a different context where benchmarks ought more appropriately be, for example, ethical and moral. Given an apparent lacuna of ethical drivers for climate change policy then ‘market’ values of economic efficiency and managerial tools like benchmarks and best practice form the instrumental rationality of policy.

An example would be the managerial practices of the Clean Development Mechanism (CDM) in the Kyoto Protocol<sup>178</sup> crowding out the fundamental imperatives driving it, including sustainable development. Recall (Chapter Two) that the CDM is a market-based mechanism by which industrial (Annex I) countries can undertake emission-reduction projects (so-called ‘low-hanging fruit’) in developing countries to earn Certified Emission Reduction (CER) credits which can then be used by industrialized countries to meet a part of their emission reduction targets under the Kyoto Protocol, thus providing some flexibility to those countries.

However, the Kyoto Protocol assesses CDM projects according to two objectives, the second being Sustainable Development (SD) in the host countries.<sup>179</sup> It is the prerogative of host countries to define the SD requirement of any CDM. In fact, whilst the market-driven CERs have been a vehicle for emission reductions the same market imperatives have eroded the

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<sup>176</sup> Ibid.

<sup>177</sup> Ibid 136.

<sup>178</sup> The CDM is also included in the 2015 Paris Agreement (Article 2.2).

<sup>179</sup> ‘The CDM involves investment in emission reduction or removal enhancement projects in developing countries that contribute to their sustainable development’ <<https://unfccc.int/process/the-kyoto-protocol/mechanisms>>.

sustainable development objective. A study of registered CDM projects shows that while most CERs (72%) represents real emission reductions ‘less than 1% are likely to contribute significantly to sustainable development in the host country’.<sup>180</sup> The problem is that host countries lack the market power to affect the price of CERs and must therefore compete for CDM projects, thus creating incentives for low SD requirements.<sup>181</sup> The result is that ‘a highly competitive supply side of the CDM is likely to cause a trade-off in favor of the cost-efficient emission reduction objective’.<sup>182</sup> The CDM mechanism thereby, through its emphasis on emission reduction efficiencies, imports with it an instrumental rationality ‘efficiency’ agenda that mitigates against SD ambitions and the value-rationalities they incorporate, resulting in ‘mission drift’.

Whilst this critique of benchmarks as importing certain (possibly inappropriate and conflicting) values from their formative contexts is important, Sandel offers a different critique that, quite apart from any benchmarking occurring, marketization itself may have a corrupting effect on values. The point is that, contrary to traditional economic thinking that economic efficiency gains can be made without altering the character of the goods in question, ‘markets don’t only allocate goods; they also express and promote certain *attitudes* toward the goods being exchanged’, that is to say, markets are not merely inert but reflect certain *immanent values* and the act of commodification may thereby corrupt or degrade the good being marketized.<sup>183</sup> He offers the example of a Swiss town that agreed to host a nuclear waste site as a matter of civic duty but that when offered a cash incentive the support was actually eroded.<sup>184</sup>

Sandel also uses the example of the Kyoto mechanism for trading greenhouse gas emission permits. He suggests that this outsourcing of the obligation to reduce emissions may have the effect of ameliorating the moral stigma of emitting excess greenhouse gases, and it may undermine the underlying ethic of shared sacrifice,<sup>185</sup> as well as any ethical and moral imperatives driving the climate change regime generally. In such manner does the neoliberal

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<sup>180</sup> Christopher Sutter and Juan Carlos Parreño, ‘Does the current Clean Development Mechanism (CDM) deliver its sustainable development claim? An analysis of officially registered CDM projects’ (2007) 84 *Climatic Change* 75, 75.

<sup>181</sup> Ibid 76.

<sup>182</sup> Ibid.

<sup>183</sup> Sandel (n 72) 9 (emphasis added).

<sup>184</sup> Ibid 114–117.

<sup>185</sup> Ibid 75.

preference for market mechanisms undermine important moral drivers of climate change. It reinforces an attitude that such emissions are acceptable for those who can afford it, thus undermining foundational values that ought more appropriately be driving climate change policy – for example, accountability, responsibility, equity, corrective justice. Similar arguments apply to the carbon offsets offered to, for example, airline travellers.<sup>186</sup>

Alternatively, Sandel suggests that contesting the role of markets would ‘invigorate our politics, by welcoming competing notions of the good life into the public square ... a morally robust public discourse’ as well as ‘our social practices, human relationships, and everyday lives’.<sup>187</sup> This is the realm of *homo politicus* which, it will be argued in the following chapter, is important to climate change deliberation but diminished in neoliberalism. In fact, as we shall see, neoliberalism reverses Sandel’s prescription and undermines his conceptions of a communitarian politics in which difficult climate change issues might be argued and consensus achieved.

Whilst the role of the state may seem to be the principal driver in the evolution of neoliberalism as a deep structure we would expect to see its influence permeate as well throughout its host societies, albeit imperfectly and incompletely. In the following chapter we will see its influence play out in political life, in legal systems, but above all in the character and texture of the neoliberal subject, the individual citizen. In each case it will be shown how neoliberal ideology corrodes possibilities for an efficacious climate change regime not only in the reconfigured role of the state but as well in these other forums of social, political, and legal life.

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<sup>186</sup> Ibid 76–79.

<sup>187</sup> Ibid 14–15.

## CHAPTER IV: NEOLIBERALISM BEYOND THE ROLE OF THE STATE

### I THE NEOLIBERAL SUBJECT – *HOMO ECONOMICUS*

#### *A Introduction*

Ontological conceptions of the self evolve and change over time<sup>1</sup> and will be influenced by, for example, whatever deep structure ideologies are operating. The Kantian liberal image from the previous chapter is of self-imagined, autonomous, rational individuals pursuing individually conceived notions of the good life. The self is inevitably constructed in large part by its contexts and (for present purposes) the neoliberal self which, notwithstanding its roots in liberalism, instantiates a particularised construction.

Central to the construction of the neoliberal subject is the notion of individual self-governance – the ‘responsibilization’ of individual entities which requires them to practice appropriate strategies of ‘self-investment and entrepreneurship’.<sup>2</sup> It is not because they are ‘ordered’ to by an authoritarian state but because their surrounding conditions require them to. It is not about a self-generated sense of being ‘responsible’ but rather of being ‘responsibilized’ in that neoliberal subjects have imposed upon them an accountability for their own welfare.<sup>3</sup>

For individuals, as we will see, this is undertaken in pursuit of maximising personal capital, for example, in pursuing educational opportunities which will enhance one’s ‘brand’ in the marketplace rather than, say, equipping them for an active life of argumentation about politics. Just as for organised economic entities, including de-regulated and privatized enterprises and public–private partnerships, for the subject it is about successfully negotiating ‘market’ environments which are facilitated by the state, which itself is ‘enterprised’. Even in traditional areas of state-provided education and health individuals are encouraged to self-invest – in private health care, private schools, relevant university qualifications financed by repayable government loans, informal networking among peers, savings (promoted by

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<sup>1</sup> See generally, for example, Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press, 1989).

<sup>2</sup> Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (Zone Books, 2015) 132–133.

<sup>3</sup> Ibid 133.

government incentives) to finance one's retirement, and so on. Through such self-investment the 'responsibilised' self will not, and now increasingly cannot, look to the state for support. Formerly public goods (for example, health care, education, social security, infrastructure, utilities, public transport) are now marketized, not incidentally relieving the state of responsibility for decision making.

Markets are imagined as a field of freedom for exchange relations and are, as we have seen, to be underwritten by the state both through its nurturing of the conditions of the market and by its distance from the workings of the market other than to underwrite basic legal regimes of enforceable contract law, property, and so on which facilitate these exchange relations.

But the state's role is far more than this with regard to its subjects. Traditionally liberalism has sought to 'identify compulsion with restrictions by the state on personal choice'.<sup>4</sup> The hoped-for ideal is that the liberal subject under a minimalist state is free to exercise unconstrained choice, typically characterised in terms of her self-chosen conception of the good life. Thus liberalism promises that 'each person's life should be its own *telos*'<sup>5</sup> or ultimate purpose – the shape of the individual's conception of the good life. This, not the collective utility of society generally, is the central organizing principle of (Kantian) liberal societies. The individual is sovereign.

But neoliberalism reconfigures that *telos*. The organizing unit for the theorists of the Mont Pèlerin Society and later the Chicago School economists remains the individual but now conceived as a rational, narrowly self-interested, utility-maximising *economic* actor, or *homo economicus*. Human subjects are re-characterised as entrepreneurial units of human capital<sup>6</sup> which they seek to maximise. Indeed, '[l]ife, for the Chicago school, is an enterprise'.<sup>7</sup> One takes responsibility for one's own life projects and personal well-being, including, for example, self-investment in formerly state-sponsored goods like education, health care and retirement. One manages one's own 'permanent project of self-development' in pursuit of

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<sup>4</sup> Jacob Segal, 'The Discipline of Freedom: Action and Normalization in the Theory and Practice of Neoliberalism' (2006) 28(3) *New Political Science* 323, 323.

<sup>5</sup> Ibid.

<sup>6</sup> Defined by one author as '[a] measure of the economic value of an employee's skill set ... recogniz[ing] that not all labor is equal and that the quality of employees can be improved by investing in them ... [t]he education, experience and abilities of an employee have an economic value for employers and for the economy as a whole' (See Brown (n 2) 246–7 (footnote 76)).

<sup>7</sup> Gavin Kendall, 'From Liberalism to Neoliberalism' (Paper presented to the Social Change in the 21<sup>st</sup> Century Conference) 10 <[https://eprints.qut.edu.au/134/1/Gavin\\_Kendall.pdf](https://eprints.qut.edu.au/134/1/Gavin_Kendall.pdf)>.

‘the magnificent possibilities for the individual who “takes control”’.<sup>8</sup> The ideal neoliberal type involves ‘the recasting of identity in terms of flexibility, adaptability and instant transformation’ wherein ‘the free movement of networked individualism is the Utopian ideal’.<sup>9</sup> One must continuously re-image and burnish one’s ‘brand’ as needs must.

This fantasy image of a re-constructed subject represents a ‘reification of economic relations’<sup>10</sup> whereby the earlier socialised subject becomes a unit of income and wealth accumulation. The subject comes to serve and re-produce ‘market’ relations rather than economic markets serving but one aspect of the social self. The good life is re-oriented to economic priorities.<sup>11</sup>

Whyte puts it that this marketised self ‘dispenses with politics and the active citizenry it requires, and cultivates submissive subjects’,<sup>12</sup> including formerly politicized selves who might ordinarily in moments of solidarity or civic virtue engage with climate challenges. She interprets Hayek as requiring that we *submit* as a matter of faith to the opaque, unintelligible workings of market forces – ironically in order to be free. We may not be able to calculate exactly the collective good that results from this ‘spontaneous order’ but we must understand that to interfere with it via central planning or oversight would be ‘dangerous folly’.<sup>13</sup> As a consequence, says Whyte, this market order ‘dispenses with politics and ... [an] active citizenry’.<sup>14</sup> For Whyte this is not only important for distancing us from social justice issues such as welfare policies but also from ‘any collective political action that aims to establish and work towards collectively determined ends’.<sup>15</sup> It is this latter consequence that concerns us regarding climate change.

In addressing the many and profound challenges of a ‘super wicked’ problem like climate change, and particularly the moral and ethical issues it raises, it is the collectivity of selves

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<sup>8</sup> Ibid.

<sup>9</sup> Jim McGuigan, ‘The Neoliberal Self’ (2014) 6 *Culture Unbound* 223, 233.

<sup>10</sup> Jessica Whyte, ‘The Invisible Hand of Friedrich Hayek: Submission and Spontaneous Order’ (2019) 47(2) *Political Theory* 156, 177.

<sup>11</sup> For a critique of *homo economicus* as a heuristic device in various disciplines see, for example, Dante A Urbina and Alberto Ruiz-Villaverde, ‘A Critical Review of *Homo Economicus* from Five Approaches’ (2019) 78 (1) *American Journal of Economics and Sociology* 63.

<sup>12</sup> Whyte (n 10) 160–161 (characterizing Hayek).

<sup>13</sup> Ibid 158.

<sup>14</sup> Ibid 161.

<sup>15</sup> Ibid 176.

embodied in the state as ‘citizenship, an active citizenry and the concept of the public good [that] are all undermined by neoliberalism’.<sup>16</sup> We will consider similar arguments from Brown. Lyster goes so far as to say there is a neoliberal program ‘for destroying collective structures which may impede the pure market logic’.<sup>17</sup>

In short, citizens are at once economised and de-politicised. This is troubling for two reasons. If as seems clear the present arrangements of what has been called fossil fuel based capitalism are the cause of climate change then their revision will likely be (perhaps catastrophically) disruptive, or perhaps more likely, will occur in a context of ‘disaster capitalism’ from a climate-caused catastrophe (Chapter Six). We cannot assume an orderly and timely transition. Publics may have a democratic right to *participate* in that process, but can only do so if there is a *polis* which is enabling and responsive to such participation – the shrinking of the neoliberal *polis* is discussed below.

Second, in the event of widespread and disruptive change the *consent*, or at least acquiescence, of publics will be necessary if chaos is to be avoided. That consent must be argued and agreed in public contestation in a functioning *polis*. As Whyte and Brown show, neoliberalism undermines those possibilities both by fashioning a subjectivity that is less likely to concern itself in political debate that is not wealth-enhancing – indeed one such as climate change will likely threaten wealth accumulation – and because the *polis* itself is diminished by the shrinking of the role of the state to that of facilitator of market efficiencies.

The unmissable irony is that climate change which all but incontrovertibly results from human activity via markets, now nurtured by the neoliberal state, must not be the subject of state action which might constrain those same markets. Again neoliberalism cannot be blamed for climate change – the processes were in train already. But to the extent that neoliberal markets, nurtured by the state, continue to accelerate processes of accumulation they exacerbate climate change and render still more difficult an efficacious climate change regime. It may be going too far to assign causation in the growth of greenhouse gases during

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<sup>16</sup> Rosemary Lyster, ‘The Idea of (Climate) Justice, neoliberalism and the Talanoa Dialogue’ (2019) 10(1) *Journal of Human Rights and the Environment* 35, 49.

<sup>17</sup> *Ibid* (quoting Ciplet and Roberts).

the neoliberal era<sup>18</sup> – also coinciding with the growth in awareness of the climate change threat – but it would be prudent to note at least the coincidence of timing.

So whilst individual freedom is the core value and the connecting thread to classical liberalism, that freedom is now re-written and instrumentalized as ‘economic’ freedom through individualism and the ‘hedonistic spirit’<sup>19</sup> of consumer sovereignty, and an ‘acutely brand-aware commodity fetishism’.<sup>20</sup> This economic re-fashioning of the human subject has been characterized by various writers as a license to indulge in, indeed celebrate, some of our worst instincts: ‘selfishness, greed, and acquisition for its own sake’, ‘the triumph of auto-consuming narcissism ... more adequately understood as a part of the managerialization of personal identity and personal relations which accompanies the capitalization of the meaning of life’,<sup>21</sup> ‘little more than singular, gratification-seeking units, out to maximise our narrow advantage’.<sup>22</sup> The market is the field on which this liberty can be realised, not only in economic terms but extending as Whyte claims to the social. There is ‘a new notion of the self, in which actors can be seen as fundamentally economic, while their aptitudes and skills can be understood as human capital’.<sup>23</sup> One writer puts it that ‘[o]nly the economists feel confident in their recommendation that a guilt-free self-interest is the only rational way to conduct a life’.<sup>24</sup>

Thus markets are said to have ‘invaded the grit of our personal lives ... the attitude of the salesman has become enmeshed in all modes of self-expression ... competition is the only legitimate organising principle for human activity’.<sup>25</sup> Another writer characterizes ‘the neoliberal ideology of ‘individualism’ that shifts all responsibility for success or failure to a mythical, atomized, isolated individual, doomed to a life of perpetual competition and disconnected from relationships, community, and society’.<sup>26</sup> This is the ‘responsibilized’

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<sup>18</sup> See, for example, historical data on carbon dioxide emissions at <<https://www.statista.com/statistics/264699/worldwide-co2-emissions/>>.

<sup>19</sup> McGuigan (n 9) 232.

<sup>20</sup> Ibid 235.

<sup>21</sup> Kendall (n 7) 11 (quoting Gordon).

<sup>22</sup> Naomi Klein, *This Changes Everything: Capitalism vs. The Climate* (Simon & Schuster, 2014) 460.

<sup>23</sup> Kendall (n 7) 11–12.

<sup>24</sup> Jerome Kagan, *The Three Cultures: Natural Sciences, Social Sciences, and the Humanities in the 21<sup>st</sup> Century* (Cambridge University Press, 2009) 243.

<sup>25</sup> Stephen Metcalf, ‘Neoliberalism: the idea that changed the world’ (*The Guardian*, 18 August 2017) <<https://www.theguardian.com/news/2017/aug/18/neoliberalism-the-idea-that-changed-the-world>>.

<sup>26</sup> Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Public Affairs, 2019) 33.

individual who must hold themselves accountable for any failure to develop and polish their personal ‘brand’ in the market place of individual capital units.

There is a shrinking of the social and political self wherein the neoliberal archetype risks becoming ‘a self ... condemned to freedom and lonely responsibility ... everyone is abandoned to their fate like an angst-ridden French philosopher’<sup>27</sup> (though it should be recalled that similar concerns are levelled at the Kantian rights-bearing individual). By way of contrast

[a]s recently as the 1970s, the idea that the point of life was to get rich and that governments existed to facilitate this would have been ridiculed : not only by capitalism’s traditional critics but also by many of its staunchest defenders ... [r]elative indifference to wealth for its own sake was widespread in the postwar decades ... [t]hinking ‘economistically’, as we have done now for thirty years, is not intrinsic to humans.<sup>28</sup>

Brown encapsulates this *homo economicus* as ‘an intensely structured and governed bit of human capital tasked with improving and leveraging its competitive positioning and with enhancing its (monetary and nonmonetary) portfolio value across all of its endeavours and venues’.<sup>29</sup> Increasingly in contemporary practice the evolution of surveillance practices for commercial use, including social media, allows publics to be ‘constructed statistically as manipulable entities in data bases ... they are monitored and objectified for purposes of social control or profit’.<sup>30</sup> Indeed these practices of gathering and assembling mass data and employing algorithms to anticipate and even to direct consumer behaviour have been labelled the era of ‘surveillance capitalism’, leading to the loss of privacy and autonomy for individual citizens, enabled by the context of neoliberalism.<sup>31</sup>

### *B Construction of the Neoliberal Subject*

At its moral best and most benign neoliberalism would claim to comprise ‘neoliberal intellectuals who dreamed of nations comprised of free individuals lightly constrained by the rule of law, guided by moral and market rules of conduct, and disciplined by competition’.<sup>32</sup>

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<sup>27</sup> McGuigan (n 9) 234.

<sup>28</sup> Tony Judt, *Ill Fares the Land* (Penguin, 2010) 39.

<sup>29</sup> Brown (n 2) 10.

<sup>30</sup> Stephen Gill, ‘Globalisation, Market Civilisation, and Disciplinary Neoliberalism’ (1995) 24(3) *Millennium: Journal of International Studies* 399, 416.

<sup>31</sup> See generally Shoshana Zuboff, *The Age of Surveillance Capitalism* (Profile Books, 2019) – for example, at 54: ‘surveillance capitalism is inconceivable outside the digital milieu, but neoliberal ideology and policy also provided the habitat in which surveillance capitalism could flourish’.

<sup>32</sup> Wendy Brown, ‘Neoliberalism’s Frankenstein: Authoritarian Freedom in Twenty-First Century “Democracies”’ (2018) 1(1) *Critical Times* 74.

Harvey characterises the original theory as a set of ‘political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms within an institutional framework characterized by strong private property rights, free markets, and free trade ... if markets do not exist ... then they must be created, by state action if necessary’.<sup>33</sup> The promise is of enhanced material prosperity generated by efficient markets and responsabilised individuals who instrumentalise optimum outputs from minimum inputs, be they labour, resources or capital – that is, enhanced income generation and capital accumulation in neoliberal subjects through efficient market relations.

It is notable that some neoliberal proponents like Friedman appear to have had no particular concept of *which* values<sup>34</sup> (other than the economic) might be enhanced or promoted through the economic freedoms of the newly ‘marketised’ individual subject. Neoliberalism claims a new subjectivity associated with economic freedoms which go as well to notions of individual freedom, dignity and self-reliance but oddly, this claim is rarely articulated or given substance – for example, it is absent from one of the texts where one would most expect to find it, namely Milton and Rose Friedman’s *Freedom to Choose*.<sup>35</sup> Notwithstanding Friedman’s enormous influence in popularising neoliberalism through his books, popular writings and television programs,<sup>36</sup> the book is surprisingly free of ruminations as to what kind of citizen and subject might evolve once government steps aside and markets, and more particularly individual market actors, flourish unconstrained. Even in a brief discussion on ‘Human Freedom’<sup>37</sup> there is no transformative, life-enhancing articulation of a new subjectivity, no neoliberal aspiration to a more fully realized humanity (beyond, presumably, material well-offness), or of how economic freedom via unfettered markets will play out in other aspects of private and social life.

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<sup>33</sup> David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 2.

<sup>34</sup> For a broad definition of ‘values’ see, for example, Johanna Wolf, Ilana Allice and Trevor Bell, ‘Values, climate change, and implications for adaptation: Evidence from two communities in Labrador, Canada’ (2013) 23(2) *Global Environmental Change* 548, 551: ‘[values] are more abstract and more durable than attitudes, more independent of personality than traits, are trans-situational unlike norms, and are less biological and more culturally prescribed than needs’ (Hitlin and Piliavin, 2004). According to Kluckhohn (1951), values are conceptions of the desirable that influence the selection of available modes, means, and ends of action. A less deterministic definition of values suggests that they are “enduring beliefs that a specific mode of conduct is personally or socially preferable to an opposite or converse mode of conduct or end-state of existence”.

<sup>35</sup> Milton and Rose Friedman, *Free to Choose: A Personal Statement* (Harcourt Brace, 1980).

<sup>36</sup> See also, for example, Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Penguin Books, 2007) Ch. 2.

<sup>37</sup> Friedman (n 35) 67–69.

Without an articulated value-rationality neoliberalism is left with its instrumentalist fetish for economic efficiency seemingly devoid of any other purpose, with troublesome implications not only for its host societies but for all (present and future) who will suffer from climate change impacts. As will be shown, neoliberalism's reductive stance toward individuals as singularly wealth-maximising units marginalises, if not precludes, the kinds of values which are surely a pre-condition for climate change mitigation – values which preference one mode of conduct over another. Again, if liberalism (and particularly its Kantian form) already tends to a self-interested and alienating individualism then neoliberalism goes a long step further in focussing that individualism on the 'efficient' realisation of overwhelmingly economic ends – personal capital accumulation in all forms, in competition rather than cooperation with fellow citizens, in pursuit of what are arguably in significant part the satisfaction of petty wants and desires rather than authentic needs.

In short '[n]eoliberalism expects individuals to think like businesses and to pursue unlimited individual accumulation'.<sup>38</sup> Brown characterizes this image of neoliberal individuals as hyper-individualized 'capital units', embodying 'a perspective of the world that is ahistorical, economistic, materialistic, 'me-oriented', short-termist, and ecologically myopic'<sup>39</sup> – unlikely characteristics for a long-term, collective, morally charged project like climate change mitigation. Similarly Judt sees a 'reduced and impoverished capitalist vision: the ideal of nomadic productive units maximising private advantage and indifferent to community or convention'.<sup>40</sup> In such manner neoliberalism is said to promote a 'virulent economism'<sup>41</sup> that pushes the discipline of economics well beyond its traditional focus on the production and consumption of material goods. As well the primacy of such economic ends is itself the very driver of climate change via (fossil-fuel driven) economic growth. The state, formerly a repository and agent of other collective values as well as public goods, is reconfigured to nurture these singularly economic drivers.

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<sup>38</sup> Joanne Swaffield and Derek Bell, 'Can 'climate champions' save the planet? A critical reflection on neoliberal social change' (2012) 21(2) *Environmental Politics* 248, 256.

<sup>39</sup> Brown (n 2) 30.

<sup>40</sup> Tony Judt, *The Memory Chalet* (Penguin Press, 2010) 109.

<sup>41</sup> Josh Bowsher, "'Omnus et Singulatim": Establishing the Relationship Between Transitional Justice and Neoliberalism' (2018) 29(1) *Law and Critique* 83, 88.

One might expect some kind of alternative moral stimulus to come from religious institutions but this has been limited. As to a Christian religious theme in climate change attitudes<sup>42</sup> it might be noted that notwithstanding, for example, the issue of Pope Francis's encyclical *Laudato Si*<sup>43</sup> the influence of religion as a driver of climate change ethics appears to be just one of many influences and not independently significant.<sup>44</sup> There is, however, optimism among some that there has been a resurgence of religion accompanying neoliberalism and even a hope that religion might be important in a post-neoliberal society.<sup>45</sup> Ian Barns, on the other hand, is concerned at the neoliberal influence on, in particular, fundamentalist religions: 'perhaps the most startling Christian response has been endorsement of free-market capitalism by mainstream neoconservative theologians, by right-wing evangelical Christians in the United States'.<sup>46</sup> He puts it that, for example, '[n]eo-Pentecostalism clearly embodies neoliberal ideas and values of entrepreneurialism, self-assertiveness and transactional spirituality ... [i]t is a case of a spirituality of acquisition and consumption by unencumbered selves'.<sup>47</sup> However, that is not to say that morality is absent in neoliberalism though some have characterized it as amoral.<sup>48</sup>

Whyte characterises Hayek's vision of market morals as 'individual, commercial values that prioritised the pursuit of self-interest above the development of common purposes'.<sup>49</sup> According to Whyte celebrated values of wealth accumulation and individual and familial responsibility are promoted 'at the expense of the deliberate pursuit of collectively

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<sup>42</sup> For an account of changing ontological perspectives on humans and the environment from an immanent spirituality to one of instrumental rationality see, for example, Geoffrey WG Leane, 'Ways Not to Think about Social Theory: Rethinking Environment Law and Society' (1997) 12(1) *Canadian Journal of Law and Society* 193, 203–207.

<sup>43</sup> *Laudato Si* (18 June 2015) is the second encyclical of Pope Francis, with the subtitle 'On care for our common home'. The Pope critiques consumerism and irresponsible development, laments environmental degradation and global warming, calling on all people of the world to take 'swift and unified global action'. <[https://en.wikipedia.org/wiki/Laudato\\_si%27](https://en.wikipedia.org/wiki/Laudato_si%27)>.

<sup>44</sup> See, for example, Evan Berry, 'Social Science Perspectives on Religion and Climate Change' (2016) 42(2) *Religious Studies Review* 77, 81. See also Pew Research Centre, 'Few Say Religion Shapes Immigration, Environment Views' (suggesting that only 6% regarded Religion as the biggest influence on views of Environmental Laws and Regulations) <<https://www.pewforum.org/2010/09/17/few-say-religion-shapes-immigration-environment-views/>>.

<sup>45</sup> Ian Barns, 'Can we re-imagine a good society after neoliberalism?' (2018) 49/50 *Arena Journal* 122, 144: 'overcoming the corrosive effects of neoliberalism and moving to a good society will need to deal with what are essentially religious problems'.

<sup>46</sup> *Ibid* 136–7.

<sup>47</sup> *Ibid* 137 (quoting Burity).

<sup>48</sup> See, for example, discussion (re Wendy Brown, Foucault) in Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso, 2019) 6–8.

<sup>49</sup> *Ibid* 11.

formulated ends ... [that] do not require positive obligations to others'.<sup>50</sup> This is consistent with the depiction of both *homo economicus* and *homo politicus* (below) and offers scant encouragement for collective and other-regarding impulses that might motivate climate change policy. Whyte also references an early (mid twentieth century) neoliberal claim to a socially conservative morality including 'family values, Christianity and "Western civilisation"'.<sup>51</sup>

Similarly Wendy Brown in her later book<sup>52</sup> (in which she seeks to correct omissions in her earlier critique<sup>53</sup> of neoliberalism) associates 'traditional morals' with neoliberalism and characterizes 'Hayekian neoliberalism [a]s a moral-political project',<sup>54</sup> though of a particular kind. In this later book Brown renders a revised and closer reading of Hayek's conception of neoliberalism<sup>55</sup> wherein markets and morality form the twin pillars of freedom and both require restraining the power of the state – what she calls a neoliberal 'moral-political' project that 'negat[es] the very idea of the social and radically restrict[s] the reach of democratic political power in nation-states'.<sup>56</sup> Her analysis serves to re-emphasize how neoliberal politics subverts any leadership role and legitimising authority for the state as a champion of social or public morality which might, for example, drive climate change reforms. She sees this diminution of the state (in its representative role in public morality and values) as further eroded in the shift to an individual, *private* (Christian and familial) morality and patriotism. This is important to the arguments made above for it doubles down on the 'dethronement of politics'<sup>57</sup> at the level of both the state and the community. Thus she seeks in the later book to remedy what she sees as 'neglect of the *moral* side of the neoliberal project',<sup>58</sup> both generally and in her own earlier book. Brown sees in neoliberalism (particularly from the political right in America) a shift to 'anti-democratic' politics as public values are eroded by a private, traditional religious and familial morality,<sup>59</sup> replacing 'a public, pluralistic, secular democratic order'.<sup>60</sup> The implication is that values of care to others

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<sup>50</sup> Ibid 12.

<sup>51</sup> Ibid 9.

<sup>52</sup> Wendy Brown, *In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West* (Columbia University Press, 2019).

<sup>53</sup> Brown (n 2).

<sup>54</sup> Brown (n 52) 12–13.

<sup>55</sup> See also Whyte (n 10) 156.

<sup>56</sup> Brown (n 52) 12.

<sup>57</sup> Ibid 55 (quoting Hayek).

<sup>58</sup> Ibid 20 (emphasis added).

<sup>59</sup> Ibid 116.

<sup>60</sup> Ibid 118.

are narrowed to include only family and close friends. This ‘privatization’ of morality, she says, complements neoliberal privatization in the economic sphere which she says is also ‘deeply subversive of democracy’.<sup>61</sup>

For present purposes the threat is to the *polis* (below), and the possibilities for public argument and consensus on moral and ethical issues that arguably need to drive climate change policy. If Brown is correct in her reading of present neoliberalism it suggests a narrowed conception of the social self as extending only as far as family but little beyond that to community, society and ultimately humanity. Without the latter it will likely be difficult to galvanize and motivate publics for a global (or even national) climate regime. Similarly if, as Whyte asserts, it is a traditional and conservative morality there will difficulty in meeting likely challenges to, for example, entrenched fossil-fuel capitalism or notions of self-sacrifice for absent and unknown others, even if the reconfigured neoliberal state were inclined to do so. So to the extent that neoliberalism does lead to a certain inward looking moral reordering as Brown and Whyte suggest, there are again apparently negative implications for outward looking climate change policies that are inclusive of a more widely conceived human community which includes temporal and spatial ‘others’ – future generations and present innocent and vulnerable ones.

More generally the neoliberal freedom sought is a negative one – freedom from state interference and whatever constraints it places on individual self-realisation. Indeed Hayek argued that ‘freedom is the mere absence of restraints’ and nowhere is this more true than in markets where ‘only the innumerable consumers, making their spontaneous choices, can reveal actual preferences’,<sup>62</sup> though (as argued above) those preferences are in turn manipulable and likely biased toward material, if not hedonistic, impulses. There appears to be little contemplation of what is gained (or lost) in this newly constituted individual beyond wealth accumulation itself.

As to a darker reading of neoliberal ‘freedom’ Polanyi pointed out that among the negative effects of freedom

are the freedom to exploit one’s fellows, or the freedom to make inordinate gains without commensurable service to the community, the freedom to keep technological inventions from

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<sup>61</sup> Ibid 115–116.

<sup>62</sup> Segal (n 4) 325.

being used for public benefit, or the freedom to profit from public calamities secretly engineered for private advantage.<sup>63</sup>

The implications for climate change policy are clear. Similar concerns inform Harvey's sceptical characterisation of neoliberalism as being about 'the restoration of class power'<sup>64</sup> and Klein's claims of exploitation of disasters (natural and otherwise) by modern capitalism<sup>65</sup> (Chapter Six).

But in terms of the central argument going to the field of individual autonomy, expanded by the withdrawal of the suffocating influence of the state, neoliberalism is presumed to be self-fulfilling through the individual's pursuit of freedom through markets. Friedman was not a philosopher or political theorist, and 'seemed [not] to grapple with the possible tensions among the values he cherished ... [i]n fact, he had little interest in wrangling with any of the fundamental philosophical issues within liberal thought, including the defense of individual freedom or material welfare as the highest ends ... he was an economist, not a political or moral philosopher'.<sup>66</sup>

Similarly F.A. Hayek in his influential book *The Road To Serfdom*<sup>67</sup> is motivated more by a fear of collectivism and potential totalitarianism<sup>68</sup> than by the fleshing out of the self-choosing individual. That is appropriate in that the point is to not dictate to individuals a collectivist (state mandated) notion of the good life – Kantian liberalism was similarly careful not to do so. Hayek celebrates 'respect for the individual man *qua* man, that is the recognition of his own views and tastes as supreme in his own sphere, *however narrowly that may be circumscribed*, and the belief that it is desirable that men should develop their own individual gifts and bents'.<sup>69</sup> Thus Brown characterises 'Hayek and his intellectual kin' as imagining an idealised individual as 'calculating, entrepreneurial, moral, and disciplined'.<sup>70</sup> Recall, however, that Whyte and Brown (above) do locate a 'traditional morality' in Hayek, going to religious and familial values.

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<sup>63</sup> Harvey (n 33) 36 (quoting Polanyi).

<sup>64</sup> Ibid generally Ch.1.

<sup>65</sup> Klein (n 36).

<sup>66</sup> William Ruger, *Milton Friedman* (Bloomsbury, 2011) 98–99.

<sup>67</sup> FA Hayek, *The Road To Serfdom* (Routledge & Kegan Paul, 1944).

<sup>68</sup> Ibid, for example, Ch. III, XIII.

<sup>69</sup> Ibid 11 (emphasis added).

<sup>70</sup> Wendy Brown, 'Neoliberalism's Frankenstein: Authoritarian Freedom in Twenty-First Century "Democracies"' (2018) 1(1) *Critical Times* 60, 75. For a general critique of Hayek see pp. 63–65.

Hayek asserts that the move away from a ‘rigidly organised hierarchic system’ to one ‘where men could at least attempt to shape their own life ... is closely associated with the growth of *commerce*’<sup>71</sup> – that is to say, that authentic individual freedom is rooted in economic relations. In the context of defending the notion that ‘almost everything can be had at a price’ he does reference ‘the higher values of life’ (namely ‘life and health, beauty and virtue, honour and peace of mind’) – not that all are self-concerned – but then asserts that ‘they can often be preserved only at considerable material cost, and that somebody must make the choice’.<sup>72</sup> These ‘higher values’ seem then to be subsumed in economic ones, and it is notable that none go to collective, communal values that might drive climate change policy. Writing in 1944 he complains that ‘[i]ndividualism has a bad name to-day and the term has come to be connected with egotism and selfishness’<sup>73</sup> (though he denies that this is a valid connection). But as noted the same criticism of selfish individualism can be levelled at theories of Kantian liberalism as well as the neoliberal subject *homo economicus*<sup>74</sup> which is the descendant of Hayek’s ambition for a market society.

More generally Hayek says that ‘our only chance at building a more decent world is that we continue to improve the general level of wealth’ and asserts this as a condition of democracy.<sup>75</sup> If ongoing accumulation is the *sine qua non* of democracy but also the fundamental driver of (fossil fuel based) climate change then there is a cognitive disconnect. Of course this is not a problem that Hayek could have been expected to anticipate, but then his descendants do not appear to have done so either – witness the apparent inadequacy of the present regime. As discussed above, the primacy of economic growth is still evident in neoliberal ideology. Not only is neoliberalism dismissive of the kind of collectivist values that surely need to drive an effective climate change response. It is also, according to Hayek, necessary that compounding economic growth continue lest democracy ‘crack’ – a decline in living standards, or even a plateau, would suffice to fatally undermine it.

Given the existential threats that appear likely under present (failing) climate change policy, and the challenge climate change presents to present economic policy in carbon-based

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<sup>71</sup> Hayek (n 69).

<sup>72</sup> Ibid 72.

<sup>73</sup> Ibid 10.

<sup>74</sup> Kendall (n 7) 11.

<sup>75</sup> Hayek (n 67) 156 (‘[t]he one thing modern democracy will not bear without cracking is the necessity of a substantial lowering of the standards of living in peace time or even prolonged stationariness of its economic conditions’).

economies, the logical implication of Hayek's claim – that compounding growth is a precondition of ongoing democracy – is that present economic and political arrangements are incommensurable with the reforms likely necessary to manage climate change. Again, present evidence suggests that to be the case. The crude logic is that unending and compounding economic growth must be unsustainable on a planet of finite resources and sink limits, albeit ameliorated to a degree by technological innovation. One scenario might be that markets may prove sufficiently resilient to encompass climate change impacts without necessarily undermining democratic politics – the possibility of 'disaster management'. This is considered in Chapter Six – environmental disasters may be re-imagined as security issues and as opportunities for 'efficient' (cost-effective) resolution via neoliberal markets, 'managed' by for-profit or public/private enterprises enabled by the state. Management of the disaster is framed in the language of business, the disaster is a consequence of inefficiency (the failure to incorporate environmental externalities), and the focus is on 'efficient' remedial action rather than the underlying causes. There are also new market opportunities in new products, processes and innovation – that is to say, new opportunities for accumulation. Thus in this scenario 'neoliberal capitalism both precipitates disasters and employs those same disasters ... as an opportunity to facilitate its expansion'.<sup>76</sup> Naomi Klein gives the example of the 2005 Hurricane Katrina response by neoliberal economists (including Milton Friedman) advocating, for example, 'mak[ing] the entire affected area a flat-tax free-enterprise zone ... an economic competitiveness zone', tax incentives, waivers of regulations, and the introduction of a voucher system for charter schools.<sup>77</sup>

On different grounds, as we have seen, Wendy Brown sees Hayek's neoliberalism as anti-democratic. He is suggesting that the market reforms fundamental to neoliberalism will provide the growth necessary to preserve democracy, but he is (unsurprisingly given the times in which he was writing) not sensitive to environmental limitations on endless growth. The failures to date of climate change policies suggest that is still the case – it is a central claim of this thesis that neoliberalism, for a variety of reasons including its growth imperative, is incommensurable with a plausible and efficacious climate change regime.

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<sup>76</sup> Robert Fletcher, 'Capitalizing on chaos: Climate change and disaster capitalism' (2012) 12(1/2) *ephemera: theory and politics in organization* 97, 97.

<sup>77</sup> Klein (n 65) 410.

Hayek also proposed a darker view of the discipline of markets. One's efforts through hard work and delayed gratification will not necessarily be rewarded in some merit-based sense; rather one will be rewarded according to one's 'usefulness' to others in an 'unplanned, spontaneous exchange of value for value'.<sup>78</sup> More cynically Hayek is said to advocate a 'false understanding' in directing citizens' attentions toward 'those circumstances that he can control as if they were the only ones that mattered';<sup>79</sup> that is to say, ignoring the 'external' contingencies that will in fact significantly determine 'usefulness' and therefore reward. Put simply, rewards will not necessarily flow from merit, hard work and delayed gratification and one needs to be 'educated falsely in order to achieve an end of which she is unaware'.<sup>80</sup> Whyte puts it more bluntly – that individuals are required to submit to the 'spontaneous order' of the market as a matter of *faith*.<sup>81</sup> Again there is irony here in that *homo economicus* is supposed to be a *rational* maximiser of self-interest. If that is so then the 'freedom' of the neoliberal subject must be less glibly assumed – in the sense that neoliberal subjects are held to be responsible for the consequences of their free choice, yet they are in turn controlled by the inscrutable vagaries of these same markets.<sup>82</sup>

The conclusion seems to be that these central theorists of neoliberal ideology gave little thought to the kind of individual who might emerge in their newly-freed and expanded markets. But given their fear of an oppressive collectivism narrowing the freedom of individuals to choose, it is ironic that the neoliberal realisation of their ambition takes the form of individuals cajoled, if not forced, into a competition of capital accumulation that surely compromises alternative (non-economic) visions of the good life and that requires a faith-based submission. The instrumental rationality of the economic was surely always going to marginalise the value-rationality aspects of the good life. Again, says Whyte, a consequence is the depoliticization of social life and of 'any collective political action that aims to establish and work towards collectively determined ends'<sup>83</sup> – the shrinking of the *polis* (considered below).

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<sup>78</sup> Segal (n 4) 326 (referencing Hayek).

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Whyte (n 10) 173 (original emphasis).

<sup>82</sup> Segal (n 4) 324 (referencing Wendy Brown).

<sup>83</sup> Whyte (n 10) 176.

Other writers have similarly expanded in general terms on the nature of the neoliberal subject. For example, neoliberalism is seen as a hegemonic discourse which acts on subjectivity by ‘installing in society a concept of [sic] human subject as autonomous, individualized, self-directing decision-making agent who becomes an entrepreneur of oneself; a human capital’.<sup>84</sup> In another view the neoliberal shift has been from ‘organised capitalism’ (referencing the Keynesian ‘command and control’ economy) to neoliberal hegemony, incorporating ‘a corresponding transformation in subjectivity’,<sup>85</sup> a new preferred self. This was famously made explicit by Thatcher, who said that:

it isn’t that I set out on economic policies; it’s that I set out really to change the approach, and changing the economics is the means of changing that approach. If you change the approach you really are after the heart and soul of the nation. *Economics are the method; the object is to change the heart and soul.*<sup>86</sup>

On the other hand, and notwithstanding the almost uniformly negative characterisations of neoliberalism in the literature, we ought to recall that deep structures are revisable and nor are they totalising. Even in neoliberal societies reflexive individuals will retain varying degrees of autonomy and agency. Other deep structures are also operating, sometimes in contradiction. Even the diminished neoliberal state remains a placeholder for certain collective values and a supplier of certain public goods and thereby derives a certain moral authority. The state as being emblematic of collective impulses might be seen as acknowledging a fundamental reality that the state of the individual is always and ultimately one of ‘vulnerability and precariousness’<sup>87</sup> – for example, future generations at risk from the response of present generations to climate change. So ‘actually existing’ neoliberalism will not perfectly conform to the model characterised by critics like Brown and Harvey.

But to conclude, the neoliberal ambition, it is said, ‘represented a scheme for reordering the social and a design for refashioning the conduct of the self’.<sup>88</sup> Writers on neoliberalism (including Brown) frequently reference Foucault’s 1978–79 lectures at the College de

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<sup>84</sup> Salman Türken et al, ‘Making Sense of Neoliberal Subjectivity: A Discourse Analysis of Media Language on Self-development’ (2016) 13(1) *Globalizations* 32, 33.

<sup>85</sup> McGuigan (n 9) 223.

<sup>86</sup> Margaret Thatcher, Interview (Sunday Times, May 1, 1981) <<https://www.margaretthatcher.org/document/104475>> (emphasis added).

<sup>87</sup> Massimo Pendenza and Vanessa Lamattina, ‘Rethinking Self-Responsibility: An Alternative Vision to the Neoliberal Concept of Freedom’ (2019) 63(1) *American Behavioural Scientist* 100, 105.

<sup>88</sup> McGuigan (n 9) 229.

France.<sup>89</sup> Elliott, for example, pushes the characterisation of neoliberalism as not merely economic policy, nor even as a formative ideology, but rather (echoing Hayek's 'false understanding' above) as

some sort of false consciousness giving agents an erroneous picture of material reality ... more than a delusional state of consciousness ... [it] has become ... a set of rigorous procedures and disciplinary practices governing individuals and institutions both from the 'inside' of personal consciousness and from the 'outside' in the form of social mores and political common sense.<sup>90</sup>

This is to characterise neoliberalism as an almost totalising deep structure such as to be taken (as suggested above) on faith.

So the justificatory argument for neoliberalism must be that although the neoliberal path offers no guarantees of even material success, and certainly not any semblance of equal (or even 'just' or merit-based) outcomes, or any form of distributional equity, or even a level playing field in the race of capital accumulation, it does claim to offer the possibility of an enhanced field of individual choice. This is not simply in the sense of choices made available by hoped-for material success, but also in the sense of lifeways that will be increasingly ordered and enhanced by personal, 'responsibilised' choices rather than by those imposed (even if altruistically) by government. Thus is the self 'condemned to freedom and lonely responsibilities'.<sup>91</sup>

### *C Evaluating the Neoliberal Subject*

It is widely accepted that neoliberalism 'transforms human beings themselves ... [i]t is incorporated into subjectivities and shapes how people understand themselves ... [i]t creates human beings who feel solely responsible for the conditions under which they live'<sup>92</sup> and 'each individual operates within a social imaginary according to which self-improvement is the underlying maxim'.<sup>93</sup> More generally, the social is said to have become individualized and neoliberalism is said to 'have replaced the ethics of social solidarity with a tendency to

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<sup>89</sup> Michel Foucault, *The birth of biopolitics : Lectures at the College de France, 1978–1979* (Palgrave Macmillan 2008) (Michel Senellart ed.; translated by Graham Burchell).

<sup>90</sup> Brian Elliott, *Natural Catastrophe: Climate Change and Neoliberal Governance* (Edinburgh University Press, 2016) 1–2.

<sup>91</sup> McGuigan (n 9) 234.

<sup>92</sup> K Schwiter, 'Neoliberal Subjectivity – difference, free choice and individualised responsibility in the life plans of young adults in Switzerland' (2013) 68 *Geographica Helvetica* 153, 153.

<sup>93</sup> Elliott (n 90) 8.

limit concern only to the self and one's significant others'.<sup>94</sup> This is the concern for the *polis* (below).

Typical descriptors of the neoliberal subject include 'self-reliance ... individualis[ed] responsibility ... an entrepreneurial self',<sup>95</sup> 'a free, autonomous, individualized, self-regulating actor ... [requiring] lifelong learning ... continual self-improvement ... governable via continual self-monitoring and self-disciplining'.<sup>96</sup> The neoliberal subject is not just an entrepreneur in economic life but also, and more importantly, of himself'.<sup>97</sup> She must be a 'mobile and flexible self' with a 'constant orientation to 'innovation''.<sup>98</sup> The language used is distinctive and telling. Whilst these characteristic descriptors are directly oriented to economic life, with growth of personal 'capital' and 'value' as the driving force,<sup>99</sup> descriptors such as 'mobile', 'flexible' and 'innovative' are nonetheless seductive in the sense of an imaginative and a dynamic that maximises possibilities in choosing one's life ways. It is no accident that the terminology is metaphorical in regard to the business enterprise itself with its need for branding, innovation, resilience in a competitive market, its fundamental drive for accumulation and market power. If, as one writer has put it, the corporation is effectively an institutional psychopath in that it exhibits many / most of the relevant characteristics,<sup>100</sup> then an obvious concern must be the tendency of neoliberal individuals in at least their economic lives to mimic those traits at the expense of others, in particular those others who are and will be damaged by climate change.

In neoliberal ideology to the extent that 'government' is said to interfere with and constrain those choices it is assumed to diminish us and our possibilities by weakening the critical element of personal responsibility. The basic argument runs that to the extent government acts at all it does so inefficiently and ineffectually by not deferring to a 'market' framework.

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<sup>94</sup> Salman Türken (n 84) 34.

<sup>95</sup> Schwiter (n 92) 153.

<sup>96</sup> Türken (n 84) 34.

<sup>97</sup> McGuigan (n 9) 229 (referencing Foucault).

<sup>98</sup> Ibid.

<sup>99</sup> Salman Türken (n 84) 34. See also, generally, Brown (n 2).

<sup>100</sup> See (law professor) Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press, 2004) 56–57. The characteristic tendencies of psychopaths which are said to play out similarly in business corporations are: to be singularly self-interested, to be irresponsible, to manipulate whatever it can, to be grandiose in asserting its superiority, to lack empathy, to display antisocial tendencies, to refuse to accept responsibility for its actions, to be unable to feel remorse, to relate to outsiders superficially. In short, corporations are said (at 161) to be 'self-interested to the point of psychopathy'. A relevant example would be the treatment of environment damage, such as that to the atmosphere in regard to climate change, as an 'externality' which corporations need not include in pricing decisions nor take any responsibility.

But not only is government inefficient, that is to say wasteful, in its interventions it also is said to diminish its subjects in a more profound sense. It does so by diminishing individual responsibility and accountability by seeking (for example, through redistributive policies) to achieve greater degrees of equality between its subjects and thereby to creating ‘men without chests’.<sup>101</sup> Worse, it is said to encroach on our self-imagined conceptions of the good life, the ultimate version of this threat being totalitarianism. The dead hand of the state is said to fall not only on markets but on individual citizens.

In looking beyond the narrow economic version of neoliberalism it is possible to imagine a more emancipatory version of free individuals of which neoliberal market ideology in its materialist form is really a subset, though neoliberalism asserts that it is only through unconstrained markets and a severely constrained state that this larger vision can be realised. In this ‘strong’ neoliberal version the individual ‘is morally obliged to engage in the self-realization project and develop a better version of herself to manage life’.<sup>102</sup> The idea seems to be that the cut and thrust of unconstrained market competition realises something fundamentally ‘human’, even ‘moral’, in us that an egalitarian-minded government cannot. It is our competitive instincts, ideally in some sense of self-realisation or self-transcendence, that are said to permit us to be fully ‘human’. To the extent that the state seeks to cosset us against the vicissitudes of life in this ceaseless competition with each other it is said by conservative critics to diminish us in our heroic struggles toward self-realisation and aspirations to spiritual and existential well-being.

So the neoliberal fear is that the state would mould us into creatures of conformity and mediocrity, diverting us from the pursuit of what Nietzsche calls our ‘proper destin[ies]’.<sup>103</sup>

Thus

[s]ociety and the State represent to [Nietzsche’s] mind not the consummation of rationality and justice, of ethics and philosophy, but only the embodiment of mediocrity and the temptation that has to be overcome before the individual can come into his own ... [t]he State ... prevents man from realizing himself.<sup>104</sup>

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<sup>101</sup> The reference is to a quote (‘We make men without chests and expect of them virtue and enterprise’) in CS Lewis, *The Abolition of Man* (Touchstone, 1996) 35–37.

<sup>102</sup> Türken (n 84) 34.

<sup>103</sup> Walter Kaufmann, *Nietzsche: Philosopher, Psychologist, Antichrist* (Princeton University Press, 1974 4<sup>th</sup> edit.) 158.

<sup>104</sup> *Ibid* 162–3. See also at 404–405 ‘equality is confused with conformity – as Nietzsche sees it – and it is taken to involve the renunciation of personal initiative and the demand for a general levelling. Men are losing the

Self-reliant individuals, it is said, can better realise their potential and a sense of dignity when left to their own devices.

In a modern context this is best captured by the vision of the state as levelling out inequality through re-distributive policies. Drawing on a tradition going back to Plato's conception of 'spiritedness'<sup>105</sup> this theme was famously reinvigorated by Fukuyama in respect of his 'last man' in history following the postulated ultimate triumph of liberal democratic ideology. This 'last man' is said to be rendered less than fully human by the equality fetishism of liberal democracy<sup>106</sup> which it is said suffocates 'a side of the human personality that deliberately seeks out struggle, danger, risk, and daring, and will this side not remain unfulfilled by the 'peace and prosperity' of contemporary liberal democracy?'<sup>107</sup> This seems (on a kindest reading) to be the emancipatory aspect of neoliberal ambition for its subjects – presumably the promise, or at least the prospect, of prosperity and emancipation but not the peace which suffocates.

But again it must be emphasised that in the more limited vision of individuals as economic units there is little claim in neoliberalism to anything beyond that – the dream seems to be that these economic units will once again develop the 'chests' which were diminished by the intrusive state. When Fukuyama asserts that '[l]iberal democracy produced 'men without chests', composed of desire and reason but lacking *thymos*, clever at finding new ways to satisfy a host of petty wants through the calculation of long-term self-interest',<sup>108</sup> he might equally be speaking to the materialist *homo economicus* of neoliberalism. Taking *thymos* to represent the human desire for recognition, that is to say recognition of some superior status as opposed to mere equality with others, there seems to be little or no claim to anything more than the freeing-up of individual economic and materialist desire, presumably in the competitive pursuit of the 'petty wants' and 'long-term self-interest' that Fukuyama finds abhorrent in liberal democracy.

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ambition to be equally excellent, which involves as the surest means the desire to excel one another in continued competition, and they are becoming resigned to being equally mediocre'. See also, for example, the influential novels (*Atlas Shrugged*, *The Fountainhead*) of Ayn Rand; for evidence of their popularity and longevity (<[https://en.wikipedia.org/wiki/Ayn\\_Rand](https://en.wikipedia.org/wiki/Ayn_Rand)>).

<sup>105</sup> Francis Fukuyama, *The End of History and The Last Man* (The Free Press, 1992) xvi.

<sup>106</sup> See, for example, *Ibid* xx.

<sup>107</sup> *Ibid* xxiii.

<sup>108</sup> *Ibid* xxii.

In practice, notwithstanding the heroic and idealized vision of fully actualising individuals, free of the dead hand of the state, it is not often articulated in the neoliberal literature itself – perhaps it was most clearly done so in the novels of Ayn Rand, an iconic figure for many neoliberals.<sup>109</sup> The academic literature tends to focus on general economic claims<sup>110</sup> and the valorisation of markets,<sup>111</sup> or paeans to freedom<sup>112</sup> rather than a fleshed-out characterisation of the ideal neoliberal subject.

The idealised neoliberal subject tends to be limited in the literature to broad claims of enhanced personal freedom enabled by the withdrawal of the intrusive state. The relevant personal characteristics are typically those of resilience and adaptivity, being necessary for success in the face of the vagaries of markets.<sup>113</sup> It is the ‘enterprised selves’ who must compete for capital accumulation – for them ‘almost every act becomes an investable advantage in a competitive world’.<sup>114</sup> In that sense neoliberal individuals need also to practice reflexivity in considering how to ‘fashion’ themselves for the competition of the neoliberal world.<sup>115</sup>

But if the ‘idealised subject’ is ‘the product of political, societal, and organisational discourses’ then even the major philosophical forebears of neoliberalism like Friedman (as noted above) and Hayek appear to have little or no substantive conception of what kind of subject might emerge from neoliberal discourses. Hayek has said that ‘the term social justice

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<sup>109</sup> See, for example, Ayn Rand, *The Fountainhead* (Bobbs-Merrill, 1943); Ayn Rand, *Atlas Shrugged* (Random House, 1957). For a list of influential adherents of her individualist philosophy (including, for example, Alan Greenspan, long time Chair of the US Federal Reserve; Malcolm Fraser, former Australian Prime Minister; Associate Justice Clarence Thomas, US Supreme Court), see <[https://en.wikipedia.org/wiki/List\\_of\\_people\\_influenced\\_by\\_Ayn\\_Rand](https://en.wikipedia.org/wiki/List_of_people_influenced_by_Ayn_Rand)>.

<sup>110</sup> For example, Gérard Duménil and Dominique Lévy, (2001) 8(4) ‘Costs and benefits of neoliberalism. A class analysis’ *Review of International Political Economy* 578–607; E Huber and F Solt, ‘Successes and Failures of Neoliberalism’ (2004) 39(3) *Latin American Research Review* 150–164 (referring (at 151) to the neoliberal model as ‘growth, economic stability/predictability/absence of volatility, poverty, inequality and quality of democracy’ – there is no reference to images of a neoliberal subject).

<sup>111</sup> For example, Sam Bowman, ‘In Defence of Neoliberalism’ (2017) 33(3) *Policy* 75 (note, at 79, the author volunteers the thought that ‘I would like to raise the rather heretical question of whether democracy is something of value in itself ... it seems to me mistaken – and possibly damaging – to set democracy up as something that is valuable for its own sake’).

<sup>112</sup> For example, J Shearmur, ‘In Defense of Neoliberalism’ (1992) 3(3) *Journal of Democracy* 75–81.

<sup>113</sup> For example, Stephanie Wakefield, ‘Review: David Chandler and Julian Reid, *The Neoliberal Subject: Resilience, Adaptation and Vulnerability* (Bowman & Littlefield International, 2016) *Society and Space* (May 30, 2017). See also McGuigan (n 9) 232: ([t]he neoliberal self ... is consistent with ‘the recasting of identity in terms of flexibility, adaptability and instant transformation’; at 234 ‘everyone is abandoned to their fate like an angst-ridden French philosopher’).

<sup>114</sup> Elizabeth Houghton, ‘Becoming a neoliberal subject’ (2019) 19(3) *Ephemera: theory and politics in organization* 615, 621.

<sup>115</sup> *Ibid* 622.

... has no meaning for a society of free people ... I have to say that I cannot think socially because I do not understand what that means'.<sup>116</sup> He seems to offer a kind of free neoliberal subject-without-content. On the other hand he has no doubt as to the reach of the state into the social, for example, asserting that

[t]he authority directing all economic activity would control not merely that part of our lives which is concerned with inferior things; it would control the allocation of the limited means for all our ends ... whoever controls all economic activity controls the means for all our ends ... which ends are to be served, which values are to be rated higher and which lower, in short, what men (sic) should believe and strive for ... economic planning [by the state] would involve direction of almost the whole of our life.<sup>117</sup>

Again ironically we have seen precisely the same claims as to control of all aspects of individual lives made by commentators on neoliberalism like Brown, Harvey and Whyte in their critiques of 'actually-existing' neoliberalism. The problem here is that Hayek, like Friedman, appears to have no vision of the kind of individual citizen who would emerge from this world of unconstrained market forces. He does envisage 'civilising forces of commerce'<sup>118</sup> but does not spell out an ideal individual neoliberal other than to celebrate the fact of her new freedom. Ironically this claimed freedom has arguably produced a perverse outcome in 'neoliberalism's nihilism and annihilation of human agency'.<sup>119</sup> One critic sees this as imaging an 'ideal neoliberal subject [who] seeks to make an enterprise of their own life in order to fuel the consumption that will produce their own satisfaction'.<sup>120</sup> If this singularly materialist image of the individual neoliberal subject has any credence beyond caricature then it is of great concern in the context of climate change, going as it does to an unsustainable materialism and a self-regard that eschews commitment to other-oriented common causes.

Returning from this micro-view of the neoliberal subject to a macro-view of neoliberal economic ordering, the neoliberal prescription for the state is not just to diminish its roles in people's lives in order to remove this constraint on our ability to be 'fully human', but rather to co-opt the state into the market itself. Neoliberals want not just to set the market against the state but 'to treat the state and all its doings *as* a marketplace',<sup>121</sup> indeed to have the state

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<sup>116</sup> Quoted in Christian Stark, 'The neoliberal ideology, its contradictions, the consequences and challenges for social work' (2018) 25 *Annual of Social Work* 39, 43.

<sup>117</sup> Hayek (n 67) 68–69.

<sup>118</sup> *Ibid* 110.

<sup>119</sup> Wakefield (n 113) 2.

<sup>120</sup> Elizabeth Houghton (n 114) 623.

<sup>121</sup> McGuigan (n 9) 229 (referencing Foucault) (emphasis added).

facilitate the conditions for markets to operate.<sup>122</sup> The emphasis as we have seen is limited to freedom for ‘economic man’ (*homo economicus*) rather than any hoped-for fully self-actualising free individual. In this more limited conception the state is seen as having a legitimate role in facilitating a legal framework within which markets can operate, for example, by enforcing property rights and contractual relations, and as well it can also ‘create’ new markets, for example, in formerly ‘government’ goods like utilities, health care, and education as well as in so-called public–private partnerships and in emerging markets of information and communications technology.

Harvey has a more sceptical view:

[i]t has been part of the genius of neoliberal theory to provide a benevolent mask full of wonderful sounding words like freedom, liberty, choice, and rights, to hide the grim realities of the restoration or reconstitution of naked class power, locally as well as transnationally, but most particularly in the main financial centres of global capitalism.<sup>123</sup>

Simply put, freedom is narrowed to mean the neoliberal debasement of the concept of freedom ‘into a mere advocacy of free enterprise’<sup>124</sup> – ‘freedom’ for Harvey means ‘entrepreneurial freedom’. In such readings neoliberalism is seen as a ‘false consciousness’ wherein underlying realities – for example, for Harvey the exercise of ‘naked class power’ – are concealed.<sup>125</sup>

Brown has a similarly sceptical view, not only of *homo economicus* but of neoliberalism’s relation to democracy itself. For her,

[m]ore than merely saturating the meaning or content of democracy with market values, neoliberalism assaults the principles, practices, cultures, subjects, and institutions of democracy ... more than merely cutting away the flesh of liberal democracy, neoliberalism also cauterizes democracy’s more radical expressions.<sup>126</sup>

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<sup>122</sup> Jason Read, ‘A Genealogy of Homo-Economicus: Neoliberalism and the Production of Subjectivity’ (2009) 6 *Foucault Studies* 25, 28 (‘competition is understood by the neo-liberals of the twentieth century to be an *artificial* relation that must be protected against the tendency for markets to form monopolies and interventions by the state. Competition necessitates a constant intervention on the part of the state, not on the market but on the *conditions* of the market’) (emphasis added).

<sup>123</sup> Harvey (n 33) 119.

<sup>124</sup> *Ibid* 183.

<sup>125</sup> Robert Fletcher, ‘Taking the Chocolate Laxative: Why Neoliberal Conservation “Fails Forward”’ in Bram Büscher, Wolfram Dressler and Robert Fletcher, *Nature Inc: Environmental Conservation in the Neoliberal Age* (University of Arizona Press, 2014) 94.

<sup>126</sup> Brown (n 2) 9.

She sees *homo politicus*, including ‘political contestation about broad principles organizing and directing the polity’, as being displaced by *homo economicus*, thereby replacing ‘a political lexicon with a market lexicon’.<sup>127</sup> That is not to say that a democratic utopia has been lost, for liberal democracy was never ‘uncontaminated by capitalism’, but rather that ‘when market values become the only values ... liberal democracy is fully transformed into market democracy’ and the ability of *homo politicus* to limit and critique ‘capitalist productions of value and market distributions’ is lost.<sup>128</sup> So it is important to understand this erosion of *homo politicus* since it is the terrain upon which climate change struggles will be waged. It is tempting to see this as a Tragedy of the Commons scenario wherein private market actors are incentivised to exploit the commons (in this case the atmosphere) at the expense of a collective interest in preserving the commons. The absence or diminution of a robust *polis* threatens collective voices and democratic values. As well, as will be discussed in Chapter Six, market actors may even be in a position to exploit the impacts of climate change via what Klein calls ‘disaster capitalism’.<sup>129</sup>

But before turning to *homo politicus* it should be noted that the analysis of neoliberalism so far suggests an ideology which appears to fail on its own terms. In terms of material prosperity (measured by GDP growth) it has not matched that of post-WWII Keynesian arrangements.<sup>130</sup> On the contrary, according to both Brown and Harvey, there seems to be no evidence that the neoliberal project has succeeded in any aspect other than wealth and income re-distribution toward a privileged class (indeed Harvey sees this as the very ambition of neoliberalism). Similarly Whyte notes that ‘Hayek struggles to explain why the unpredictable and incomprehensible results of the spontaneous order are superior to the results of deliberate human planning’.<sup>131</sup> Similarly and more fundamentally it is said that

[d]espite its nearly complete triumph over global political power, it is increasingly clear that neoliberalism does not carry over either empirical or historical support for its position that markets are the superior social form and economic activity the best and most desirable expression of human freedom.<sup>132</sup>

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<sup>127</sup> Ibid 207.

<sup>128</sup> Ibid 208.

<sup>129</sup> Klein (n 65) Part 5.

<sup>130</sup> See, for example, <[https://www.imf.org/~media/Websites/IMF/imported.../ft/.../\\_chapter5pdf.ashx](https://www.imf.org/~media/Websites/IMF/imported.../ft/.../_chapter5pdf.ashx)> at 154, 156.

<sup>131</sup> Whyte (n 10) 163.

<sup>132</sup> Joshua Ramey, ‘Neoliberalism as a political theology of chance: the politics of divination’ 3 <<https://www.nature.com/articles/palcomms201539>>.

This is a damning claim, for if neoliberalism cannot on the evidence demonstrate superior economic performance, and if the neoliberal subject is not in fact emancipated as social and political entity (per the discussion above), then the suspicion must indeed be that as Harvey asserts it is first and foremost a *political* project masquerading as something else.

In the context of climate change policy the discouraging implication is that ‘[t]he value system of neoliberalism, which has since become entrenched in global mainstream discourse, holds that humans are individualistic, selfish, calculating materialists’.<sup>133</sup> It is tempting to see a kind of Hobbesian world of endless competition between ‘enterprised’ individuals in which ‘[t]he free market generates a form of Darwinian selection: the survival of the competitive’<sup>134</sup> – the neoliberal self must be ‘selfishly resourceful and fit in order to survive under social-Darwinian conditions’.<sup>135</sup> The weakening (or reconfiguration) of the state is accompanied by individual relations between citizens founded on competition and accumulation, a move toward an economic ‘war of all against all’ in which individuals submit less to the power of a sovereign state than to the authority of markets.

This does not present an image of citizens moved to argue and act on moral and ethical grounds for a just distribution of mitigation and adaptation measures which would support an efficacious climate change regime. The sacrifice of present material comforts for the wellbeing of absent others (spatial and temporal) seems unlikely to be a compelling motivation and political elites are well advised to recognize this.

The argument thus runs that neoliberalism constructs a new model of economic subjectivity but (as Harvey et al claim) it cannot be justified on its own terms as a project of efficient wealth accumulation. Rather neoliberalism is re-characterised as a fundamentally *political* project. If an other-oriented neoliberal subject seems unlikely then how might this in turn shape prospects for any collectivist sentiment to power climate change policy? If the *polis* is a particular version of the human community wherein it seeks to identify and pursue common purpose then does neoliberalism reconfigure *homo politicus* as a complement to *homo economicus*, and with what implications for climate change?

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<sup>133</sup> <<https://www.opendemocracy.net/en/transformation/coronavirus-spells-the-end-of-the-neoliberal-era-whats-next/>>.

<sup>134</sup> Stark (n 116) 43.

<sup>135</sup> McGuigan (n 9) 236.

## II NEOLIBERAL POLITICS – *HOMO POLITICUS*

### *A The Practice of Politics in Neoliberalism*

The recognition and understanding of neoliberalism as a *political* rather than merely economic practice is crucial.<sup>136</sup> Whilst the pre-neoliberal Keynesian model reserved a space for an activist, even intrusive and paternalistic, state providing public goods, undertaking infrastructure projects, managing essential services, underwriting rights as well as maintaining an economic framework, and providing leadership on issues requiring collective resolution (such as risk assessment of climate change), it nonetheless remained at a certain distance and separation from civil society. But at least it undertook to provide certain public goods and services and reserved for itself via fiscal and tax policies a role in directing the economy, if necessary in tension with markets. That could have included, for example, a reorientation away from fossil-fuel driven capitalism via sponsorship of alternative energy sources, for example, by carbon pricing, subsidies, direction of technology, and so on. It might also have provided leadership in making civil society aware of and educated about the evidence for climate change and the risks involved. But those options are foreshortened under a neoliberal politics that eschews such roles for the state and encourages an individualistic civil society whose gaze is diverted to the personal and economic. The consequences of this neoliberal version of politics are evident in the failure to devise plausible and efficacious responses to a climate change problem that happened to become manifest at the same time as an hegemonic neoliberalism (Chapters Two and Three).

Civil society,<sup>137</sup> the public sphere, had earlier been seen as in a sense ‘natural’, ‘spontaneous or naturally self-producing’, in Habermasian terms embodying the ‘natural virtues of the lifeworld’.<sup>138</sup> Furthermore there was consensus that ‘the ultimate ends of society and of life, were established in the non-economic sphere’, conceived as, for example, ‘a polis, a civil sphere or a kind of family’.<sup>139</sup> In this image of the social ‘questions of value are resolved

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<sup>136</sup> See, for example, Kendall (n 7) 2 (‘as an economic practice, neoliberalism is not especially innovative, yet as a *political* practice, it is extremely innovative’); Harvey (n 33) 2 (‘[n]eoliberalism is in the first instance a theory of *political* economic practices’) (emphasis added).

<sup>137</sup> According to one definition civil society ‘refers to that sector of private associations relatively autonomous from the state and economy, which spring from the everyday lives and activities of communities of interest’ (Mark Olssen, ‘Understanding the Mechanisms of Neoliberal Control: Lifelong Learning, flexibility and Knowledge Capitalism’ (2006) 25(3) *International Journal of Lifelong Education* (2006) 213, 228.

<sup>138</sup> Kendall (n 7) 5.

<sup>139</sup> Metcalf (n 25).

politically and democratically, not economically – through moral reflection and public deliberation’.<sup>140</sup> In that sense ‘politics’ is taken here to include both the broad sense of political behaviour in a wide range of social and institutional settings as well as the narrower sense of the formal institutions of government and state practice’.<sup>141</sup> In particular ‘*politics is an attempt to maximize one’s value preferences (to achieve one’s goals) in various arenas by use of relevant available resources, in competition with others and their resources*’.<sup>142</sup> It is in such a domain that difficult and contested ethical and moral questions about, for example, intergenerational obligations that arise in regard to climate change can and ought to be argued. The concern is obvious – that in a neoliberal politics those value preferences will orient inward to the self and to the economic, not to the ‘other’ and the moral.

Beyond its celebration of markets neoliberalism, as we have seen, seeks to actively reconstitute the social world through its construction of *homo economicus*. It intrudes as well into ‘social relations ... ways of life and thought ... and habits of the heart’.<sup>143</sup> More than merely a set of *economic* policies Brown conceptualises neoliberalism as

a normative order of reason developed over three decades into a widely and deeply disseminated governing rationality, [it] transmogrifies every human domain and endeavour, along with humans themselves, according to a specific image of the economic ... [a]ll conduct is economic conduct; all spheres of existence are framed and measured by economic terms and metrics.<sup>144</sup>

That is to say, a deep structure of thought permeating all the routines of our economic, political and social arrangements.

We have seen how neoliberalism reconceives the role of the state and how it re-imagines the individual subject as ‘social’ in singularly economic terms. But how does it impact the ‘political’, read as the propensity and opportunity for citizens to engage with and argue matters of common concern, the arrangements of their common life? The question is important because there are aspects of life, indeed of any reasoned appreciation of the good

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<sup>140</sup> Ibid

<sup>141</sup> See, for example, Earl R Kruschke, ‘Toward a Brief Formulation of a Definition of Politics’ (1973) 48(2) *Social Science* 93, 93–94.

<sup>142</sup> Ibid 94–95 (original emphasis).

<sup>143</sup> Harvey (n 33) 3. See also, for example, Gill (n 30) 409–410: ‘Commercialisation has configured more aspects of family life, religious practices, leisure pursuits, and aspects of nature ... aspects of life that had been viewed as inalienable ... [s]ocial interaction, work patterns, and leisure become increasingly monetised, marketised, and abstracted’.

<sup>144</sup> Brown (n 2) 9.

life, that cannot be realised individually but only through association with fellow citizens. One such would be the ethically charged question of responsibility to future generations and geographically distant innocents for climate change impacts which can reasonably be anticipated and alleviated by present publics.

In her discussion of *homo politicus* Brown characterises the ‘fundamentally political’ as:

[the] *substance* and legitimacy of whatever democracy might mean beyond securing the individual provisioning of individual ends ... includ[ing] political equality and freedom, representation, popular sovereignty, and deliberation and judgment about the public good and the common ... living together in a deliberately governed fashion, to self-rule in a settled association that comprises yet exceeds basic needs, and to the location of human freedom and human perfectibility in political life.<sup>145</sup>

Critics of neoliberalism argue that it is the loss of *homo politicus* – of ‘a critically reflective political life’<sup>146</sup> – to the dominant *homo economicus* that is the price of neoliberalism. Brown argues that it is within the *polis* that we

realize and develop our distinctive capacities for association, speech, law, action, moral judgment, and ethics ... oral reflection, deliberation, and expression ... moral reflection and association making – these are the qualities that generate our politicalness ... linguistically conveyed moral judgments permit humans to order and govern ... according to deliberations about the good.<sup>147</sup>

We will see (below) that Brown as well locates a strong anti-democratic strain in neoliberalism.

In similar terms the *polis* is described by others as ‘the manifestation of mutual consent, rational persuasion and pluralistic action that collectively disrupts the causal chain of a problem ... [it] can dramatically transfigure political landscapes and the moral topographies of society at local, regional and global scales’.<sup>148</sup> For Koskenniemi, ‘[i]n the *polis* we constitute ourselves, not only as social beings, but also as beings equally entitled to bring our Utopias to bear in the organization of social life’.<sup>149</sup> For Elliott, ‘[a]ccording to the neoliberal

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<sup>145</sup> Ibid 87.

<sup>146</sup> Bernard Dunne, ‘The Historical Significance and Political Potential of Environmental Impact Legislation’ in Nicole Rogers (ed), *Green Paradigms and the Law* (Southern Cross University Press, 1998) 32, 64.

<sup>147</sup> Brown (n 2) 88.

<sup>148</sup> Charles Travis and Poul Holm, ‘Lessons for the Anthropocene from the recent past: Tobacco use, HIV/AIDS, and social transformation’ (2017) 156 *Global and Planetary Change* 167, 168–9 (referencing Arendt).

<sup>149</sup> Martti Koskenniemi, ‘The Wonderful Artificiality of States’ (1994) 88 *American Society of International Law Proceedings* 22, 29.

perspective, collaboration and cooperation are best seen through the lens of mutual competitiveness'<sup>150</sup> – the antithesis of a collective impulse. From the discussion above this is said to be the case for individual neoliberal subjects but (in Chapter Five) also in the global order of states – for example, even the state-constraining rules of international financial and trading institutions like the World Trade Organisation, the World Bank and International Monetary Fund are oriented to explicitly neoliberal practices of deregulation, fiscal austerity, privatisation and opening up of markets to free competition.

But, per Koskenniemi above, we need a robust *polis* for debate and reasoned argument about climate change policy given its complexity, reach and dire prospects for all levels of society everywhere now and in the future. The timing, however, is tragic for as we have seen 'neoliberal economics [has] led to hyper-individualist, market fundamentalist, incremental and atomistic approaches ... rather than promoting political action as engaged citizens'.<sup>151</sup> This erosion of the *polis* under neoliberalism, consciously or as collateral damage from an enlivened economic individualism, surely bodes ill for collective action on a context-challenging issue like climate change.

There is a darker view. It may be that a diminution of the *polis* is not necessarily merely collateral damage from the ascendance of neoliberalism. According to Harvey '[a] contradiction arises between a seductive but alienating possessive individualism on the one hand and the desire for a meaningful collective life on the other' and '[f]aced with social movements that seek collective interventions ... the neoliberal state is itself forced to intervene, sometimes repressively'.<sup>152</sup> Thus collectivist interventions to achieve common ends – for example, quantitative limits to states' greenhouse gas emissions to forestall global climate change threats – are apt to be viewed with hostility by neoliberals where there is an intrusive and destabilizing effect on market dynamics, as is inevitable with a 'super-wicked' problem like climate change. Thus Hamilton notes the 'broader *anti-collective* political philosophy underpinning [neoliberalism]'.<sup>153</sup> Harvey warns as well that 'the drive towards

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<sup>150</sup> Elliott (n 90) 25.

<sup>151</sup> Jem Bendell, 'Deep Adaptation: A Map for Navigating Climate Tragedy' *IFLAS Occasional Paper #2* (July 27, 2018) <<http://www.lifeworth.com/deepadaptation.pdf>>.

<sup>152</sup> Harvey (n 33) 69.

<sup>153</sup> Clive Hamilton, *The freedom paradox: Towards a post-secular ethics* (Allen & Unwin, 2008) 25 (emphasis added).

market freedoms and the commodification of everything can all too easily run amok and produce social incoherence'.<sup>154</sup> Klein too notes that

we are products of our age and of a dominant ideological project ... [o]ne that too often has taught us to see ourselves as little more than singular, gratification-seeking units, out to maximise our narrow advantage, while simultaneously severing so many of us from the broader communities whose pooled skills are capable of solving problems big and small.<sup>155</sup>

Similarly, for Brown '[neoliberalism's] sole political significance is negative – flourishing where politics and especially government are absent'.<sup>156</sup>

Thus the possibility of argument about collective goods in a neoliberal public of capital accumulating individuals is made still more difficult by the diminution of the neoliberal state as a force for provoking and facilitating debate about the public goods which are or were the business of government. Further, democratic argument may give rise to hostile, market-threatening hard decisions which reflect a collectivist, that is to say democratic, will. The neoliberal state is constrained in making hard decisions which threaten or de-stabilize that which the state now serves to legitimate – the market. Climate change represents just such a challenge to the present order. Brown goes further in claiming that neoliberal economic privatization 'is deeply subversive of democracy; it generates inequality, exclusion, private ownership of the commons, plutocracy, and a profoundly dimmed democratic imaginary'.<sup>157</sup> Of particular note for present purposes is that Brown concurs (with Sluga) that what is lost is 'any concern for others ... *in particular the compact between generations* on which our entire social order has rested so far'.<sup>158</sup> Social ties and obligations are, she claims, 'thinned or ruptured' in neoliberal culture.<sup>159</sup> Again there are profound implications for collective debate and consensus about, for example, the 'compact between generations' which climate change issues threaten to disrupt or indeed has likely already ruptured. Recall the concern of one author that present generations might choose to *increase* greenhouse gas emissions in order to resource present adaption efforts – this would worsen emissions for future generations and perhaps even provoke an 'intergenerational arms race'.<sup>160</sup>

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<sup>154</sup> Harvey (n 33) 75.

<sup>155</sup> Naomi Klein, *This Changes Everything: Capitalism vs The Climate* (Simon & Schuster, 2014) 460.

<sup>156</sup> Brown (n 70) 62.

<sup>157</sup> Ibid 66. See also a more detailed deconstruction of neoliberalism as anti-democratic in Brown (n 52).

<sup>158</sup> Brown (n 70) 71 (emphasis added).

<sup>159</sup> Ibid 75.

<sup>160</sup> Stephen M Gardiner, 'Saved by Disaster? Abrupt Climate Change, Political Inertia, and the Possibility of an Intergenerational Arms Race' (2009) 40(2) *Journal of Social Philosophy* 140, 151.

States are ‘subordinated to the market, govern for the market, and gain or lose legitimacy according to the market’s vicissitudes’.<sup>161</sup> The state’s role is one of enabling the free play of market mechanisms – for example, in the introduction of private health care in formerly state-sponsored public health care systems, in the manner of allocating funding for education, in the privatization of public utilities such as energy, in the privatization of other government functions such as prison administration, in the provision and maintenance of infrastructure such as roads and railways. Such examples implicate not only economic and efficiency concerns but also the expression of public and collective responsibilities and the values associated with them – for example, normative notions of fairness and equality in access to health care and education. Once privatised or at best ‘managed’ in regimes of ‘governance’ those values tend to evaporate in the metrics of instrumental rationality and the world of benchmarks and best practice (and the values immanent within them) discussed above. Thus the *polis* as a forum for the debate and realisation of collective values and responsibilities and obligations, as well as rights, is diminished.

Similarly as we have seen the neoliberal citizen-subject is reduced to and constituted by *homo economicus*, again reflecting a paradoxical diminution of the freedom supposed to be enhanced by the reduced role of the state in people’s lives. It was on grounds of ‘freedom’ and the promise of enhanced wealth accumulation that the neoliberal project was rationalised and justified to national publics – at least in those democratic societies in which ‘freedom’ is a term of powerful cultural resonance. In other states force was necessary.<sup>162</sup> On the one hand, individual subjects are freed up to pursue income and capital accumulation in the absence of stultifying and inefficient state interference. Individuals can (to the extent they have the necessary resources) buy private health insurance, they can choose schools, universities and courses newly designed for maximising possibilities for their own ‘brand’ enhancement and capital accumulation, they can cheaply rent transportation and food production and delivery, they can choose from a plethora of energy suppliers, they must make their own provision for a comfortable retirement. In this field of economic liberation individuals are now responsabilised and ‘emancipated from all concerns with and regulation by the social, the political, the common, or the collective’.<sup>163</sup> Thus the individual is freed

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<sup>161</sup> Brown (n 2) 108.

<sup>162</sup> See, for example, Harvey (n 33) 40; Brown (n 2) 20.

<sup>163</sup> Brown (n 2) 108.

from an intrusive and meddling state but also from other values from which they might find sustenance, comfort, identity and purpose, and collective direction. The new ‘market-instrumental rationality become[s] the dominant rationality organizing and constraining the life of the neoliberal subject’<sup>164</sup> with a corollary loss of freedom except for the economic and instrumental. In the name of economic freedom sovereignty is lost from the neoliberal state, which now chooses to conform to the requirements and logic of markets, just as individual sovereignty is now narrowed to economics. The contrasting image of a pre-neoliberal subject is for Harvey:

Individuals ... as persons of character, as ... embedded in networks of social relations and socialized in various ways, as physical beings identifiable by certain characteristics ... who have accumulated various skills ... and tastes ... and as living beings endowed with dreams, desires, ambitions, hopes, doubts, and fears.<sup>165</sup>

Any leadership or representative role for the state in public morality –including collective obligations toward future generations – is devolved (according to Brown and Whyte) to the private, individual morality of religion and family. Even in earlier forms of the liberal democratic state ‘freedom conceived minimally as a self-rule and more robustly as participation in rule by the *demos* was fundamental to political legitimacy’.<sup>166</sup> Now that legitimacy is rendered moot as ‘both state and citizen ... are converted, in identity and conduct, from figures of political sovereignty to figures of financialized firms ... [n]o longer are citizens most importantly constituent elements of sovereignty, members of publics, or even bearers of rights’.<sup>167</sup> There is a reorientation of ‘the subject to itself, and of the state to the citizen’, which results in ‘the dramatic curtailment of public values, public goods, and popular participation in political life’<sup>168</sup> – again, the *sine qua non* for reaching consensus on climate change action. The alternative to the public must be the rule of the private, particularly economic privates (enabled by state sponsorship) with powerful biases toward conducting business-as-usual (Chapter Six).

More generally neoliberalism is said by Brown and Harvey to be ‘profoundly suspicious of democracy’ since majority rule (‘the tyranny of the majority’) in Hayek’s view threatens individual freedoms.<sup>169</sup> Rather experts and elites are to be preferred in regimes of

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<sup>164</sup> Ibid.

<sup>165</sup> Harvey (n 33) 167.

<sup>166</sup> Brown (n 2) 109.

<sup>167</sup> Ibid 109–110.

<sup>168</sup> Ibid 110.

<sup>169</sup> Harvey (n 33) 66. For a more detailed critique of neoliberalism’s anti-democratic strain see Brown (n 52).

governance. Harvey, for example, characterises the neoliberal agenda as one of ‘elite governance, mistrust of democracy, and the maintenance of market freedoms’.<sup>170</sup> The underlying assumption is that optimal opportunity for capital accumulation is in fact the *raison d’être* of the neoliberal subject, that humans are ultimately and only concerned for personal material well-being.

Of great concern must be the claim that neoliberalism’s *homo economicus* is said to be not ‘fundamentally political, loving, religious, ethical, social, moral, tribal, or something else’<sup>171</sup> but rather embodies ‘a perspective of the world that is ahistorical, economic, materialistic, ‘me-oriented’, short-termist, and ecologically myopic’.<sup>172</sup> In such descriptors there appears the very antithesis of other-regarding values and morality which must motivate climate change policies.

At worst, says Harvey, there is a danger of disorder from the ‘anarchy of the market, of competition, and of unbridled individualism ... a breakdown of all bonds of solidarity and a condition verging on social anarchy and nihilism’.<sup>173</sup> This alarming image is profoundly at odds with that of other-oriented citizens voluntarily and pro-actively taking account of the welfare of future collectives or present innocent victims of climate change.

Note again that the language of neoliberal governance presents as benign, even comforting – ‘participation, consensus, accountability, effectiveness, efficiency, equitability, inclusiveness, and following the rule of law’.<sup>174</sup> But, says Brown, this move to ‘decentered and devolved power’ in governance substitutes ‘consensus-oriented policy formation and implementation for the overt exercise of authority and power through law making and policing’.<sup>175</sup> This does not sound like such a bad thing and indeed hints at a more participatory democracy. But the consequence is to dissolve the ‘structural stratifications in economy and society that could produce different political stakes and positions, as well as normative conflicts over the good’.<sup>176</sup> Sometimes this ‘overt exercise of authority and power through law making and policing’ is necessary in making and enforcing difficult decisions in achieving public ends –

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<sup>170</sup> Harvey (n 33) 82.

<sup>171</sup> Brown (n 2) 81.

<sup>172</sup> Ibid 30.

<sup>173</sup> Harvey (n 33) 82.

<sup>174</sup> Brown (n 2) 129.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

for example, carbon pricing in order to mitigate greenhouse gas emissions, or wealth transfers to emerging economies to subsidise non-fossil fuel development.

A consequence of this benign terminology of neoliberalism is to de-politicise and wash away the conflict and debate that makes democracy awkward and uncomfortable but which are its engine and which offer opportunities for contestation, consensus and eventually social solidarity. It is on this field of contestation (the *polis*), requiring as it does thoughtful and reasoned debate and ultimately the realisation of hard-won agreement, that the core ethical and moral dilemmas and motivating impulse for climate change policy need to be resolved by *homo politicus*.

In summary, what is lost in this transition from government to governance goes to the very heart of the *polis*, namely

deliberation about justice and other common goods, contestation over values and purposes, struggles over power, pursuit of visions of the good for the whole ... public life is reduced to problem solving and program implementation, a casting that brackets or eliminates politics, conflict, and deliberation about common values or ends.<sup>177</sup>

### *B Alternative Conceptions of Politics*

In de-constructing neoliberalism and illuminating its influence on *homo politicus* we need to be mindful in recognizing firstly that deep structure ideologies will never be totalizing. They are always imperfectly and incompletely realized. Second, it must be acknowledged that this public sphere of argumentation about common goods, values, social justice and so on is never perfectly realised. It would not be appropriate to set a neoliberal ‘straw man’ against a utopian version of fully informed, reason-based argument among concerned citizens open to persuasive and principled argument and to supporting consensus.

But a lesser point can be made that ‘the public sphere, in short, is not the state; it is rather the informally mobilized body of nongovernmental discursive opinion that can serve as a *counterweight* to the state’.<sup>178</sup> The point being that an informed, active and robust public sphere may fill a vacuum left where states decline to act, in this case on painful climate change options which will of necessity disrupt systems of neoliberal market ordering. That is

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<sup>177</sup> Ibid 127.

<sup>178</sup> Nancy Fraser, ‘Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy’ (1990) 25/26 *Social Text* 56, 75 (emphasis added).

to say, resistance to neoliberal governments' inadequacies in addressing climate change might potentially come from this public sphere but not if, as has been argued, it has been diminished by the reconstitution of neoliberal subjects into singularly self-regarding *homo economicus*.

There are other deep structure forces at work besides neoliberalism – for example, most obviously liberalism itself, long-entrenched capital relations, together with deep-rooted fundamentals psychological constraints like egoism<sup>179</sup> guiding individual behaviour and Michel's Iron law of oligarchy.<sup>180</sup> The latter, for example, claims that elite rule is inevitable in democratic organizations as a 'leadership' class will always ascend to manage power structures – 'often with little accountability, due to the apathy, indifference and non-participation [of] most rank-and-file members' and thus '[r]epresentative democracy is just a façade ... true democracy [is] practically and theoretically impossible'.<sup>181</sup> Similarly public choice theory (below) suggests that political and bureaucratic actors in fact are similarly motivated to those in the private sphere, seeking personal advantage rather than necessarily serving an ill-defined public interest. That is to say, the agents of *government* are not representative of, or necessarily serving, the common interest – indeed they too could be said to be operating as self-interested actors concerned with instrumental rationality and its immanent values both before and now during neoliberal hegemony. They too may be self-seeking and egoist rather than agents and promoters of the public good.

An alternative idealised image is of a thriving public sphere, legitimised by informed and engaged citizens open to persuasion through rational argumentation and eventual consensus on matters relating to common 'goods'. Discussion around this image typically begins with Jürgen Habermas<sup>182</sup> and his conception of a public sphere which is 'not an arena of market relations but rather one of discursive relations, a theater for *debating and deliberating rather than for buying and selling*'.<sup>183</sup> The actors are 'private persons' deliberating on 'public matters'<sup>184</sup> seeking 'consensus about the common good'.<sup>185</sup> This conception of political

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<sup>179</sup> Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton University Press, 1990) 157.

<sup>180</sup> Ibid 157.

<sup>181</sup> Ibid. See <[https://en.wikipedia.org/wiki/Iron\\_law\\_of\\_oligarchy](https://en.wikipedia.org/wiki/Iron_law_of_oligarchy)>.

<sup>182</sup> See in particular Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (trans. Thomas Burger and Frederick Lawrence) (Polity Press, 9<sup>th</sup> printing, 1999).

<sup>183</sup> Nancy Fraser (n 178) 57 (emphasis added).

<sup>184</sup> Ibid 70.

<sup>185</sup> Ibid 59.

discourse has been identified with civic republicanism (as opposed to liberal individualism) which ‘stresses a view of politics as people reasoning together to promote a common good that transcends the mere sum of individual preferences ... participants are transformed from a collection of self-seeking, private individuals into a public-spirited collectivity, capable of acting together in the common interest’.<sup>186</sup> This is the polar opposite of Brown’s characterisation of neoliberal *homo economicus*.

This public sphere presents an idealised image of *homo politicus* although its realisation is seen by some critics as remote,<sup>187</sup> or inadequate on its own terms,<sup>188</sup> or simply non-existent now or ever, suggesting that it has currency only for normative purposes, something to be aspired to and perhaps approximated if never realised.<sup>189</sup> The more likely institutional form might be the mass media-based public sphere but media may be ‘so polluted by the twin needs of promotion and the need to create a readership that they cease to provide a relatively neutral source for the development of public opinion’ and ultimately of principled decisions.<sup>190</sup>

The problem with mass media is that ‘private and public interests became the structuring forces in mass communication, which crowded out the potential for a mass-mediated public sphere’,<sup>191</sup> which in any event lacked the fundamental condition of access for all.<sup>192</sup> In consequence, say sceptics, ‘today, public participation in political power and its control of it is reduced to sporadic acts of acclamation or disapproval through general elections whose outcome is not primarily a result of rational political discourse but of publicity campaigns presenting images rather than arguments to the people’.<sup>193</sup> Similarly, Fraser puts it that

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<sup>186</sup> Ibid 71–72.

<sup>187</sup> For example, see Peter Lunt and Paul Stenner, ‘The Jerry Springer Show as an Emotional Public Sphere’ (2005) 27(1) *Media, Culture & Society* 59, 69: ‘contemporary society is so complex, so dependent on social institutions and so grounded in individualism that Habermas’s insistence on unmediated, non-institutionalized and yet public occasions at the centre of public life seems idealistic in the extreme’.

<sup>188</sup> For example, see Fraser (n 178) 77: ‘the bourgeois conception of the public sphere, as described by Habermas, is not adequate for the critique of the limits of actually existing democracy in late capitalist societies’.

<sup>189</sup> Colin Sparks, ‘The Internet and the Global Public Sphere’ in W Bennett and R Entman (eds), *Mediated Politics: Communication in the Future of Democracy* (Cambridge University Press, 2001) 75, 76.

<sup>190</sup> Lunt (n 187) 69.

<sup>191</sup> Ibid.

<sup>192</sup> Fraser (n 178) 56 (footnote 18).

<sup>193</sup> Andreas Gestrich, ‘The Public Sphere and the Habermas Debate’ (2006) 24(3) *German History* 413, 416.

‘publicity in the sense of critical scrutiny of the state gave way to public relations, mass-mediated staged displays, and the manufacture and manipulation of public opinion’.<sup>194</sup>

The internet has been suggested as a possible public sphere with its virtues of access, low entry barriers and potential for participation offering opportunities for inclusivity and diversity of arguments.<sup>195</sup> The ideal is that ‘citizens are said to be able to challenge the monopoly control of media production and dissemination by state and commercial institutions’.<sup>196</sup> On the other hand sceptics

are likely to reject the democratic potential of social media and instead point to its capacity to under-mine serious rational deliberation ... cit[ing] its use for negative campaigning and encouraging populist rhetoric and even extremism, as a future means to sensationalize the public sphere and foster celebrity politics.<sup>197</sup>

Empirical evidence suggests that ‘people use the Internet mostly for entertainment purposes and online they are more likely to seek out only those fragments that are of particular interest’.<sup>198</sup> An example of exploitive internet activities can be seen in so-called ‘astroturfing’ – the running of ‘fake grassroots campaigns that create the impression that large numbers of people are demanding or opposing particular policies ... most likely to occur where the interests of companies or governments come into conflict with the interests of the public’.<sup>199</sup> In fact some studies indicate ‘search engines might actually silence societal debate by giving more space to established actors and institutions, to experts and to expert evaluations and views, thereby replicating pre-existing power structures online’.<sup>200</sup>

A corollary problem for *homo politicus* goes to the issues of news and its function in democratic systems. In particular the decline in high-quality news service is not only due to a shift to the online environment but ‘is linked more fundamentally to the practices of neoliberalism – the increasing marketization of news and the ruthless logic of an economic

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<sup>194</sup> Fraser (n 178) 59.

<sup>195</sup> Jürgen Gerhards and Mike S Schäfer, ‘Is the internet a better public sphere? Comparing the old and new media in the USA and Germany’ (2010) 12(1) *new media and society* 143, 155. See also Geoffrey WG Leane *Deliberative Democracy and the Internet: New Possibilities for Legitimising Law through Public Discourse?* (2010) 23 *Canadian Journal of Law and Jurisprudence* 373.

<sup>196</sup> Brian Loader and Dan Mercea, ‘Networking Democracy?’ (2011) 14(6) *Information, Communication & Society* 757, 759.

<sup>197</sup> *Ibid* 761.

<sup>198</sup> Natalie Fenton, ‘Deregulation or democracy? New media, news, neoliberalism and the public interest’ (2011) 25(1) *Continuum* 63, 68.

<sup>199</sup> George Monbiot, ‘The need to protect the internet from ‘astroturfing’ grows ever more urgent’ (*The Guardian*, 23 Feb 2011).

<sup>200</sup> Gerhards (n 195) 156.

system that demands ever-increasing profit margins ... undermining the provision of news in the public interest'.<sup>201</sup> The result is that '[n]ews is left stranded in a thoroughly marketized system that stubbornly refuses to understand its market value as being firmly located in the public interest'.<sup>202</sup> Given the importance of news ('news is not an 'ordinary', it has a special status by dint of its relationship to democratic life')<sup>203</sup> this appears as another impact (albeit indirect) on *homo politicus*. From this perspective neoliberalism, whilst perhaps not the original cause of a weak sphere of public discourse, further distorts the public interest aspect of 'the news' (as an essential input to democratic argument) by rather emphasising its profit potential in markets. More cynically, climate change news will be particularly vulnerable to manipulation by powerful 'business-as-usual' interests given the existential threat it poses to those interests.

It has been argued that some approximation of robust public political discourse existed in earlier times – for example, Habermas references eighteenth century coffee houses in England and salons in France.<sup>204</sup> Also the means for public scrutiny of the state were later instrumentalized with 'legally guaranteed free speech, free press and free assembly, and eventually through the parliamentary institutions of representative government'.<sup>205</sup> But nonetheless Habermas is said to argue that 'under altered conditions of late twentieth century 'welfare state mass democracy', the bourgeois or liberal model of the public sphere is no longer feasible'.<sup>206</sup> Note that the reference to 'welfare state mass democracy' suggests the Keynesian state operative at the time – the loss of the Habermasian ideal was apparent well before the advent of neoliberalism, if indeed it ever existed, but would fade still further from view under neoliberalism.

Thus in distinguishing between the public sphere and market relations in the private sphere the argument for present purposes is that the narrowed concentration of neoliberalism on that market arena is inimical to even any *impulse* toward a Habermasian public sphere. If this public sphere is seen as just a normative characterisation by Habermas – a useful idealised image to be approximated as nearly as possible – its pursuit is rendered even more remote in

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<sup>201</sup> Fenton (n 198) 65.

<sup>202</sup> Ibid 70.

<sup>203</sup> Ibid 66.

<sup>204</sup> See, for example, Eric Laurier and Chris Philo (2007) "'A parcel of muddling muckworms": revisiting Habermas and the English coffee-houses' (2007) 8(2) *Social & Cultural Geography* 259–281.

<sup>205</sup> Fraser (n 178) 58.

<sup>206</sup> Ibid.

neoliberalism, as are its possibilities for reasoned public argument on climate change policy as a quintessentially appropriate issue to be argued in such a sphere. To the extent that individuals are encouraged to pursue their own private interests they will likely be less motivated to pursue political participation.<sup>207</sup> Further Brown (above) is alarmed at the anti-democratic strains in neoliberalism.

At its simplest the argument runs that as our preferences turn to market mechanisms and the trump card of economic efficiency then as a corollary we see key issues – including climate change debate amongst other collectivist issues – removed from political contestation and even democratic participation.<sup>208</sup> Neoliberalism moves us even further from democratic argument grounded in informed, rational and principled responses. If individuals in liberal-capitalist democracies were already tending to the self-seeking and self-constrained in pursuing collectivist public goods then as overwhelmingly economic actors in neoliberalism this tendency is intensified still further.

The ‘economizing’ of climate change (and other) issues will shift them into the realm of markets where they will be dealt with as financial and technical problems impacting on profits in the immediate and near term (Chapter Six) by experts. For example, private interests will seek maximum financial returns on carbon trading and the Clean Development Mechanism – both market mechanisms created by governments attempting to introduce ‘efficiencies’ into climate change policy. Informing moral and ethical issues recede and the result is to ‘shield [such problems] from general public debate and contestation’.<sup>209</sup> Similarly, to characterize them as ‘economic’ issues marks them as off limits to the state, whose role is only to facilitate markets in such ways. Likewise neoliberal subjects, to the extent they are engaged in communal debate and contestation at all on climate change issues, would bring market perspectives (and their immanent values) to any argument, thereby undermining (as Sandel has pointed out in Chapters Two and Three) any original motivating ethical imperatives.

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<sup>207</sup> See, for example, Sheldon S Wolin, *Democracy Incorporated: Managed Democracy and the Specter of Inverted Totalitarianism* (Princeton University Press, 2008) 75 (referencing Hobbes).

<sup>208</sup> Lyster (n 16) 36.

<sup>209</sup> Fraser (n 178) 73.

Finally, in regard to neoliberalism's diminution of *homo politicus*, we have noted questions as to its impact on democracy itself. Honig puts it that 'democracy, whatever its many other constitutive conditions, always involves inaugurating, maintaining, and *contesting shared or public things*, and responding to them when they call to us, as well'.<sup>210</sup> As noted above both Harvey and Brown have concerns about neoliberalism's constraining of democratic engagement by citizens. Similar concerns are articulated by writers on 'post-democracy',<sup>211</sup> who are said to have 'developed to become one of the most influential discourses in contemporary political science'.<sup>212</sup> Crouch<sup>213</sup> identified the diminishing influence of democratic institutions with the domination of (mostly economic) elites, the degeneration of political parties into 'mere vote catching apparatus', the profit-oriented marketization of media resulting in failure to fulfil democratic functions, and 'the citizen's passiveness and political disenchantment', with neoliberal hegemony.<sup>214</sup> Wolin too notes 'the virtual disappearance of the culture of participation and its replacement by a culture of privatism, isolation and ... consumerism'<sup>215</sup> and emphasizes the democratic importance of the public sphere.

These post-democratic authors see democratic politics as a 'sphere of societal life' and 'neoliberalism [as] the starting point of processes of post-democratization'.<sup>216</sup> Neoliberalism (like all deep structures) influences political discourse by de-limiting 'the realm of the thinkable and speakable ... *who* is allowed to make legitimate claims and *what* political changes can be demanded'.<sup>217</sup> A familiar example was Thatcher's assertion that 'there is no alternative' when promoting neoliberal economic policy.

It will be recalled that the introduction of neoliberalism was not itself the outcome of democratic processes but rather was introduced and promoted by economic and intellectual elites (the *Ordoliberalen* and the Mont Pèlerin Society, Hayek, Friedman, Chicago

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<sup>210</sup> Bonnie Honig, *Public Things: Democracy in Disrepair* (Fordham University Press, 2017) 15 (emphasis added).

<sup>211</sup> In particular, Colin Crouch, Jacques Rancière and Sheldon Wolin. See Claudia Ritzi, 'Neoliberal Hegemony and the Post-Democratization of the Public Sphere. An analytical framework to evaluate the democratic quality of political discourse' (2014) 11(IC) *Revista Científica de Información y Comunicación* 167, 169 <<http://icjournal-ojs.org/index.php/IC-Journal/article/viewFile/292/284>>.

<sup>212</sup> Ritzi (n 211) 169.

<sup>213</sup> C Crouch, *Post-democracy* (Polity Press, 2004).

<sup>214</sup> Claudia Ritzi (n 211) 171 (referencing Crouch).

<sup>215</sup> *Ibid* 174 (quoting Wolin).

<sup>216</sup> *Ibid* 175.

<sup>217</sup> *Ibid* 177 (original emphasis).

economists), charismatic political advocates (Thatcher, Reagan) and in some cases by force (Chile).

Further it should be cautioned that even in a functioning public sphere the notion of consensus is questionable. Fraser notes that ‘there is no way to know in advance whether the outcome of a deliberative process will be the discovery of a common good in which conflicts of interest evaporate as merely apparent or, rather, the discovery that conflicts of interest are real and the common good is chimerical’.<sup>218</sup> As well, even if achieved, a seeming consensus may have been reached ‘through deliberative processes tainted by the effect of dominance and subordination’.<sup>219</sup> In such cases the task then must fall into the category of the ‘hard work’ of government making and enforcing difficult decisions rather than the ‘soft sell’ of governance via interest-accommodation among ‘stakeholders’.

In conclusion, and notwithstanding the above counter-arguments and qualifications, it is probably reasonable to accept Bonnie Honig’s summary that ‘[c]itizenship itself is undone by neoliberalism’s unremitting calculations of instrumental worth and its incapacity to imagine a world-building project that is not entrepreneurial by nature’.<sup>220</sup> Climate reform is surely such a project. She echoes Brown’s concern that ‘[p]eople are now trained to think of themselves as a resource to be invested in for future earnings, not as subjects of integrity or, as Brown argues ... *stewards of shared futures*’.<sup>221</sup> This latter phrase reminds us of our stewardship responsibilities to ‘nature’ generally and in particular of ‘shared futures’ which include those of present and future generations subject to climate change impacts.

Given the saturation of neoliberal values in all aspects of its host societies it would be surprising if we did not see it manifest in legal systems, the domain of *homo juridicus*.

### III NEOLIBERAL LAW – *HOMO JURIDICUS*

#### *A Introduction*

Law has always been an intimate partner in the construction of economic life, most notably in Contract law, Property law and Intellectual Property but also in regulatory regimes such as

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<sup>218</sup> Fraser (n 178) 72.

<sup>219</sup> Ibid 73.

<sup>220</sup> Honig (n 210) 13.

<sup>221</sup> Ibid (emphasis added).

consumer protection and labour markets, and importantly for present purposes, the construction and maintenance of ‘markets’ themselves. Thus, law sets the architecture and regulation of capitalism itself and so is a crucial component in the neoliberal project. It does so through legislation by the state but also through the courts as adjudicators and enforcers of private law between parties and occasionally overtly in the political sphere. It also has an important legitimising function, for example, in reifying contractual relations between market actors.

For Brown<sup>222</sup>

law becomes a medium for disseminating neoliberal rationality beyond the economy, including to constitutive elements of democratic life ... [m]ore than simply securing the rights of capital and structuring competition, neoliberal judicial reason recasts political rights, citizenship, and the field of democracy itself in an economic register.<sup>223</sup>

Law is said to draw on ‘the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men’.<sup>224</sup> That is to say that legal systems, as would be expected, are constructs of the deep structures that inform them. Of present interest is the manner in which neoliberal values are manifest in legal systems.

Brown, as an American political theorist, draws on a number of recent U.S. Supreme Court cases to demonstrate how they represent ‘assaults on collective consciousness’ which, together with other neoliberal intrusions on political, social and economic discourses, have eliminated ‘forms of identity and ... political energy’ from a ‘democratic political imaginary’.<sup>225</sup> In particular she cites the U.S. Supreme Court case of *Citizens United v Federal Election Commission*<sup>226</sup> as being ‘often taken to emblemize the radical neoliberal turn of the Roberts Court’, not only permitting ‘corporate money to flood American elections’ but in ‘mobilizing law and even the Constitution for the relentless remaking of political life with market values, not merely by market forces’.<sup>227</sup> In doing so we see *homo*

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<sup>222</sup> See generally Brown (n 2) Ch.5 (‘Law and Legal Reason’).

<sup>223</sup> Ibid 152.

<sup>224</sup> Brian Bix, *Jurisprudence: Theory and Context* (Thomson Reuters, 2015, 7<sup>th</sup> edition) 196 (quoting Oliver Wendell Holmes).

<sup>225</sup> Brown (n 2) 153.

<sup>226</sup> 130 SCt 876, 558 US 310, 175 LEd 2d 753 (2010). See, generally, Brown’s discussion of *Citizens United* at Brown (n 2) 152–173.

<sup>227</sup> Brown (n 2) 154–5 (citing Timothy K Kuhner, ‘*Citizens United* as Neoliberal Jurisprudence: The Resurgence of Economic Theory’ (2011) 18(3) *Virginia Journal of Social Policy and the Law*).

*economicus* crowding out *homo juridicus* as well as *homo politicus*. She analogizes the neoliberal reduction of individuals to capital units to the reduction of political speech to capital in the employ of corporations in the ‘political marketplace’.<sup>228</sup> That is to say, ‘speech is the capital of the electoral market ... existing solely for the advancement or enhancement of its bearer’s interest’<sup>229</sup> – that is to say, shorn of all but its economic value.

Whilst political speech in pursuit of a speaker’s interests is hardly novel, she is arguing that such speech now assumes a largely (even wholly) economic identity, as opposed to incorporating and iterating notions such as deliberation, contestation, ideas and values, and democratic equality. This economization of politics by the legal system ‘vanquishes the political meaning of citizenship’<sup>230</sup> for individuals. In the U.S. for example, the state which once limited corporate funding as a fence around democratic politics is now diminished by the *Citizens United* decision. The result is that ‘the political, far from being a field of highly specific powers through which common existence is negotiated, protected, or transformed, becomes, as a market, a field for advancing every kind of capital – human, corporate, financial, cultural’.<sup>231</sup>

Put crudely, when ‘big capital can enhance its own value and positioning by delivering votes, exactly what *Citizens United* facilitates ... [then] [e]lected officials are for making deals with, and not for addressing contemporary common challenges or preventing future common predicaments’<sup>232</sup> (such as climate change). Recall the earlier discussion of governance and interest accommodation (Chapter Three). Thus is *homo juridicus* too enlisted in the neoliberal project through the agency of the U.S. Supreme Court.

But there is a more compelling and generalised account of the neoliberalization of law in the so-called Law and Economics (or Economic Analysis of Law) movement. Although Brown, a non-lawyer, does not consider it, the sub-discipline of Law and Economics is a paradigmatic instance of her central thesis, one which ‘might well count as the most influential intellectual development in law in the last hundred years ... [i]t has also had a major impact on how

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<sup>228</sup> Ibid 157.

<sup>229</sup> Ibid 158.

<sup>230</sup> Ibid 173.

<sup>231</sup> Ibid 163.

<sup>232</sup> Ibid 170.

regulators in the United States, Europe, and elsewhere deal with antitrust, environmental protection, highway safety, health care, nuclear power, and workers' rights'.<sup>233</sup>

### *B Law and Economics*

It has been claimed that 'no approach to law in recent decades has been more influential than the economic analysis of law ... even areas of law which would seem uncongenial to economic analysis'.<sup>234</sup> Its foundations lie in 'free market economic theory', its focus is 'solely on economic factors as the underlying explanatory ... determinant of legal principles', advising courts to rule on the basis of economically efficient outcomes.<sup>235</sup> The focus on economic efficiency clearly mirrors and reinforces neoliberalism's reach into all aspects of ordering – of the state, of the individual, of the *polis*, and now of the law.

The Law and Economics (L&E) movement was originally characterised as a 'colonisation' of the 'soft' discipline of law by neo-classical economists, whose foundational assumptions invoked rational choice<sup>236</sup> and the pursuit of efficiency and wealth maximisation via markets<sup>237</sup> we have seen in the foregoing discussions of neoliberalism. Law is primarily concerned with the *regulation* of behaviour whilst economics in liberal-capitalist societies is about free trade so there is an inherent tension which neoliberalism, as we have seen, seeks to ameliorate by shrinking the regulatory state and expanding the domain of markets. L&E presents a theoretical framework for doing so.

The L&E movement was preceded in legal theory by the Critical Legal Studies (CLS) movement. CLS extended an earlier Realist critique of law by suggesting that law's foundations lay in politics and ideology rather than in logic and a systematic application of fact and analogical reasoning (leading to a legally 'correct' decision). For some that left a worrying indeterminacy at the core of 'law' that was open to exploitation by, for example, ruling elites.<sup>238</sup> Any pretence of neutrality, of some Archimedean perspective from which to

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<sup>233</sup> Cass R Sunstein, 'Listen, Economists!' (*The New Yorker*, Nov. 10, 2016) (reviewing Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (Yale University Press, 2016)).

<sup>234</sup> Bix (n 224) 207.

<sup>235</sup> Denise Meyerson, *Understanding Jurisprudence* (Routledge Cavendish, 2007) 98–99.

<sup>236</sup> Note that assumptions about rationality in economic models have been modified to assume 'average' rationality of groups rather than of all individuals within a group (Margaret Davies *Asking the Law Question* (Lawbook Company, 2017, 4<sup>th</sup> edition) 181.

<sup>237</sup> *Ibid* 175–177.

<sup>238</sup> See, for example, Bix (n 224) 237–241.

dispense ‘justice’, became increasingly difficult to sustain. L&E offers a substantive alternative to legal indeterminacy by starting with the assumption that individuals are rational maximisers of their own utility, as reflected in their behaviours when exercising choice and more particularly in their pricing decisions (what they are willing to pay). Exchanges (‘market transactions’) occur between willing ‘buyers’ and ‘sellers’ of goods and services, each seeking to maximise their share of any surplus value available. In the L&E conception law’s purpose is to further the efficiency of such exchange, for example, by reducing transaction costs that might hamper them. Regulations are an example of transaction costs that may hamper free market relations.

Coase’s theorem, one of the founding principles of L&E, holds that in the absence of transaction costs legal rules are irrelevant because rational parties will trade legal rights among themselves until an efficient, that is to say utility maximising, outcome eventuates.<sup>239</sup> Transaction costs are the various ‘costs of doing business’, whose presence may prevent parties partaking of otherwise sensible (that is, ‘efficient’) economic transactions.<sup>240</sup> L&E theorists would have government and courts, through regulation and judicial decisions, act in such a way as to reduce or eliminate transaction costs in order to allow the otherwise ‘economically rational’ transaction to take place. For example, the requirement for new drugs to be tested and certified by independent government agencies may cause delays and price increases which will interfere with markets. Again, economic efficiency is the guiding criterion and, as with neoliberalism ideology, governments (and the legal system) ought to construct and re-construct ‘efficient’ markets. De-regulation (a defining principle of neoliberalism) is desirable as government regulation is said to add to transaction costs and impedes efficient outcomes. Again we see the mirroring of neoliberal ideology.

L&E’s most prolific author is Richard Posner, an American jurist, economist and legal academic at (unsurprisingly) the University of Chicago. He argued that ‘wealth maximisation serve[s] well both as an explanation of the past actions of common law courts and as a theory of justice’, albeit with judges acting subconsciously (although he has retreated somewhat

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<sup>239</sup> For a summary of Coase’s theorem see, for example, Davies (n 236) 187–188.

<sup>240</sup> See, for example, discussion of Coase’s Theorem in Bix (n 224) 214–218.

from his original exclusive focus on wealth maximisation).<sup>241</sup> Other L&E theorists argue that the approach can also be applied to non-market behaviours.<sup>242</sup>

The L&E movement has become ‘[p]robably the most widespread and influential of the modern social-scientific approaches to law’,<sup>243</sup> perhaps now ‘the default style of legal scholarship’.<sup>244</sup> At its most benign it simply offers to lawmakers a contribution to understanding the economic and efficiency effects of legal rules, irrespective of their morality or justice.<sup>245</sup> Inevitably, however, it carries within it normative values which mirror those of neoliberalism, for example, in its reconfiguration of the legal subject into an economic subject. *Homo juridicus* is now absorbed by *homo economicus*. Wealth maximisation becomes the legitimising principle for law. This is of course not surprising – political and economic arrangements are formalised in legal systems and it is no surprise that those systems too would be permeated by the same ideological contexts.

Whatever the merits or otherwise of L&E theory it has had a profound and far reaching impact on law and one that closely mirrors the wider impact of neoliberalism. Again, it celebrates *homo economicus* at the expense of *homo juridicus* and reinforces the neoliberal shift to a diminished regulatory state which previously inflicted ‘inefficient’ transaction costs, as well celebrating markets as the appropriate vehicle for satisfying human wants. Whilst this transformation in the motivating impulse of the legal system was not considered specifically by Brown (a political scientist) and Harvey (an anthropologist and geographer) this shift to a neoliberal economic theory clearly reinforces their theses and serves an instrumental and legitimising role in the imposition of neoliberal ideology.

As with most movements there is a wide field of L&E theory and practice which in some cases conceals ‘a very conservative political agenda’ whilst in other aspects it is said to be ‘not inherently conservative’.<sup>246</sup> In its most generalised and benign form the movement simply questions whether a given legal rule most effectively, or in particular most

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<sup>241</sup> Ibid 223 (footnote 60).

<sup>242</sup> Ibid 207 (referencing Gary Becker, *The Economic Approach to Human Behaviour* (University of Chicago Press, 1976).

<sup>243</sup> Davies (n 236) 173.

<sup>244</sup> Thomas Ulen, ‘Book Review: *Law’s Order: What Economics Has to Do With Law and Why it Matters* (2001) 41 *Santa Clara Law Review* 643, 643 (quoted in Davies (n 236) 173).

<sup>245</sup> Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009) 244.

<sup>246</sup> Davies (n 236) 174.

‘efficiently’, achieves its objectives. It is an instrumental approach, as it should be, but instrumental in an ‘economic’ sense as suggested by ‘efficient’. The goal, as with neoliberalism generally, is wealth maximisation by way of promoting efficiencies, or more likely removing inefficiencies such as market hampering regulation. In interpreting and applying legislation emanating from neoliberal legislatures judges have little alternative but to implement legislative desire.

L&E as a guiding principle has the useful virtue of being measurable (as opposed to amorphous alternative principles such as ‘justice’, ‘fairness’, ‘morality’ or ‘equity’) – recall earlier reference to the metrics of governance and the tendency to value that which can be measured when employing benchmarks and best practice.

A particular critique from the earlier CLS movement related to law’s distinction between ‘public’ matters with which government might legitimately concern itself, for example, the provision of public goods like health care, policing, and infrastructures, and ‘private’ matters from which the state ought to maintain a distance, indeed an absence.<sup>247</sup> The CLS movement was critical of this distinction given the opportunities for ‘unjust’ behaviours in the private sphere, whether in personal and social relations or in commercial contexts where power imbalances lead to inequitable outcomes. Arguably therefore the state ought to play a more intrusive role in the private sphere to ameliorate injustice. The general point is important here because, as we have seen, neoliberalism is very much about eliminating the state’s ‘public’ presence in the private sphere (other than as a facilitator of markets) – it represents an odious transaction cost impeding free exchange. States make international agreements (for example, to reduce greenhouse gas emissions) which they must then impose on private conduct to which they have committed to de-regulate. Unsurprisingly given such tensions, the outcomes have been underwhelming (Chapter Two). An example in the present context of climate change law would be the reluctance of governments to supervise effective regulatory regimes on greenhouse gas emissions, for example, through carbon pricing or outright prohibitions. Rather their preference is for constructing ‘markets’ in tradeable emission permits for the private sector (which as Sandel points out (Chapter Three) by implication conveys legitimacy on the emissions themselves).

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<sup>247</sup> Bix (n 224) 240.

Finally a related movement of relevance to this neoliberal turn in law is that of Public Choice Theory, which seeks to explain much behaviour of political, legal and administrative officials (and of their supporters) in terms of their self-interest, rather than the public good.<sup>248</sup> The claim is that public officials are motivated by private rather than (or at least as well as well as) public reason. Examples would be vote trading in legislatures and the influence of lobbyists. Thus it is said that '[t]his neo-liberal vision of governance marks a departure from traditional images that saw public service as a vocation, rather than just another occupation, and the higher civil service as a body motivated by a distinctive culture based on collective ideals rather than market principles'.<sup>249</sup>

Similarly, regulation by government may result in rent seeking behaviours from those subject to it. For example, a government may be subject to effective lobbying by a firm or industry group when designing 'cap and trade' greenhouse gas emission standards (or even free permits) to particular emitting industries. This creation of a new 'market' in emission permits by government is in effect 'marketising' an externality (atmospheric pollution) which existing markets failed to account for. That is to say, a market failure (not including environmental 'externalities' as a cost of production) is redeemed through the creation of a new 'market' comprised of the same producers. But to the extent that market-efficiency-distorting behaviours occur through self-seeking public servants and / or their vulnerability to rent-seeking subjects they undermine the legitimacy of government and provide incentives for de-regulation in favour of markets, thus furthering the neoliberal cause. The consequence is of course that collective wishes for (say) environmental protections or a stable climate are lost or ignored, as are issues of value-rationality such as moral and ethical principles, or the public interest, which may (or ought to) have been driving policies and practice.

The typical criticism of L&E – that it is 'an approach to law and life that attempts to analyse everything in terms of a single parameter (money, wealth, willingness to pay)'<sup>250</sup> – unsurprisingly echoes the same criticism that Brown and Harvey make of the neoliberal shift to *homo economicus*. In the discussion above Brown has comprehensively critiqued the 'marketisation' of the individual and the state, her focus being on the dissolution of *homo*

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<sup>248</sup> Ibid 227.

<sup>249</sup> Peter Hall, 'The Changing Role of the State in Liberal Market Economies' in Stephan Leibfried et al (eds), *The Oxford Handbook of Transformations of the State* (Oxford University Press, 2015) 426, 437.

<sup>250</sup> Bix (n 224) 232.

*politicus* in the ‘great turn’ to neoliberalism. She suggests that in re-configuring humans as exclusively economic actors via state constructions of ‘markets’ we are shorn of any bonds of social solidarity that drive non-economic behaviours. We no longer contest values and principles in the collective fora of politics big and small. The critique revolves around what is excluded and lost. Now with the L&E movement we see the same themes emerge as *homo juridicus* is reconfigured in the domain of the market behaviour of private actors, and ‘public’ actors are recast and compromised by the claims of Public Choice Theory.

#### IV GAME THEORY

There is another important analytical tool said to underpin the instrumental rationality of neoliberalism, though not considered by Brown or Harvey or many other prominent critics . This is game theory, which appears to have developed in concert with neoliberalism itself. Sonja Amadae puts it

that neoliberalism reflects both the mentality and institutions consistent with game theory ... neoliberal economics and politics are best understood as the *result* of modelling agency and designing institutions according to the principles of orthodox game theory.<sup>251</sup>

Central to game theory is the figure of *homo strategicus* (individual or state) who shares with neoliberalism a singular strategic rationality. Game theory applies mathematical models to strategic behaviour. For Amadae game theory is ‘historically unprecedented and ha[s] justified and rendered plausible or even inevitable, the iconoclastic features of neoliberalism’, and going further to suggest that ‘this congruence is not coincidental or accidental ... the core ideas that inform neoliberal governance and market discipline are structured in accordance with game theory’.<sup>252</sup> Its compatibility with Brown’s version of *homo economicus* can be summed up the statement that both game theory and neoliberalism are said to provide ‘the purported solution of optimization without regard to others’.<sup>253</sup>

From the earlier discussion it is clear that *homo economicus* and *homo strategicus* are all but identical in their pursuit of strategic rationality. The concern for present purposes is that they ‘effectively distil[l] out ethical actions, other-regarding considerations, and the ability to

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<sup>251</sup> SM Amadae, *Prisoners of Reason: Game Theory and Neoliberal Political Economy* (Cambridge University Press, 2015) 4 (emphasis added).

<sup>252</sup> *Ibid* 8–9.

<sup>253</sup> David Levy, ‘Book Review: S.M. Amadae *Prisoners of Reason: Game Theory and Neoliberal Political Economy* (Cambridge UP, 2015) (2019) 41(2) *Journal of the History of Economic Thought* 278.

voluntarily co-operate in groups',<sup>254</sup> for they are 'irrational according to rational choice theory' as 'every decision is evaluated on a cost–benefit analysis basis of how it promotes individual interest'.<sup>255</sup>

Of particular interest for present purposes is the well-known game theory example of Prisoner's Dilemma wherein two rational, self-interested prisoners will choose to free ride and betray each other and thereby arrive at a collectively irrational outcome. The theory has been applied to environmental problems including climate change – indeed '[i]n its simplest form, climate change mitigation *is* a prisoner's dilemma'.<sup>256</sup> It is said that because of uncertainties associated with climate change there will be even less co-operation between states than in even iterated versions of prisoner's dilemma, resulting in an even greater probability of climate catastrophe.<sup>257</sup> Significantly, other research suggests that substantial government regulation (as opposed to unregulated markets) can produce a win–win situation.<sup>258</sup> On the other hand positive benefits of communication between parties (not available in the classical prisoner's dilemma model) may encourage mitigation strategies, and some game theory models attempt to find paths toward greater co-operation in the face of 'strong free-rider incentives',<sup>259</sup> but 'the global warming threat needs *aggravation* before an international solution of it can be found'.<sup>260</sup> The fear, however, is of irretrievable and catastrophic outcomes occurring before the necessary level of 'aggravation' is reached.

Whilst an extensive review of game theory is beyond the scope of this enquiry it will be clear that, as a governing metric, it substantially informs neoliberal ideology itself and, further, has important implications for climate change if only in reinforcing (and rationalising) the irrationality of present inaction. As a methodological tool it appears to demonstrate the unsustainability of neoliberalism itself, for it demonstrates the unlikelihood of collective

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<sup>254</sup> Amadae (n 251) 7.

<sup>255</sup> Ibid 10.

<sup>256</sup> Peter John Wood, 'Climate Change and Game Theory' (2010) 62 *Environmental Economics Research Hub, Research Report #33* (emphasis added).

<sup>257</sup> <[https://en.wikipedia.org/wiki/Prisoner%27s\\_dilemma](https://en.wikipedia.org/wiki/Prisoner%27s_dilemma)> (quoting Julie Rehmeyer: 'Game theory suggests current climate negotiations won't avert catastrophe').

<sup>258</sup> <[https://en.wikipedia.org/wiki/Prisoner%27s\\_dilemma](https://en.wikipedia.org/wiki/Prisoner%27s_dilemma)>.

<sup>259</sup> See, for example, Wood (n 256) 3.

<sup>260</sup> Karen Pittel and Dirk Rubbelke, 'Transitions in the negotiations on climate change: from prisoner's dilemma to chicken and beyond' (2012) 12 *International Environmental Agreements: Politics, Law and Economics* 23, 36 (emphasis added).

action on climate change which is a condition for an effective regime among states. This observation will resonate also in discussion on the global order of states (Chapter Five).

## V SUMMARY

A recurring theme in this chapter has been the neoliberal privileging of instrumental rationality (the efficient matching of ends and means) and how it drives the neoliberal privileging of markets as the embodiment (through the pricing system) of an efficient utilisation of resources. The goal is wealth maximisation. Some, but not much, mention was made of value rationality – measuring the degree to which actions achieved an objective according to some value criterion, thereby achieving some measure of legitimacy beyond wealth accumulation. Examples might be ‘justice’ in a legal system, or ‘equity’ in a ‘fair’ distribution of goods or of tax burdens, or fairness in the distribution of opportunity for citizens to access educational or health resources. The argument was that such moral and ethical questions which citizens might well be moved to contemplate and contest are overwhelmed in neoliberalism’s singular focus on the ‘economic’ in all aspects of life.

The discussion sought to illuminate the ways in which neoliberalism promoted instrumental rationality in economic life but more importantly as the thin edge of a wedge to be driven into all aspects of life. This could only be realised, say neoliberals, through the exchange relations of freely choosing individuals in unconstrained markets unburdened by state intervention. From that freedom it was expected that other freedoms would follow, to be enjoyed free of the dead hand of the state. What these other freedoms are, and how they might be enjoyed, is not clear.

Neoliberalism has pursued this singular end in a number of ways. First the role of the state has been re-cast as an enabler of markets – constructing them where necessary and underwriting their efficient working. It has shifted its focus from government to governance so as to facilitate market operations and withdraw from the provision of public goods, it has moved away from the regulation of the economy in the public interest to regulation by the market via the price mechanism for private interests, and in doing so has diminished the *polis* as a forum for public political contestation regarding collective desires.

Second, and largely as a consequence, the neoliberal state has reconfigured its citizens to conform to this market model – to be capital accumulators in a competitive social milieu in which individuals (Brown’s ‘units of capital’) strive to fully exploit their ‘brand’ through personal entrepreneurship. There is little room or incentive to divert such an individual’s attention toward collective issues like climate change mitigation which might be for the good of all, far less for unknown others distant in geography or time. This is not to say that value rationality is non-existent, rather that it is overwhelmed and not nurtured. This is the newly empowered world of *homo economicus*.

Third, the diminished role of the state as a repository of collective values and ends, and the corollary of self-concerned capital-accumulating citizens, leads to an impoverished political discourse. The *polis* is diminished by the withdrawal of the state and its contribution to, and enabling of, a civic life now reduced to an instrumentalism focused on economics rather than politics of non-economic and collective interests. This diminished realm of political discourse is the shrunken world of *homo politicus*.

Fourth, these profound shifts in government, social and political life are mirrored in a legal system refashioned and instrumentalized to serve economic ends – to ensure the smooth operation of an ‘efficient’ state, economy, politics and citizen. This is the newly imagined *homo juridicus* – the world of law shaped by instrumental rationality.

The aim has been to go beyond an explanatory account of neoliberal identity and interest formation to illuminate a fundamental incompatibility with plausible and efficacious climate change policy, compounded by an unfortunate coincidence of timing in the respective evolutions of climate change awareness and neoliberal discourse.

At the simplest and most basic level, any ideology with a singular focus on unending, compound growth is literally unsustainable on a planet with non-renewable extractive resources and sink limits. Harvey puts it that ‘[c]apital is always about growth and it necessarily grows at a compound rate ... an extremely dangerous but largely unrecognized and unanalysed contradiction’.<sup>261</sup>

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<sup>261</sup> David Harvey, *Seventeen Contradictions and the End of Capitalism* (Profile Books, 2014) 222.

At an institutional level it is incompatible with the profound re-ordering that will surely be necessary in the present world of fossil fuel-based capitalism – that is, economies structurally dependent on fossil fuels and therefore requiring structural reform to be sustainable.

Neoliberal ideology diminishes the role and legitimacy of the one actor that must be pivotal – the agenda-setting regulatory state and its leadership and educational roles, particularly for a long-term existential issue like climate change with its innumerable practical and ethical challenges. It re-shapes citizens in such a way as to minimise the likelihood of any motivation other than capital accumulation which is in turn premised on unending compound growth.

The value rationality that must be a part of the motivation for radical change is swamped in these individuals, as is the political space for the contested discourses which need to be heard and resolved by an empowered and legitimised state unafraid to do so. Similarly the legal system itself is re-oriented to the economic so that the resolution of disputes moves increasingly from a value to an instrumental rationality.

In every case the momentum is away from meeting the challenges of climate change – the challenge to strong government, the challenge to moral and ethical values, the challenge to sacrifice individual and present material values, the challenge to communal attachments, the challenge of empathy for distant and future victims of climate change, the imaginative challenge to conceive and argue different ordering systems with which to deal with climate change – in short the challenge to revise deep structures. These are not challenges to be resolved through wealth accumulation by selfish and materialistic citizens, by a state subservient to private economic interests, by a shrunken field of political discourse, by a legal system re-oriented to efficient economics, by an inward-looking private morality of citizens, or by the rationales offered by game theory.

But if neoliberalism is a corrosive influence on efficacious climate change policy in national contexts it will be important to consider influences on climate change policy in the global order of states wherein climate change regimes must coalesce. It is within the international order of states that a global climate change regime must be negotiated and implemented, for no state can individually resolve the super-wicked problem of global climate change. As well as its structural limitations the global order will also be shown to carry within it, unsurprisingly, neoliberal discourses though necessarily in different ways from those which permeate individual states.

# CHAPTER V: THE GLOBAL ORDER OF STATES AND THE CLIMATE CHANGE REGIME

## I INTRODUCTION

The global climate change regime is necessarily international as it is difficult to imagine that without the collective and co-ordinated efforts of states we can succeed in managing a ‘super wicked’ global problem like climate change. So the functioning of the global order – the ‘society of states’, or ‘international society’<sup>1</sup> – is of fundamental concern. The Stern Review ends with the conclusion that

[a]bove all, reducing the risks of climate change requires collective action. It requires cooperation between countries, through international frameworks that support the achievement of shared goals ... [i]t is still possible to avoid the worst impacts of climate change, through strong collective action.<sup>2</sup>

Collective action on climate change will include developing a broad consensus on long-term goals, institution building to facilitate co-operative action (for example, the UNFCCC and Paris Agreement as well as financial institutions like the IMF and World Bank) and the creation of conditions which will lead to collective action (for example, pre-commitment offers which become binding with reciprocity).<sup>3</sup> Practical incentives include avoidance of free-riding on the efforts of other countries and cost reductions to be achieved on mitigation and adaptation measures.<sup>4</sup> More particularly, some minimal areas of cooperation would include co-ordinated emissions trading schemes (including a broadly comparable carbon price worldwide)<sup>5</sup> if they are to remain a significant policy tool), cooperation on technology, reduction of deforestation (perhaps using pilot programs), and adaptation programs which support poorer countries.<sup>6</sup>

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<sup>1</sup> Tim Dunne, ‘The English School’ in Robert E Goodin (ed.) *The Oxford Handbook of Political Science* (Oxford Handbooks Online, 2011) 5: ‘[p]erhaps the sharpest definition of international society is to be found on the first page of the edited collection *The Expansion of International Society*. By an international society, Bull and Watson write

we mean a group of states (or, more generally, a group of independent political communities) which not merely form a system, in the sense that the behaviour of each is a necessary factor in the calculations of the others, but also have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognize their common interest in maintaining these arrangements.

<sup>2</sup> Nicholas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, 2006) 644.

<sup>3</sup> Ibid 641–643.

<sup>4</sup> Ibid 510.

<sup>5</sup> Ibid 507.

<sup>6</sup> Ibid 643–644.

But this is written in the future tense and the global climate regime is presently failing in terms of its own goals (Chapter 2).<sup>7</sup> Failures occur locally at the state level but as well the global order itself has characteristics that seemingly render it unable to remedy them through muscular collective action. It will therefore be useful to critically evaluate the institutional forms which define the global order and as well look to the influence of neoliberalism on them.

This chapter begins with an examination of the global order of states, drawing on commentary from the cognate disciplines of International Relations (IR) and International Law (IL). The intent is to broadly characterise the global order as a framing for the climate change regime and as well to provide the context for a critique by Martti Koskenniemi, a distinguished historian, academic, practitioner, and critic of international law.<sup>8</sup> Finally the discussion will turn to a consideration of the global order itself as neoliberal – importing neoliberalism through its constituent state actors, manifesting neoliberalism in its institutional arrangements (for example, finance and trade), in its governance practices which reflect

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<sup>7</sup> See also, for example, Will Steffen, ‘Failure is not an option. Australia must radically scale up its climate targets now’ (*The Guardian*, 15 April 2021) – the (to be released) Australian Climate Council inaugural report (May 2021) warned that the coming decade was critical to restraining temperature increases. In fact emissions increased and it ‘[i]s now virtually certain Earth will pass the critical 1.5 C degrees temperature rise this century – most likely in the 2030s’ and there will almost certainly be a period of ‘overshoot’ with ‘a greater risk of crossing “tipping points” ... [which] may set off irreversible changes to the global climate system, and destroy critical ecosystems on which life on Earth depends’.

<sup>8</sup> Martti Koskenniemi is a Finnish international lawyer and former diplomat. Currently he is professor of International Law in the University of Helsinki and Director of the Erik Castrén Institute of International Law and Human Rights, as well as Centennial Professor at the Law Department of the London School of Economics. He is well known for his critical approach to international law. In 2008–2009 he held the seat of distinguished visiting Goodhart Professor at the Faculty of Law, Cambridge University. In 2011 Koskenniemi was Peace of Utrecht professor at Utrecht University. In 2014 he was elected a Corresponding Fellow of the British Academy. Koskenniemi is currently serving as an Academy Professor for the Academy of Finland. Previously he has been Global Professor of Law in the New York University, and a member of the International Law Commission (2002–2006). He served in the Finnish Diplomatic Service in the years 1978–1996, lastly as director of the Division of International Law. He was Finland’s counsel in the International Court of Justice in the *Passage through the Great Belt case* (Finland v. Denmark) (1991–1992). From 1997 to 2003 he served as a judge in the administrative tribunal of the Asian Development Bank. He is a member of the *Institut de droit international*. <[https://en.wikipedia.org/wiki/Martti\\_Koskenniemi](https://en.wikipedia.org/wiki/Martti_Koskenniemi)>. See also, for example, David Kennedy, ‘The Last Treatise: Project and Person (Reflections on Martti Koskenniemi’s *From Apology to Utopia*)’ (2006) 7(12) *German Law Journal* 982: ‘Martti Koskenniemi’s *From Apology to Utopia* is the most significant late 20th century English language monograph in the field of international law’; Kenneth Abbott <<http://kennethandersonlawofwar.blogspot.com/2004/12/martti-koskenniemi-theory.html>>: ‘Any discussion of Professor Martti Koskenniemi’s work must begin by acknowledging the fundamental importance of his 1989 book *From Apology to Utopia*. It is a brilliant book, a heady and intoxicating book, and I don’t think anyone who was developing his or her views on international law during that period could help but be profoundly impacted by it. It was, to my mind, *the* book on international law that one had to come to grips with in setting out a view of international law during the first part of the 1990s.’

neoliberal managerial forms, and in the metaphorical sense of the global order of some two hundred states behaving like private market actors in utilising resources in a self-interested pursuit of profit and power.

In turning to an overview of the global order an initial observation is that it does not bear close resemblance to familiar domestic political and legal orders, most obviously in the absence of a central sovereign power equivalent to the ‘state’ in domestic orders of government. It will therefore be useful to briefly explore different characterisations and motivations of actors in this sovereign-less order by IR and IL scholars and the relationship between the two disciplines. Here the commentaries of Koskeniemi will be a useful touchstone in this interdisciplinary discussion.

The main theoretical schools which characterise IR and IL scholarship are those of Realism, Liberalism and Constructivism.<sup>9</sup> A common theme of these theories is the centrality of states as the primary actors – being both the authors and at the same time the subjects of international law – though they vary in the degree to which they stress that primacy.

Occasional use will be made of the heuristic device of viewing the global order of states as itself a kind of ‘market’ of some two hundred competing, self-interested actors, endowed with resources and productive capacity, lacking an overriding authority, rationally calculating individual advantage and profit in their relations with others. The analogy is with private economic actors in domestic markets which we have seen afforded primacy in neoliberalism.

In this global order ‘the primary challenge is not the vertical relationship of subjects to a sovereign, but the horizontal relationship of subjects to other subjects’.<sup>10</sup> To the extent their relations with each other are governed by international law at all they are ‘more akin to a

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<sup>9</sup> Jeffrey L Dunoff and Mark A Pollack, ‘Reviewing Two Decades of IL/IR Scholarship: What We’ve Learned, What’s Next’ in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013) 626, 647. See also, for example, Tanja E Aalberts, ‘Interdisciplinary Perspectives on International Law and International Relations’ (Book Review) (2015) 11 *Journal of International Law and International Relations* 85, 88:

‘The tripartite framework of realism/liberalism-liberal institutionalism/constructivism is the standard pluralist framework in mainstream International Relations research, sharing a widespread epistemological consensus on positivism’.

<sup>10</sup> Simon Chesterman, ‘An International Rule of Law?’ (2008) 56(2) *The American Journal of Comparative Law* 331, 333.

network of contracts between private entities than to the [international] legal system'<sup>11</sup> – that is to say, all states are rationally pursuing self-interest (in the form of wealth accumulation, security, power) and they enter into beneficial formal arrangement such as treaties, membership of institutions (political, financial, security, trading, and so on.) There is a notable reluctance to submit to any supra-state external regulation (for example, the voluntariness and lack of enforcement of NDCs in the Paris Agreement). If market relations are relatively free of state intervention in domestic neoliberal economies, so too are relations between states in the international order almost free *ab initio* from any form of economic interventionism such as regulation as there is no legitimate central, supra-state authority to impose limitations on sovereignty. As well enforcement is difficult in the event of breach.

Lacking a disciplinary authority, compliance by states to their 'legal' commitments in this global order is largely voluntary and withdrawal relatively painless, especially for wealthy and powerful states – witness the Canadian withdrawal from the Kyoto Protocol and the U.S. abandonment of both Kyoto and the Paris Agreement (later endorsed by the U.S.). Broadly speaking it is said that '[m]ost of the rules of international law are only binding on countries which have signed the treaties that gave rise to them, there are no courts with compulsory jurisdiction, and the rules are openly flouted when they become costly or run counter to state interest'.<sup>12</sup> Hence we will see the global order characterised as 'anarchic'.

The withdrawal of the state in national economies from a Keynesian 'command and control' role to a neoliberal market-facilitating role was seen in Chapter Three as a distinguishing feature of the ascendance of neoliberal ideology. But in the global order in which the legal regime for climate change must achieve a necessarily collective outcome – a relatively benign global climate, limiting global temperature increase to 1.5C degrees – the absence of a robust central authority is critical. There was never a 'Keynesian' regulatory-state alternative to neoliberalism in the global order so it was and is a receptive environment for neoliberal practices – there was never an equivalent of the strong, interventionist, regulatory state in the global order. It was in a sense already 'neoliberal' in its two hundred strong 'market' of unconstrained egoist actors.

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<sup>11</sup> Carmen E Pavel, 'The international rule of law' (2019) *Critical Review of International Social and Political Philosophy* 1, 3.

<sup>12</sup> *Ibid.*

In looking more closely at the nature and characteristics of this global order of states it will be useful to review the main explanatory theories as to how states behave. This will shed some light on the difficulties faced in establishing a robust climate change regime and add to an understanding of present failures to do so.

## II THEORIES ABOUT HOW STATES BEHAVE IN THE GLOBAL ORDER

### *A Realism*

Realist theory has historically been the dominant theoretical school in IR<sup>13</sup> – for reasons that will become clear it is less favoured in IL scholarship. The inter-war period of the twentieth century is said to have nurtured common hopes in IL and IR theory of a utopian internationalism built on values of democracy, the rule of law and international institutions.<sup>14</sup> Those hopes were dashed by World War II, which ignited a turn to Realism in IR.

The Realist model takes states as overwhelmingly the main actors in the international order. One writer sees American political scientists as promoting a vision of the global order as ‘an anarchical solipsistic world disorder’.<sup>15</sup> Elliott, for example, puts it that ‘[d]espite over two centuries of political theory calling for transnational political rule (stemming from Enlightenment-period cosmopolitanism), we still live in a world where nation states remain the exclusive source of ultimate political legitimacy’.<sup>16</sup> Similarly core principles of IL go to the sovereignty and independence of states and the right to non-interference by other states.<sup>17</sup>

The Realist model can be described in four broad propositions:<sup>18</sup>

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<sup>13</sup> See, for example, Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010) 10–11: ‘[h]istorically, realists are the dominant school in IR theory. For realists of all stripes, law is virtually irrelevant, as is the concept of legal obligation. Relative power and interests determine state conduct.’

<sup>14</sup> Anne-Marie Slaughter Burley, ‘International Law and International Relations Theory: A Dual Agenda’ (1993) 87 *The American Journal of International Law* 205, 207 (captured in the notion of ‘Wilsonian liberal internationalism’).

<sup>15</sup> John Haskell, ‘From Apology to Utopia’s Conditions of Possibility’ (2016) 29(3) *Leiden Journal of International Law* 667, 676.

<sup>16</sup> Brian Elliott, *Natural catastrophe: climate change and neoliberal governance* (Edinburgh University Press, 7<sup>th</sup> ed, 2016) 37.

<sup>17</sup> See, for example, Malcolm N Shaw, *International Law* (Cambridge University Press, 2014) 153–155.

<sup>18</sup> Jack Donnelly, ‘The Ethics of Realism’ in Christian Reus-Smit and Duncan Snidall (eds), *The Oxford Handbook of International Relations* (Oxford University Press, 2008) 150. See also, for example, Anne-Marie Slaughter Burley (n 14).

- States are overwhelmingly the most important actors.
- The international system is anarchic – states must govern their relations with other states themselves, absent any central authority or governing body.
- States are unitary, egoist actors rationally pursuing only self-interest.
- The primary concern of all states is power in pursuit of survival/security.

The analogy to the anarchic private market of economic actors in neoliberal societies is apposite – they too are primary, egoist and concerned with survival, profit and market power – though the absence of a central state-like authority in IL as in domestic orders is critical. There are some modest constraints imposed by the need for a degree of order – for example, the UN and its agencies, the World Trade Organisation (WTO) in facilitating free trade, the World Bank and International Monetary Fund in the global economic and financial order – but their purpose is enabling where collective interests are at stake and even there imperfectly. Their infusion with neoliberal ideology is discussed below.

As to the role of IL in this conception of the global order the accumulation and practices of power are said to be determinative of outcomes. In this dominant Realist branch of IR theory there is said to be ‘no room whatsoever for international law’<sup>19</sup> for it is said to be of no consequence in explaining state behaviour. Indeed one IR Realist text asserts that ‘law is largely powerless to resolve collective action problems, and, more controversially, that states do not – and should not – feel any legal or moral obligation to follow international law when instrumental calculations reveal that noncompliance would better advance state interests’.<sup>20</sup>

Thus states in the Realist conception *may* follow IL not because of its bindingness or normative claims or fear of sanctions but because it further advances their self-interest. They are aided, as we will see, by IL’s indeterminacy. It is said that ‘International Law is thus a symptom of State behaviour, not a cause’<sup>21</sup> – it is epiphenomenal, hovering ‘above’ state behaviours but rarely directing them.

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<sup>19</sup> Slaughter Burley (n 14) 217.

<sup>20</sup> Jeffrey L Dunoff and Mark A Pollack, ‘International Law and International Relations: Introducing an Interdisciplinary Dialogue’ in Jeffrey L Dunoff and Mark A Pollack (eds) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013) 3, 19 (quoting Goldsmith and Posner).

<sup>21</sup> Anne-Marie Slaughter, ‘International Relations, Principal Theories’ in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011) para.7.

Any normative elements in IR are said to have suffered from ‘a tendency to set aside ethical considerations in a turn toward economics’, for example, as the pursuit of Pareto efficiency<sup>22</sup> and a bias toward ‘free exchange and decentralized power’.<sup>23</sup> This emphasis on economic motivations – of transactional relations – echoes the discussion in Chapters Three and Four regarding the fundamental neoliberal principle of privileging the economic and efficient via markets at the expense of a central and intrusive organising role for the state (other than as an enabler of markets).

The turn away from normative elements in IR is reflected in characterisations by leading scholars – IR is said to be ‘a practical exercise and not a moral one’ (Kennan), ‘no ethical standards are applicable to relations between states’ (Carr) and ‘[u]niversal moral principles cannot be applied to the actions of states’ (Morgenthau).<sup>24</sup> In the context of ethical questions in climate change this is a challenging constraint although Koskenniemi, as we will see, nonetheless argues for a normative element in IL. Nor, in structural terms, does the anarchical and egoist character of the global order auger well for collective, enforceable legal regimes that are the *sine qua non* for plausible climate change (and other collectivist) outcomes.

Chapters Three and Four demonstrated the widespread influence of neoliberal ideology in domestic state societies and its problematic implications for plausible climate change policy. For now the corollary implication is that in all probability states will import into international forums and agreements these same negative implications in their climate change policies. We would expect to see states’ (neoliberal) ideology manifest in the global order. In varying degrees this would likely include a distaste for centralised regulatory authority and a preference for unregulated ‘market’ solutions as we have seen in the previous chapter.

To the extent that the Realist model captures the reality of IR and IL in international practice it is little wonder that the climate change regime has proven at best compromised. Survival and prosperity of the state and its security and material interests in an uncertain world fraught

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<sup>22</sup> Christian Reus-Smit and Duncan Snidall ‘Between Utopia and Reality: The Practical Discourses of International Relations’ in Christian Reus-Smit and Duncan Snidall (eds) *The Oxford Handbook of International Relations* (Oxford University Press, 2008) 7. An allocation of resources is ‘Pareto efficient’ if there is no other allocation in which some other individual is better off and no individual is worse off – but there is no element of equity in such cases <<https://www.economics.utoronto.ca/osborne/2x3/tutorial/PE.HTM>>.

<sup>23</sup> Ibid 18–19.

<sup>24</sup> Donnelly (n 18) 150.

with risk and competition will be the overriding concern, and major powers will inevitably dominate in this model – for example, the influence and subsequently undermining of both Kyoto and Paris by the U.S. (Chapter Two). Again the analogy is to private markets wherein competing private actors seek profits, market power and longevity and oligopolistic actors dominate.

The Realist model suggests that contracting states to the climate regime will undertake an egoist calculus of relative advantage – in the words of one government minister responsible for his country’s Kyoto negotiating position ‘it was self-interested hard-ball from beginning to end’.<sup>25</sup> States will have a preference for individual self-governance and minimal external coercion as was effectively agreed in the Paris Agreement, as opposed to collaboration and solidarity in the pursuit of collective interests. States may choose to withdraw consent (the U.S. in the Kyoto Protocol and the Paris Agreement, Canada in the Kyoto Protocol), negotiate favourable targets (Australia<sup>26</sup> and New Zealand<sup>27</sup> in the Kyoto Protocol), claim special status (less developed states, small island states, non-Annex I states generally) and even claim special vulnerability and recompense as major emissions producers (Saudi Arabia,<sup>28</sup> Australia).

It will be recalled that game theory was characterized in Chapter Four as the quintessential methodology for rationalizing neoliberal economic and political theory both for individuals and, now, for states. Amadae puts it that ‘[o]rthodox game theory is particularly suited to realism in international relations’, being grounded in four assumptions – only outcomes not means matter; power among states shifts; rational state actors behave independently not jointly, eschewing solidarity; and ‘gratuitous altruism, imperfect duty, and other-regarding preferences are irrational’.<sup>29</sup>

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<sup>25</sup> <<https://www.beehive.govt.nz/speech/reflections-kyoto-climate-change-convention>>.

<sup>26</sup> <<https://unfccc.int/process-and-meetings/the-kyoto-protocol/what-is-the-kyoto-protocol/kyoto-protocol-targets-for-the-first-commitment-period>> (an 8% increase in emissions).

<sup>27</sup> Ibid (zero increase in emissions).

<sup>28</sup> <<https://www.reuters.com/article/us-climate-saudi-bonn-interview/u-n-climate-talks-threaten-our-survival-saudi-arabia-idUSTRE5371QM20090408>>.

<sup>29</sup> SM Amadae, *Prisoners of Reason: Game Theory and Neoliberal Political Economy* (Cambridge UP, 2015) 18.

Unsurprisingly game theory has been applied to the climate change issue in attempting to explain the failure of states to act collectively in what is clearly their common interest.<sup>30</sup> For example, a ‘mutual *mitigate*-strategy [is] dominated in the initial PD [Prisoner’s Dilemma] game (and hence was never pursued)’.<sup>31</sup> It has also been shown in the context of game theory and climate change that free-riding (for example, Australia at the time of writing) and defection (for example, Canada’s defection from the Kyoto Protocol) are critical problems and indeed ‘the primary cause of despair for those hoping for multilateral agreement on reducing emissions’ though for now the only consequence has been ‘a mild moral stigma’.<sup>32</sup>

So the Realist conception of states’ motivations and behaviour is alarming in the context of shared commons such as a climate-benign atmosphere. The dilemma is captured in the so-called Tragedy of the Commons<sup>33</sup> scenario wherein ‘individuals, acting rationally in their own self-interest, nonetheless act irrationally by irreparably depleting a resource that is owned in common ... the current climate change crisis is an example of ‘the tragedy’ on a global scale’.<sup>34</sup> Because the gains from any sacrifice a state makes will accrue to all states they will be tempted to free-ride; those who do sacrifice will benefit other states as much as themselves and they will feel like ‘suckers’.<sup>35</sup> It will be individually rational (as the Prisoner’s Dilemma of game theory suggests) to free ride in the short term at least, but self-destructive and irrational in the long term. Lacking a supranational institution – for example, a climate change Leviathan – to impose long-term rationality the Realist conception would seem to result in an unhappy outcomes for climate change policy. As one author puts it, ‘its current manifestation in the form of global warming constitutes the playing out of ‘the tragedy’ on possibly its grandest scale yet’.<sup>36</sup>

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<sup>30</sup> See, for example, Rony Smead and Ronald Sandler, ‘Game Theory and the Ethics of Global Climate Change’ (2013) 3(1) *Philosophy and Public Issues* 13 (considering the application of Prisoners Dilemma and Stag Hunt versions of game theory).

<sup>31</sup> Karen Pittel and Dirk TG Rubbelke, ‘Transitions in the negotiations on climate change: from prisoner’s dilemma to chicken and beyond’ (2012) 12 *International Environmental Agreements* 23, 36.

<sup>32</sup> Shi-ling Hsu, ‘A game-theoretic model of international climate change negotiations’ (2011) 19 *NYU Environmental Law Journal* 14, 78.

<sup>33</sup> G Hardin, ‘The Tragedy of the Commons’ (1968) 162 *Science* 1243. Note that he amended his initial view that ‘freedom in a commons brings ruin to us all’ to ‘under conditions of overpopulation, freedom in an unmanaged commons brings ruin to us all’ (G Hardin, ‘An Ecolate View of the Human Predicament’ (1981) 7(2) *Alternatives: Global, Local, Political* 242).

<sup>34</sup> Maebh O’Gorman, ‘Global Warming: A Tragedy of the Commons’ (2010) *Comparative Research in Law & Political Economy* (Research Paper No. 32/2010) 2.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid* 12.

## *B Liberalism*

In the 1990s a new wave of liberalism

emerged as a distinctive and coherent theory of international relations ... [it] emphasizes the primacy of societal actors, argues that states represent a subset of domestic society, and claims that the configuration of independent state preferences determines state behaviour ... [it emphasises] the demands of individual social groups, and their relative power in society, as a fundamental force driving state policy.<sup>37</sup>

In this IR model states can be differentiated according to their constituent cultures and political and social organizations.

Rather than singular, egoist states ‘the primary actors in the international system are individuals and groups acting in domestic and transnational civil society’<sup>38</sup> in the sense that social actors will drive state action. In short, it is claimed that ‘how states behave depends on how they are internally constituted’<sup>39</sup> including, for present purposes, versions of neoliberalism.<sup>40</sup> In terms of interest accommodation among these myriad social groups states will be weakened to the extent that they will be forced (and / or choose) to mediate in systems of governance to accommodate these diverse non-state voices – rather than top-down government regulation as is arguably required for effective climate change policy. To the extent that non-state actors become an important part of governance regimes they will undermine or even replace state capacities and thereby weaken state sovereignty and domestic state capacities. This will have outcomes that are ‘neoliberal’ in effect whether or not they are motivated by neoliberal ideology. There will be echoes of this model in Constructivism (below) and its conceptions of identity formation in states.

Liberal IR theory also includes a number of ‘institutionalist’ theories such as regime theory, game theory models and rational design.<sup>41</sup> These explanations expand the assumptions of

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<sup>37</sup> Dunoff (n 20) 8 (quoting Moravcsik).

<sup>38</sup> Anne-Marie Slaughter, ‘International Law in a World of Liberal States’ (1995) 6 *European Journal of International Law* 503, 508.

<sup>39</sup> *Ibid* 537.

<sup>40</sup> Note a confusion of terminology in the IR literature which uses ‘neoliberalism’ as a marker for a more recent liberalism which emphasises the importance of institutions. Similarly a later version of Realism is labelled ‘neorealism’ and gives rise to the so-called ‘neo-neo’ debate – not of concern here. See, for example, Brunnée (n 13) 11.

<sup>41</sup> See, for example, Barbara Koremenos, ‘Institutionalism and International Law’ in Jeffrey L Dunoff and Mark A Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013) 59; Barbara Koremenos, Charles Lipson and Duncan Snidal, ‘The Rational Design of International Institutions’ (2001) 55(4) *International Organization* 761–799.

Realism to include an explanation of cooperation between states, albeit still driven by self-interest, using methodological tools such as game theory in pursuit of greater rationality and efficiency in inter-state behaviour. For example, states may seek to reduce uncertainty by providing more information, and to increase efficiency in their relations by reducing transaction costs in centralized forums.<sup>42</sup> Chapter Four showed how such models also import certain values and assumptions such as those of neoliberalism and exclude others such as normative ethical values which arguably ought to be significant drivers of climate change policy.

As would be expected international lawyers are more receptive to this model (rather than Realist dismissal of IL as epiphenomenal). The dominant strain of IL, as in domestic law (at least in liberal-democratic states), is positivist in that the focus is on rules and sources. In IL those sources are hierarchically summarised as treaties, customary international law, general principles of law as recognized by civilized nations, judicial decisions and scholarly writings.<sup>43</sup> IL may demonstrate radical indeterminacy (the mode of ‘apologia’ in which under IL’s elastic rules and processes a defence can be offered for almost any state action) but may also manifest a transformative strain wherein ‘[l]aw is seen as a good ... “a force of linear progress, a beacon to lead us out of darkness”: the darkness of politics’<sup>44</sup> (the idealist mode of ‘utopia’).<sup>45</sup>

In the liberal models of IR and IL there are many common characteristics – for example, the notion that IL goes beyond rules to informing processes, that law ought to incorporate and promote community values (such as human dignity and peace, or more controversially as we will see below, liberal democracy), and the conviction that law goes beyond regulating and constraining state behaviour. It does so by, for example, facilitating communication, legitimacy, reassurance, co-operation and habituation.<sup>46</sup> Sometimes characterised as ‘legal process’ theory this liberal IL model in a sense retrieves morality from its exclusion in

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<sup>42</sup> Slaughter (n 21) para.10–12.

<sup>43</sup> *Statute of the International Court of Justice* s38(1).

<sup>44</sup> Adriana Sinclair, ‘Conclusion’ in Adriana Sinclair, *International Relations Theory and International Law: A Critical Approach* (Cambridge University Press, 2010) 175 (quoting Smart).

<sup>45</sup> The terminology is used in, for example, Martti Koskenniemi, *From Apologia to Utopia: The Structure of International Legal Argument* (Finnish Lawyers’ Publishing Company, 1989).

<sup>46</sup> David Armstrong, Theo Farrell and Helene Lambert (eds), ‘Three lenses: realism, liberalism, and constructivism’ in David Armstrong, Theo Farrell and Helene Lambert, *International Law and International Relations* (Cambridge University Press, 2007) 92.

Realism by recognizing a ‘utopian’ aspect of IL, namely to serve ‘progressive social ends’.<sup>47</sup> IL is said (by, for example, Koskenniemi below) to have a normative purpose beyond merely instrumental ends. For example, the New Haven school<sup>48</sup> was said to have advocated for ‘law that would help fashion a world public order that advanced human dignity’.<sup>49</sup> Similarly Koskenniemi (below) asserts a powerful normative force for IL as a ‘placeholder’ for normative values of ‘goodness’ and ‘justice’.<sup>50</sup>

In general IR scholars have been said to understand IL poorly.<sup>51</sup> Other writers similarly claim that IR has too narrow a view of legal norms as ‘simple impositions of authority, ultimately rooted in force’, whereas (for IL scholars) the relationship between ‘law’ and ‘non-law’ is really about ‘the *processes* that constitute a normative continuum bridging from predictable patterns of practice to legally required behaviour’.<sup>52</sup> Liberal IL theory has a more complex and nuanced view of law.

Liberal IL theory recognizes a world order that has become increasingly fragmented among new transnational entities such as non-government organisations, multinational corporations, transnational institutional arrangements, supranational organisations, and global networks of individuals and groups. They comprise a plethora of international, transnational and supranational arrangements resulting in degrees of de-centring and disaggregation of formerly monolithic states. There is recognition of a variety of actors operating above, below and alongside states. The *modus operandi* is one of negotiation and accommodation of diverse actors and interests in the absence of a central, authoritative agency. Recall the analysis of neoliberal models of ‘governance’ and interest accommodation among a multiplicity of actors in Chapter Three, as opposed to command-and-control ‘government’ by the institutions of the regulatory state.

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<sup>47</sup> Ibid 88.

<sup>48</sup> The New Haven school, personified in the collaborative work of Harold Lasswell and Myres McDougal, was a post-WWII movement articulating a ‘policy-oriented jurisprudence’. See, for example, Hengameh Saberi, ‘Yale’s Policy Science and International Law: Between Legal Formalism and Policy Conceptualism’ in Anne Orford et al (eds) *The Oxford Handbook of International Law* (Oxford University Press, 2016) 426–451.

<sup>49</sup> Armstrong (n 46) 88.

<sup>50</sup> Martti Koskenniemi, ‘Miserable Comforter: International Relations as New Natural Law’ (2009) 15(3) *European Journal of International Relations* 395, 413.

<sup>51</sup> For example, Adriana Sinclair (n 44) 174, claiming that IR has produced ‘a strong notion of agency and a weak notion of structure ... [with] heavy reliance on norm entrepreneurs ... [t]o a very great extent legislation and the law are treated as a black box’; ‘[IR] Constructivism, despite its legally influenced origins, has not thought about law in any sustained or critical way’.

<sup>52</sup> Ibid 68 (emphasis added).

Similarly, in contrast to Realism, liberal IL theory includes a recognition of the prescriptive (though not binding) nature of ‘soft’ law, that is, obligations that are not legally binding – for example, declarations and statements of principle, codes of practice – as part of this complex and nuanced system of governance. Together with the horizontal accommodation and ‘management’ of the interests of a variety of actors (rather than a vertical ordering from a singular sovereign authority) this soft law governance operates through flexible tools for interest accommodation. An example would be the ‘soft’ self-chosen, voluntary, unenforceable emission mitigation targets (NDCs) in the Paris Agreement, negotiated as the price of universal adoption of the Agreement. In domestic orders the equivalent would be the negotiation of, for example, pollution limits between regulators and polluters, such limits to be voluntary and self-monitored. So modes of neoliberal governance are evident in both national and international legal processes and are subject to the critique articulated in Chapter Four.

In terms of ideology later liberal IL theorists such as Franck,<sup>53</sup> Teson<sup>54</sup> and Slaughter,<sup>55</sup> aggressively pushed the particular agenda of liberal democratic *values* in this world order. The strategic influence of this theory can most obviously be seen in the political dominance of so-called liberal-democratic states in the world order, including military and economic power and cultural influences. Importantly these liberal values are embedded in international law itself,<sup>56</sup> including various major institutions, for example, the promotion of human rights instruments by the UN, the promotion of free trade by the WTO, and the neoliberal economic policies of the World Bank and International Monetary Fund and the Washington Consensus (discussed below).

There is even support, both theoretical and empirical, among liberal IL scholars for the notion that liberal democratic states enjoy a ‘democratic peace’ among themselves as suggested by Immanuel Kant.<sup>57</sup> Slaughter, for example, imagines an international law for a world of liberal

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<sup>53</sup> For example, Thomas M Franck, ‘The emerging right to democratic governance’ (1992) 86 *American Journal of International Law* 46.

<sup>54</sup> Fernando R Teson, ‘The Kantian theory of international law’ (1992) 92 *Columbia Law Review* 53.

<sup>55</sup> Slaughter (n 38) 503.

<sup>56</sup> The claim is that international law is suffused with European, colonial and liberal influences – see, for example, Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2009); Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005).

<sup>57</sup> See, for example, Slaughter (n 21) para.15.

states within liberal IR theory, such ‘law’ to include, for example, a transnational society of individuals and groups operating within ‘self-selected and customized rules’,<sup>58</sup> transnational governmental institutions regulating relationships with individual and group actors in transnational society, including transnational dialogues between courts, legislatures and executives,<sup>59</sup> and inter-governmental agreements facilitated by ‘a web of individual and group contacts in transnational civil society’.<sup>60</sup> This model suggests a radically decentralized and de-centred IL, and in particular a disaggregated sovereignty of states,<sup>61</sup> again suggesting the core neoliberal principle (Chapter Three) of a limited role for the state amongst a multiplicity of actors with diverse interests to be accommodated. These various actors have been described as ‘epistemic communities’ which act as *partners* (as opposed to subjects) of governments in formulating policy. Rather than states asserting their interests as self-contained, isolated, unitary actors (the Realist model) this liberal international order would require of states ‘engagement in a network of multilateral commitments’.<sup>62</sup> This has been described (and decried) as ‘exclusive minilateralism’ wherein ‘states, in coordination with private actors, are empowered to form exclusive alliances free from a rigid constraint-based regime’.<sup>63</sup> As was noted in Chapter Two this shift toward ‘informal bilateral and mini-lateral agreements’ between states has arguably left the ‘UNFCCC system ... reduced to merely a cheerleading forum for private and voluntary national action on climate change’.<sup>64</sup> The contrast here is with early classical IL and the ‘founding principle of the Westphalian system – look only to the prince and no farther’.<sup>65</sup>

Thus liberal IL takes into account an emerging plurality of actors and interests beyond the state and thereby emphasises expanded notions of agency alongside, below and above the state – an erosion of state sovereignty. In addressing this myriad of non-state actors it may employ a range of soft law options in accommodating diverse interests. In the climate change regime the risk is that a goal – restricting global temperature increases to 1.5C degrees<sup>66</sup> –

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<sup>58</sup> Slaughter (n 38) 518.

<sup>59</sup> Ibid 522–528.

<sup>60</sup> Ibid 528.

<sup>61</sup> Ibid 534.

<sup>62</sup> Ibid 536 (quoting Abraham and Antonia Chayes).

<sup>63</sup> Rosemary Lyster, ‘The Idea of (Climate) Justice, neoliberalism and the Talanoa Dialogue’ (2019) 10(1) *Journal of Human Rights and the Environment* 35, 53 (referencing Cipler and Roberts).

<sup>64</sup> David Cipler and J Timmons Roberts, ‘Climate change and the transition to neoliberal environmental governance’ (2017) 46 *Global Environmental Change* 148, 155.

<sup>65</sup> Slaughter (n 38) 537.

<sup>66</sup> World Meteorological Organization Secretary-General Petteri Taalas (co-chair of the Science Advisory Group of the UN Climate Summit): ‘To stop a global temperature increase of more than 2 degrees Celsius above pre-

defaults to myriad processes of interest accommodation and the goal recedes, as the evidence indeed suggests it has. The fragile structures of the climate change regime lack the authority, legitimacy and regulatory power to implement a more ambitious and enforceable scheme, most particularly as seen in the Paris Agreement, and as we shall see, in contrast to, for example, the global trading order.

This de-centred depiction of IL is a point of critique for some commentators. Koskenniemi, for example, suggests that Slaughter's model of a new international law of 'transnational networks' is corrupted by an unexpressed normativity that 'does away with the image of valid law and leads lawyers to contemplate an agenda that is posed to them by an academic intelligentsia that has been thoroughly committed to smoothening the paths of the [American] hegemon'.<sup>67</sup> IL, he says, becomes (under the influence of IR scholars) a vehicle for promoting the liberal ideological biases of the U.S. – a problem for non-liberal states such as China who are increasingly important actors in the climate change regime but who do not necessarily share these liberal values. Koskenniemi points to a rarely articulated ideological bias in IL, first liberal and now neoliberal, that permeates not only its practice but as well its (particularly American) commentators.

As we will see he is similarly sceptical of the constructivist climate change model proposed by international environmental law academics Brunnée and Toope.

### *C Constructivism*

In this third model of the global order the enquiry goes deeper into how the various actors in the global order are constituted – on 'the role that culture, ideas, institutions, discourse, and social norms play in shaping identity and influencing behaviour'.<sup>68</sup> They may not directly impel actions but 'they constrain, enable and constitute actors in their choices, and thus help to shape world politics'.<sup>69</sup> Constructivists claim that 'interests are not simply "given" and

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industrial levels, the level of ambition needs to be *tripled*. And to limit the increase to 1.5 degrees, it needs to be *multiplied by five*.' <<https://public.wmo.int/en/media/press-release/global-climate-2015-2019-climate-change-accelerates>> (emphasis added).

<sup>67</sup> Quoted in Michael Byers, 'International Law' in Christian Reus-Smit and Duncan Snidall (eds), *The Oxford Handbook of International Relations* (Oxford University Press, 2008) 617.

<sup>68</sup> Sinclair (n 44) 170.

<sup>69</sup> Jutta Brunnée and Stephen J Toope, 'Constructivism and International Law' in Jeffrey L Dunoff and Mark A Pollack (eds) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013) 119, 124.

then rationally pursued as in the Realist model, but rather the *social* construction of actors' identities is a major factor in interest formation'.<sup>70</sup>

As an International Relations text puts it, 'constructivists seek to *explain* the process of progressive normative change whereas liberal IL scholars seek to *affect* such a process'.<sup>71</sup> The emphasis is not so much on what global actors do but why they do it – what processes take place to determine the positions taken by global actors? The difference is important if, for example, the constitutive processes include the diffusion of neoliberal ideology into positions taken on climate change. That might help explain the seemingly irrational failure of states to take meaningful action on climate change – their ideological bias toward neoliberalism systemically constrains them (as we have seen in Chapters Three and Four).

For example, it was in a constructivist-style conception of how identity formation and behaviour are shaped that we saw (Chapters Three and Four) the neoliberal re-configuration of the role of the state, the motivating impulse of economic life, the social identity of individual subjects, the public sphere of politics, and the legal system. Individual and institutional identities become 'neoliberal'. It follows that their (neoliberal) ideological preferences will play out in their influence on shaping state behaviour. They will, for example in a climate change regime, likely pre-dispose neoliberal states to favour voluntary and negotiated emissions targets and market mechanisms such as emissions trading and the Clean Development Mechanism rather than an imposed carbon price or even quantitative regulation of greenhouse gas emitters. It will be less difficult for neoliberal elites to persuade neoliberal subjects of justifications for market rather than regulatory solutions.

So rather than taking interests as given, constructivists look to explain the origin and formation of those interests, with actor *identity* being a major factor.<sup>72</sup> Identity formation is said to occur prior to, or at least concurrent with, interest formation, so that interests are not only material<sup>73</sup> but can evolve into social norms via shared knowledge and understandings generated through interactions and communications among actors,<sup>74</sup> that is to say, intersubjectivity. In IR constructivism 'who we think we are in large part determines what we

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<sup>70</sup> Brunnée (n 13) 13 (emphasis added).

<sup>71</sup> Armstrong (n 46) 104 (emphasis added).

<sup>72</sup> Brunnée (n 13) 13.

<sup>73</sup> Brunnée (n 69) 121.

<sup>74</sup> Brunnée (n 72) 13.

want’, so that interests are a manifestation of identity.<sup>75</sup> Chapter Four explained the neoliberal reconstitution of individuals as units of income and capital accumulation and suggested that it is not an ontological conception likely to encourage normative, future-oriented climate change ambitions.

The constructivist ambition is to look to ideas (for example, neoliberal ideas) in particular to discover how they are revealed in the content of the interests that are the subjects of Realists (who pursue them through self-help) and Liberals (who pursue them via mutual help). Thus whilst Realist, Liberal and Constructivist models of state behaviour will be infused with neoliberal norms they will differ in the degree to which such norms are de-constructed in looking to explanations of interests and identities, and therefore behaviour – less so in Realism, more so in Liberal and Constructivist conceptions.

Unsurprisingly constructivist claims ‘do not assume *or even aspire to* the creation of a shared global identity or deep value coalescence ... any postulated world community or collective conscience’<sup>76</sup> since interests and identities will evolve in particular ways in particular state societies. That is disappointing for those who hope for an evolving cosmopolitan concern for future generations who will suffer from presently inadequate climate change measures.

On the other hand, in terms of the construction of domestic identities, values and interests, an interesting question is whether or not the existing climate change regime sufficiently articulates future commitments so as to satisfy various private domestic audiences. These would include stakeholders who seek to satisfy their own interests in a governance regime – notably business, but also NGOs and civil society – each subject to disruption and instability in different ways and degrees under any robust climate change regime. As to civil society, which neoliberalism has sought to reorient to the economic (the image of *homo economicus* in Chapter Four), there is some question as to whether

[t]he critical factor may turn out to be shifts in public attitudes and values ... the rise of a new consciousness ... an aroused public in a few key countries ... a social movement that

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<sup>75</sup> Armstrong (n 46) 96.

<sup>76</sup> Brunnée (n 72) (emphasis added).

succeeds in framing climate change in compelling terms ... some sort of climate shock that jolts side swaths of the public into taking climate change seriously.<sup>77</sup>

Such public concern may of course be stimulated by negative impacts on *homo economicus* (the neoliberal subject as ‘capital unit’ in Chapter Four), in that individual capital accumulation may suffer as sacrifices must be made. Neoliberal citizens may be willing to accept sacrifices to protect future accumulation prospects, but they may also reject sacrifices in order to protect present and short term accumulation. Alternatively, and more optimistically, dormant ethical principles might be invigorated by such a shock. That a catastrophic shock might be necessary to provoke serious policy action says much about national publics in terms of passivity of political will, and the fragility of ethical principles, on climate change policy.

For present purpose it will suffice to reiterate the ongoing argument that, as demonstrated in Chapters Three and Four, neoliberal ideology is simply an unlikely (if not corrosive) ideology for the promotion of a plausible and efficacious climate change measures.

It was argued in Chapter Four that this failure has been exacerbated by the neoliberal ideology prevailing since the early 1970s – that is to say, in its singular focus on markets, its concomitant diminution of the role of the state in providing forceful policy direction and enforcement, in its drive to re-configure individuals as self-interested capital accumulators, its consequent erosion of a public space for political engagement, and its reorientation of law to the economic. In the case of climate change the neoliberal drivers of interest and identity formation that constructivism would take account of are (as Chapters Three and Four argued) the antithesis of what effective policy requires – a strong regulatory state, a robust level of public argument about collective goals, a normative and other-regarding strain in social life, and an other-oriented ethical concern for the victims (present and future) of climate change. A descriptive, or even explanatory, account such as constructivism offers seems inadequate if the regime is not succeeding on its present terms.

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<sup>77</sup> Oran R Young, ‘The Paris Agreement: Destined to Succeed or Doomed to Fail?’ (2016) 4(3) *Politics and Governance* 124, 131; also (at 131) ‘it would not be surprising if the Paris Agreement becomes another in a long list of failed attempts to come to terms with the problem of climate change’.

But it should be noted that there is also a constructivist view that law is ‘purposive’ and ‘aspirational’,<sup>78</sup> indeed ‘constructivism’s unique selling point [is] the argument that we are able to re-make our social world’<sup>79</sup> – and a seminal constructivist text is titled *World of Our Making*.<sup>80</sup> It is not that constructivism itself is transformative but that it suggests the possibility of change through the processes of interest and identity formation which are not fixed. For example, just such a shift to neoliberalism occurred with the popularising of neoliberal ideas in Milton Friedman’s television series (Chapter Four).

Identities and interests are not given and fixed, social worlds are revisable. Law, say constructivists, is important ‘because law can help to create the conditions upon which changes of identity and interest rest ... through the special rationality of law that promotes adherence to norms through processes of self-binding legitimization’.<sup>81</sup> Chapter Four, for example, showed how neoliberalism takes a certain legal form in the Law and Economics movement which privileges legal outcomes that reinforce economic efficiency. Again, the constructivist impulse is to *explain* rather than *affect* identity and interest formation. It is also said that constructivists tend to neglect the processes of change for ‘once norms have become internalised, change becomes very difficult’.<sup>82</sup> Koskenniemi (below) criticises the constructivist model of climate change in part because it fails to recognize and critique underlying ideology.

A necessary first step for change must be to demonstrate the deficiencies in present paradigms and that was the ambition of Chapter Three and Four – to go further in demonstrating a fundamental incompatibility of dominant neoliberal ideology as informing identity and interest formation in the matter of a present ‘super wicked’ problem like climate change.

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<sup>78</sup> Jutta Brunnée and Stephen J Toope, ‘International Law and Constructivism: Elements of an Interactional Theory of International Law’ (2000–2001) 39 *Columbia Journal of Transnational Law* 19, 52.

<sup>79</sup> Adriana Sinclair, ‘The theoretical foundations of constructivism and its treatment of law’ in Adriana Sinclair, *International Relations Theory and International Law: A Critical Approach* (Cambridge University Press, 2010) 7.

<sup>80</sup> Nicholas Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Routledge, 2012).

<sup>81</sup> Brunnée (n 78) 66.

<sup>82</sup> David Armstrong (n 46) 111.

### *D Summary of Main Theories of the Global Order of States*

The dominant Realist model claims to be empirical and positivist in emphasizing the centrality of states in an anarchic international order and characterizes them as singularly and rationally pursuing self-interest. International Law is said to be epiphenomenal in that it ‘hovers above’ the international order but does not directly affect it (unless it serves self-interest). It typically does not resonate with international lawyers who privilege the rules and informing processes of international law as influencing state behaviour. Realism most obviously accounts for the impulse of states to aggressively assert their interests in climate change negotiations even when the consequences are likely mutually destructive, and thus to pursue self-interest at the cost of collectively rational interests, even to the extent of free-riding. The model is particularly suggestive of a kind of ‘neoliberal’ marketplace of states free of any effective central authority and subject only to ‘light touch’ governance that suits their purpose – in fact pretty much the Paris Agreement regime. In any event for Realists the legal regime for climate change is of little account. The withdrawal of the U.S. from the Paris Agreement is paradigmatic.

Liberal theorists envisage the possibility of co-operation between states (to their mutual advantage), privilege liberal values and even an international order of liberal states, and envisage a broad range of non-state actors and soft law informing the development of international law. Unsurprisingly the Liberal account lends itself to the models of governance favoured by neoliberalism (Chapter Four), as well as a preference for market solutions. As we will see the collective liberal institutions of international finance and trade have become neoliberal. The myriad non-state actors participating in climate change negotiations suggest a liberal model.<sup>83</sup>

Constructivists favour a more nuanced approach in the formation of state interests and identities, driven by social actors, which they see as dynamic rather than static. The model is not necessarily ideological or normative but rather explanatory and its influence may be seen more in the domestic formation of state interests rather than in the structures of international law. It may be useful in describing the evolution of ideological influences (such as

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<sup>83</sup> For a list of accredited NGOs to the UNFCCC see <<https://unfccc.int/process-and-meetings/parties-non-party-stakeholders/non-party-stakeholders/information-by-category-of-observer/admitted-ngos>>.

neoliberalism) as they infuse identity formation in state societies (Chapter Four) but lacks a critical or transformative edge.

An example of the theories in action in the context of climate change would be the U.S.. It is the second largest emitter of greenhouse gases in absolute terms and (with Canada and Australia) the largest per capita emitter,<sup>84</sup> suggesting culpability and by implication accountability and moral corruption. It is the pre-eminent 'superpower' in terms of military, economic and political power and a paradigmatic neoliberal state. It is well placed in terms of resources and technology to lead climate change policy should it choose to do so, suggesting capability. In terms of participation in collective climate change action it signed the Kyoto Protocol but did not ratify (following a unanimous Senate vote against it), it signed the Paris Agreement but then in 2017 announced its withdrawal (later reversed). In both cases it played a substantive role in authorship. It is a state able both to dictate the terms of agreements and to renege on them with impunity simply because, in the Realist mode, it has the power to do so. In constructivist terms it invokes doctrines like 'American exceptionalism'<sup>85</sup> as an element of self-identity; in liberal terms it dictated liberal/neoliberal values in its promotion of market solutions during negotiations. But its behaviour in regard to climate change policy reflects ultimately the Realist model of a powerful state rationally pursuing self-interest in an international order lacking a supreme authority to dictate or discipline its constituent actors. The collective goal of an efficacious climate change regime was seriously eroded by the absence of U.S. commitment, leadership and exercise of power (other than to undermine the very instrument it had in significant part created).

The general point to be made here is that the global order is highly receptive to neoliberalism both ideologically (because its more influential constituent states are neoliberal, as are (we will see) its financial and trading institutions) and in its anarchic structure (ready-made as it were for the relatively unconstrained pursuit of self-interest). Simply put, states can and do behave like domestic market enterprises in a neoliberal world though with even less constraint in the absence of a powerful and legitimate state-like central authority able to coerce.

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<sup>84</sup> <<http://worldpopulationreview.com/countries/co2-emissions-by-country/>>.

<sup>85</sup> For an account of American exceptionalism see, for example, James W Ceaser, 'The Origins and Character of American Exceptionalism' (2012) 1(1) *American Political Thought* 3.

If these descriptive accounts of the main theoretical models of the global order provide some useful insights it remains to understand how IR and IL theories have influenced each other and what kind of hybrid architecture results. An indication of tensions will be apparent in the critical writings of Martti Koskenniemi.

### III RELATIONSHIP BETWEEN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW THEORIES

In this part the challenge is to characterise the influence of IR theory on IL's self-conception, an influence that plays out in *inter alia* the climate change regime. Koskenniemi provides a useful perspective on this shift. The ambition is to parse some of the tensions in IL and IR that in turn shape and constrain the climate change regime. In particular consideration will be given to the tension between the limited role afforded IL by IR scholars and Koskenniemi's claim that IL has not only an important instrumental role in the global order but as well offers a redemptive normative vision sorely needed for an efficacious climate change regime. Finally the analysis will turn to the influence of neoliberalism on the global order, inevitably different in kind than for individual states but nonetheless clearly present and operative.

#### *A Evolution of the Relationship*

Whilst IR is a more recent subject of academic study than is IL the two shared something of an aspirational moment between the first and second World Wars when, it was argued, 'the spread of democracy and development of international institutions could replace war and power politics with something akin to the rule of law'.<sup>86</sup>

But following the Second World War political scientists largely 'rejected the notion that international law could serve as a meaningful constraint on states' single minded pursuit of national interest'.<sup>87</sup> As we have seen IR scholars moved to embrace Realism – the notion that states are overwhelmingly the central actors in IL, each has a set of interests that they rationally pursue, and that depending on the degree of power they can assert they will impose their will on weaker states.<sup>88</sup> In this vision of the international order IL was marginalised by IR scholars as 'epiphenomenal', having little direct effect on the actual, relentlessly self-

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<sup>86</sup> See Dunoff (n 20) 5.

<sup>87</sup> Ibid 3.

<sup>88</sup> See, for example, Richard H Steinberg, 'Wanted – Dead or Alive: Realism in International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013) 146, 148–150; also a summary of different varieties of Realism at 150–160.

interested behaviour of states. As suggested above it is a model of ‘light touch regulation’ not unlike the neoliberal economic model outlined in Chapter Three.

Nonetheless there was a certain commonality in the dominant approaches of the two disciplines – Realism in IR and Positivism in IL’s emphasis on actual rules and processes. Both emphasised the primacy of states and instrumental action rather than more nuanced influences on state behaviour such as domestic political, social and cultural contexts<sup>89</sup> (more emphasised by constructivist writers). Significantly Realists in both IR and IL eschew the role of morality, rendering problematic the centrality to climate change policy of moral and ethical impulses.

Whilst IR is strongly interdisciplinary there was little interdisciplinary interest in IL until 1989 when Kenneth Abbot urged international lawyers to re-engage with International Relations theory.<sup>90</sup> A substantial body of work by international lawyers followed, for example, Slaughter in the 1990s, Brunnée and Toope in the 2000s and Dunoff in 2015, generating new interest among IL scholars in IR theory. By the early 2000s there had been some response from political scientists<sup>91</sup> though it has arguably been somewhat limited in both quantity and quality. In reviewing the literature on interdisciplinary writing on IL and IR two general themes of particular relevance to this thesis emerge.

First, there is an asymmetry of interest and contribution between writers in the two disciplines. From the early stages and continuing to the present it is apparent that there is more interest and more scholarship from IL scholars into possible insights from IR theory than the reverse.<sup>92</sup> IR has tended to asymmetrically enrich IL scholarship as IL has been ‘the consumer of theoretical approaches produced by IR scholars’<sup>93</sup> even to the point of a ‘grossly unbalanced disciplinary terms of trade between political science and law’.<sup>94</sup> For example, a recent IR text describes its field as ‘the multi-disciplinary and heterogeneous study which goes to the heart of relations between states and international organisations embracing

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<sup>89</sup> Armstrong (n 46) 69.

<sup>90</sup> Kenneth W Abbott, ‘Modern International Relations Theory: A Prospectus for International Lawyers’ (1989) 14(2) *Yale Journal of International Law* 335.

<sup>91</sup> Dunoff (n 20) 3.

<sup>92</sup> Ibid 10.

<sup>93</sup> Ibid 23.

<sup>94</sup> Dunoff (n 9) 649.

international politics, economics, political economy, diplomatic and international history'<sup>95</sup> – there is no mention of IL. For IR Realists it is said that ‘the law functions as little more than a tool to be deployed in a wider, and more important, political game’.<sup>96</sup> To the extent that climate change policy needs to be collective and global the role of IL in shaping legal regimes appears diminished. The legal regime for climate change may matter little, which might explain its failures.

A second theme, at least from IL scholars, and from their characterisations of IR writers on IL, is that IR writers (to the extent they take account of IL at all) tend to overemphasise the role of rules, courts and formal ‘legal’ institutions and mechanisms (that is to say, positivist IL) at the expense of *process*.<sup>97</sup> There is a tendency in IR writers to exaggerate determinacy (and compliance) in IL and to underestimate indeterminacy and normative strains.<sup>98</sup> Koskenniemi refers to a ‘slippery zone between abstract speculation on binding principles and realistic deference to power’.<sup>99</sup>

This elasticity in IL can be characterised as both a good thing and a bad thing. It may be a good thing given the diverse nature and interests of states as subjects (but also authors) of IL, and the difficulties of institutional enforcement in the absence of any global ‘executive’ or courts of compulsory jurisdiction. Any IL which allows room to manoeuvre in discharging obligations may be more likely to endure and achieve at least a measure of compliance. Thus the universalism of the 2015 Paris Agreement on climate change may seem to fit this conception. The absence of legally binding emissions reduction commitments (*contra* the Kyoto Protocol) and consequent policy flexibility arguably enabled the near universal acceptance for which it was acclaimed (Chapter Two). Rigid rules and practices risk encouraging state actors (who are not bound by an overarching authority) to resile from their obligations or even remove themselves from the ambit of IL given the general absence of

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<sup>95</sup> Chris Farrands et al in Lloyd Pettiford (ed), *A new A–Z of international relations theory* (IB Tauris, 2015) (back cover).

<sup>96</sup> Adriana Sinclair (n 44) 170.

<sup>97</sup> See, for example, Ted Hopf, ‘The Promise of Constructivism in International Relations Theory’ (1998) 23(1) *International Security* 171, 189.

<sup>98</sup> Koskenniemi, for example, describes a tension between the *concreteness* of law (based on the actual behaviour of states) and a claim to *normativity* (which puts a certain distance between law and state behaviour, allowing a critique of state policy): ‘dynamics of international legal argument are provided by the constant effort of lawyers to show that their law is either concrete or normative because it is either apologist of utopian’ (Martti Koskenniemi, *The Politics of International Law* (Hart Publishing, 2011) 38–39).

<sup>99</sup> Martti Koskenniemi, ‘Imagining the Rule of Law: Rereading the Grotian Tradition’ (2019) 30(1) *European Journal of International Law* 17, 17.

substantive penalties and enforcement mechanisms for breach. As noted, Canada withdrew from the Kyoto Protocol without penalty in order to avoid costly sanctions for noncompliance, and similarly the U.S. was free to withdraw from the Paris Agreement. This is not, however, the same as saying IL is merely epiphenomenal as IR Realists are apt to claim. IL, say its proponents, may still guide or at least substantially influence state behaviour even if not reinforced by the modes of state authority operating in domestic legal systems. IL is said to have a force of its own not appreciated in the IR literature – it is more than merely epiphenomenal though less than determinative of state behaviour.

But this looseness and malleability of IL may be a bad thing in that it can be used by reluctant states to justify, even legitimise, substantive non-compliance with obligations, thereby undermining rules, treaty obligations, agreed commitments or any number of real and apparent breaches of IL processes. It may permit states to pursue self-interest through power under the guise of IL, clothing unprincipled actions in a veneer of respectability by exploiting vague rules, principles, treaty terms and even lacunae in IL.<sup>100</sup> Sinclair cites the example of torture.<sup>101</sup>

Key directions in IL, identified in the 1990s<sup>102</sup> and of ongoing relevance, include a move toward politics, a move from rules to process, and consequently a re-examination of the functions of IL beyond guiding and constraining state behaviour<sup>103</sup> (to the extent that it does even this). Koskeniemi puts it that '[p]ublic international law hovers between cosmopolitan ethos and technical specialisation'.<sup>104</sup> There has been an epistemological shift as to just what comes within the ambit of 'international law' and how the 'what' plays out. What now 'counts' as IL, how does it work, and what are its effects? The focus of IL moves from a largely internal positivist perspective (rules, sources) to consider what were previously seen as 'external' contexts in the plurality of actors and interests to be accommodated. Theory in both IR and IL has arguably moved to encompass more complex and nuanced perspectives than the more parsimonious Realist model of IR and the Positivist model of IL.

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<sup>100</sup> Sinclair (n 44) 175.

<sup>101</sup> Ibid: the prohibition on torture was 'a peremptory norm from which no derogation is permitted ... it was overturned with shocking ease ... *because of and through the forms of law* ... [t]he law and its method were sufficiently flexible to justify that which it prohibited' (original emphasis).

<sup>102</sup> See, for example, Slaughter Burley (n 14) 205, 209; Dunoff (n 20) 6.

<sup>103</sup> On this latter point, those functions may include communication, reassurance, monitoring and routinization Dunoff (n 20) 6.

<sup>104</sup> Martti Koskeniemi, *The Politics of International Law* (Hart Publishing, 2011) 331.

IL may then have become more richly theorized, for example, through the constructivism of Brunnée and Toope (below), and claims an expanded field which intersects with IR. But IL has arguably been compromised and perhaps diminished by this IR-inspired shift. An important critic of this development has been Martti Koskenniemi.<sup>105</sup> In looking to his critique the intention will be to expose a deeper understanding of international law and what Koskenniemi sees as a regrettable misdirection. As well we will note his (inchoate) transformative hope for international law as ‘law that would help fashion a world public order that advanced human dignity’.<sup>106</sup>

It will also be significant to note how his concerns, particularly with respect to ‘managerialism’ and governance in international law, will echo the same features of neoliberalism articulated by Wendy Brown in Chapter Three. Koskenniemi’s terminology in the following section is not specifically neoliberal but the essence of the argument applies. Following the Koskenniemi critique we will look more closely at specific indications of neoliberalism in the global order.

#### IV INTERNATIONAL LAW AND THE KOSKENNIEMI CRITIQUE

The intent here is to parse Koskenniemi’s ‘insider’ account<sup>107</sup> and critique of IL both to deepen understanding but also to note implications for the climate change regime. He is critical of the ‘managerialism’ that has infused IL – echoing Brown’s similar critique of neoliberal practice – and including the Law and Economics movement (Chapter Four). He also strongly asserts a normative role for IL. In particular he considers an example of an IL/IR ‘constructivist’ perspective on the climate change regime but is critical of constructivist

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<sup>105</sup> Martti Koskenniemi, *From Apologia to Utopia: The Structure of International Legal Argument* (Finnish Lawyer’s Publishing Company, 1989); *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001). It is of interest to note that in *From Apologia to Utopia* he explicitly applies (at 488) the deep structure social theory of Roberto Unger regarding ‘routines and formative contexts’ – see also Chapter Three of this thesis. See also Koskenniemi (n 50) 395; Martti Koskenniemi, ‘Law, Teleology and International Relations: An Essay in Counterdisciplinarity’ (2011) 26(1) *International Relations* 3; Martti Koskenniemi *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001) ch.6.

<sup>106</sup> David Armstrong (n 46) 88.

<sup>107</sup> In the context of Koskenniemi’s evolving scholarship it might be noted that his later work has shifted to the ‘historical’, showing for example how ‘law once replaced theology as a form of authoritative speech and economics took over from law’ (Koskenniemi (n 99) 19; note also (at 17) his continued ‘utopian versus apologia’ characterisation of international law as ‘the slippery zone between abstract speculation on binding principles and realistic deference to power’.

accounts generally and of a failure to acknowledge underlying ideological assumptions which may undermine it.

### *A The Critique of 'Managerialism'*

Koskenniemi takes exception to the new 'managerial vocabulary' that IR introduces into IL discourse, that of the "objectives", "values" and "interests" that lie behind legal rules.<sup>108</sup> Much of his argument is in counterpoint to earlier discussion of the liberal IL model (for example, Slaughter's idealised world of liberal state and practices). That conception of the global order references (in addition to states) a variety of sub-state, inter-state and non-state actors and the many networks, discursive communities, rhetorical practices, identities, values and liberal biases which have increasingly been incorporated into models of IR and IL.

He sees in IL's turn to IR an attempt 'to update international law into part of the US political science project', part of a 'liberal millenarianism', 'a normative teleology that saw global developments lead towards an increasing acceptance of electoral democracy, human rights and capitalism'<sup>109</sup> – that is to say, concealing an unspoken but dominant liberalism. For example, he characterises IR constructivism as 'ideologically conservative, statist, and closely aligned with the preferences of U.S. academic institutions'.<sup>110</sup> Similarly he characterises the Realist model of self-interested states in terms of 'self-interest ... offered as ... a set of commonsense "realist" propositions' that "validate both selfishness and the drive to acquire and consume".<sup>111</sup> We observed the same language in Chapter Four in characterising fundamental characteristics of neoliberal identity formation. There the 'selfishness and the drive to acquire and consume' were seen as realised individually in the neoliberal construction of *homo economicus*.

Further, he describes a 'legal realism on whose shoulders law and economics as well as rational choice stand'.<sup>112</sup> Thus he locates this Law and Economics strain of neoliberalism in the Realist movement and, by implication, in a 'neoliberal' IL. He sees this new IR vocabulary in IL as being articulated via six 'steps'.

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<sup>108</sup> Koskenniemi (n 50) 406–407.

<sup>109</sup> Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity' (2011) 26(1) *International Relations* 3, 15–16.

<sup>110</sup> *Ibid* 16.

<sup>111</sup> *Ibid* 17 (quoting White).

<sup>112</sup> *Ibid*.

For Koskenniemi the first is the turn from institutions to ‘regimes’ wherein IL is fragmented into new sub-groupings such as ‘environmental regimes’ with their own particularised vocabularies (idiolects) and which, lacking a superior ‘regime of regimes’, will take on a hegemonic character of their own and therefore reproduce ‘pure power’.<sup>113</sup> There is an implication of these fragmented sub-disciplines reproducing, in the absence of an overarching authority, a kind of self-interested Realism in which any original normative drivers are displaced by a drive for power (echoing the discussion of Public Choice theory in Chapter Four). So, for example, the climate change regime comes to be fragmented into a series of sub-regimes of various subject matters like ‘health’, ‘security’, ‘human rights’, and so on, giving rise to jurisdictional and political conflicts – the impetus and direction of an overall, coherent ‘climate change’ regime may be weakened and dissipate.

Koskenniemi sees these separate subject-matter disciplines of IL descending into managerial and instrumental functions serving only their particular interests – ‘an anarchy of autonomous functional systems: trade, human rights, environment, security, diplomacy and so on ... each will create within itself the *sovereignty lost from the nation-state* ... managerialism turns into absolutism’.<sup>114</sup> In this fragmentation of objectives and authority original ambitions, goals and values are diminished or eclipsed – for example, the now seemingly unreachable goal of 1.5C degrees or less of global warming. Just as (in Chapter Three) we saw the authority of the state in domestic regimes devolved to markets, so too in international law we see central authority devolved to these ‘managed’ regimes. With the erosion of domestic state authority goes the will and the means to govern by hard decisions and regulatory fiat as are surely required in the failing climate change regime. So it goes with these fragmented sub-sets of IL which will, Koskenniemi says, succumb to ‘the hubris of instrumental knowledge ... which language will prevail is simply a question of power’ in pursuit of access to the Prince’s ear.<sup>115</sup> Thus there remains a never-ending (Realist) struggle among IL sub-disciplines for power, waged in ‘the fiction that the technical vocabularies are controlling’.<sup>116</sup> They take on a life of their own. These are not the same processes observed in the neoliberal devolution of power and authority away from the state to markets and stakeholders, but the outcome is the same – the

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<sup>113</sup> Koskenniemi (n 50) 407–408.

<sup>114</sup> Ibid 401 (emphasis added).

<sup>115</sup> Ibid 413.

<sup>116</sup> Ibid.

loss of a central, legitimising, authoritative direction in pursuit of whatever policy goals are chosen. Such unifying power and direction become fragmented among diverse stakeholders, be they non-state actors in domestic regimes or sub-disciplines in IL regimes. There may appear to be ‘managerial’ advantages to this fragmentation but, as we saw in Chapter Three, the resulting ‘governance’ regimes carry risks of their own, including the loss of coherence and authority from a single directing source.

For Koskenniemi a second step in the ascension of the IR vocabulary ‘collapses the distinction between law and regulation’, the latter being instrumental in promoting the regime *itself* via harder and softer techniques of regulation rather than law. The hard edge of authoritative law gives way to ‘soft’ law accommodations – negotiated compromises, declarations and statements of principle, codes of practice, voluntary non-binding undertakings (the Paris Agreement NDCs) noted earlier. The splintered sub-regimes take on a life of their own and the original formative ambitions fade.

Thirdly, and similarly with regard to the ‘fragmentation’ discussion above, he notes a general move from ‘government’ to ‘governance’ wherein the latter suggests a model of ‘*de facto* practices’ rather than the more formal governmental ‘administration and division of powers, with the presumption of formal accountability’.<sup>117</sup> This is exactly the concern articulated both in regard to the climate change regime (Chapter Two) and (in Chapter Three) in regard to neoliberal processes of interest accommodation. David Harvey, for example, similarly claims that ‘[n]eoliberals ... tend to favour governance by experts and elites’,<sup>118</sup> precisely echoing Koskenniemi scepticism of the ‘technical vocabularies’ of fragmented sub-disciplines (above). Again the concern is the shift from authoritative formal *government* through hard law to informal interest accommodation and soft law according to these ‘*de facto* practices’ which constitute neoliberal *governance*.

A fourth step is from ‘responsibility to compliance’, away from ‘breach’ and ‘illegality’, to a softer model of ‘informal pressure and subtle persuasion as *socially* embedded guarantees for conforming behaviour’.<sup>119</sup> The reference is to the soft power tools and ‘light touch’ regulation which encourage, for example, the self-management of emissions plans (the NDCs in the

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<sup>117</sup> Ibid 408.

<sup>118</sup> David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 66.

<sup>119</sup> Koskenniemi (n 50) 408 (emphasis added).

Paris Agreement). Similarly, although the Kyoto Protocol included Compliance Mechanisms in a ‘facilitative branch’ they sought to provide ‘advice and assistance’ to erring Parties ‘in order to promote compliance’<sup>120</sup> – that is to say, soft law. Again there is reflected here the same themes from Chapter Three within neoliberal states regarding negotiated compliance with stakeholders which characterize neoliberal *governance* as opposed to *government*. Although IL always demonstrated a tendency to soft law in the absence of a central state-like authority and the need for negotiation with states, Koskenniemi sees the tendency becoming more pronounced.

These four steps are said to ‘point from normative to empirical vocabularies that cannot distinguish between coercion and the law’, a distinction that he says is mediated through a fifth step – the move from Law to ‘Legitimacy’.<sup>121</sup> ‘Legitimacy’ is said to suggest some level of normative substance yet, he says, that is not what this shift is really about. Rather its role is to ‘ensure a warm feeling in the audience’ once a course of action, based on some normative framework, has *already* been decided.<sup>122</sup> Thus legitimacy, which once connoted legality, is now ‘not about normative substance ... [rather] [i]ts point is to *avoid* such substance but nonetheless to uphold a *semblance* of substance’.<sup>123</sup> What was an authentic normative strain in IL now becomes a legitimising mask for an already-decided accommodation of interests and promotion of ideology. An example might be the Paris Agreement itself. Its success in achieving universality, albeit at the cost of hard and precise mitigation commitments, is said to have been a concession to the U.S.<sup>124</sup> Universal agreement was ‘sold’ by enthusiasts as a moral victory but in fact concealed a shift away from justice issues regarding states’ relative degrees of responsibility and capabilities. All states were now (in Foucault’s terminology) ‘responsibilized’. But the danger then becomes one of embittered states revisiting justice issues in their framing of NDCs (which in any event are not legally binding). Thus as Koskenniemi’s argument goes, Paris’s universalism could be said to provide a *semblance* of legitimacy (all states acceded) that avoided the real issue of (Realist U.S.) power and the avoidance of substantive justice issues. The ‘legitimacy’ implied by universal consensus in fact concealed the reality of U.S. power – a power later re-asserted in the proposal to

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<sup>120</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (Article 18).

<sup>121</sup> Koskenniemi (n 50) 409.

<sup>122</sup> Ibid 409–410.

<sup>123</sup> Ibid 409 (original emphasis).

<sup>124</sup> See, for example, Peter Lawrence and Daryl Wong, ‘Soft Law in the Paris Agreement: Strength or weakness?’ (2017) 26 *RECIEL* 276, 276.

withdraw from the Agreement (later reversed). The freedom of the largest industrialised emitters per capita of CO<sub>2</sub><sup>125</sup> to circumvent the spirit, if not the letter, of the climate regime makes the point. Australia, the highest advanced economy emitter, did not ratify the 1997 Kyoto Protocol until 2007, notwithstanding having negotiated a significant increase in emissions, and continues to be accused of ‘shamefully doing nothing’.<sup>126</sup> The US, the second highest emitter, declined to ratify the Kyoto Protocol, ratified the Paris Agreement, later announced its withdrawal,<sup>127</sup> then recently announced its intention to rejoin.<sup>128</sup> Canada, the third highest emitter, and facing punitive costs in making up a Kyoto shortfall and incurring a 30% emissions penalty, was able to simply withdraw and renege on the Protocol without penalty at the end of the three year ‘grace’ period.<sup>129</sup> All numbered among the wealthiest industrialised countries most endowed with the resources and technology to mitigate emissions.

These various steps can be seen as subtle but pervasive measures to move away from policy leadership, regulation and enforcement to a more diffuse and softer model through which (even conflicting) interests might be accommodated and conflict avoided, but at the expense of realising the substantive and hard-edged ambitions that need to be impelling a plausible climate change regime. In terms of the earlier discussion in Chapter Three, it is a move away from state-authority-driven ‘government’ to interest-driven, conflict-avoiding ‘governance’ in which interests are to be accommodated rather than subsumed or overridden in pursuit of the substantive goal. Thus as the Chapter Two indicated, the Paris Agreement set a theoretical goal (maximum 1.5C warming) and achieved universal participation at the cost of a voluntarism in emission targets that will demonstrably not achieve that goal. Friction is avoided, diverse interests are accommodated, universality is courted but end-goals are conceded.

A final step in Koskenniemi’s analysis of IR influence on IL goes to questions of authorial dominance. As noted earlier the dialogue between IL and IR has been asymmetrical, a largely one-way street of IR influence on IL. Koskenniemi clearly fears law becoming ‘fully

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<sup>125</sup> <<https://ourworldindata.org/per-capita-co2>>.

<sup>126</sup> <<https://www.theguardian.com/australia-news/2021/feb/27/australia-accused-of-shamefully-holding-back-global-action-on-climate-change>>.

<sup>127</sup> <<https://www.nytimes.com/2020/11/04/climate/paris-climate-agreement-trump.html>>.

<sup>128</sup> <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/>>.

<sup>129</sup> <[https://unfccc.int/files/kyoto\\_protocol/compliance/enforcement\\_branch/application/pdf/cc-eb-25-2014-2\\_canada\\_withdrawal\\_from\\_kp.pdf](https://unfccc.int/files/kyoto_protocol/compliance/enforcement_branch/application/pdf/cc-eb-25-2014-2_canada_withdrawal_from_kp.pdf)>.

epiphenomenal’ as IR theorists diminish the traditional identity of international lawyers. In Koskenniemi’s view this is most evident in Law and Economics writers (discussed in Chapter Four as a neoliberal influence on *homo juridicus*) theorising that ‘treaties are bargains between rational egoists seeking to resolve coordination or cooperation problems so as to minimize transaction costs’, that is to say, ‘merely surfaces over which parties exercise pressure against each other’.<sup>130</sup> There is little place for international lawyers in this managerial vocabulary, far less for a normative IL, and Koskenniemi points out more generally that ‘most lawyers failed to see the point of translating law into the vocabulary of political science of which they would no longer be the native speakers’.<sup>131</sup> His fear is of IR dictating the terms of interdisciplinary engagement to IL.

### *B Koskenniemi’s Alternative*

What then is Koskenniemi’s response to this war of technical / managerial vocabularies seeking the Prince’s ear?

He draws on Kant’s ‘famous condition of right’, the requirement that in a context of indeterminacy (as with law) ‘rules do not spell out the conditions of their application ... judgement is needed’.<sup>132</sup> Koskenniemi invokes Kant’s seeking to ‘privilege practical over theoretical reason, judgement over instrumental calculation’.<sup>133</sup> Kant distinguished between the ‘political moralist’, who privileges ends over principles in her instrumentalism and technical expertise, and the ‘moral politician’<sup>134</sup> who does the reverse in privileging principle. The latter seeks to make ‘right’ judgements not through instrumental reason employed for functional ends but rather aims at ‘encompassing the perspective of the whole’, employing ‘neither rational subsumption under a rule, nor fully subjective expression of emotion’.<sup>135</sup> The ambition, as with IL in its aspirational moments, is ‘to expand towards universality’ wherein ‘the vocabulary of law [is] also the language of self-improvement, spiritual maturity and all the virtues of the ‘inner morality of law’: honesty, fairness, concern for others, avoidance of deceit, injury and coercion’.<sup>136</sup> It is this aspirational conception of IL, its ‘utopian’ ambition, that connects to the ethical drivers that might generate the solidarity necessary for effective

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<sup>130</sup> Koskenniemi (n 50) 410.

<sup>131</sup> Koskenniemi (n 109) 16.

<sup>132</sup> Koskenniemi (n 50) 413.

<sup>133</sup> Ibid (citing Immanuel Kant *Critique of Pure Reason* (V Politis ed) (Everyman’s, 1991) 140–141).

<sup>134</sup> Ibid 414.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid 414–415.

global climate change responses. It is an ambition that might ground claims that future generations (and distant others in the present) can properly make on us in seeking protection from adverse climate change outcomes.

Koskenniemi goes further in asserting that ‘international law has suddenly become almost the only public vocabulary connected with a horizon of transcendence, the expression of a kind of secular faith ... *a placeholder for the languages of goodness and justice, solidarity and responsibility*’.<sup>137</sup> He claims for IL ‘an invitation to worldmaking’,<sup>138</sup> requiring that we resist ‘the temptation to turn it into another instrument of dominant institutions and expert power’.<sup>139</sup> He claims that ‘[a]stonishingly — and somewhat embarrassingly — philosophers such as Jürgen Habermas and Jacques Derrida or globalization critics such as Joseph Stiglitz appeal to international law ... [n]ot for this or that rule or institution but as a place-holder for the languages of goodness and justice, solidarity and responsibility’.<sup>140</sup>

So for Koskenniemi (and other international lawyers for whom he speaks) IL still has a *telos* – ‘to ‘do’ international law is to operate with a teleology that points from humankind’s separation to unity’, ‘a vocabulary of progress’ in which ‘one is working not only to coordinate the activities of states but for the good of humanity itself’; indeed ‘teleology and progress are ineradicable from international law’, notwithstanding late-modernity’s suspicion of teleologies and grand narratives.<sup>141</sup> These are very large claims – that there is in IL (and in humanity) an impulse and an aspiration toward the utopian, an impulse that redeems us from the pedestrian accommodation of interests which characterizes IL in its mode of *apologia*, freewheeling and ambiguous enough to rationalise almost any behaviour by states (including torture) willing to exploit it. Whether this is mere romantic yearning or genuinely grounded *telos* is important, and for present purposes particularly in normatively loaded issues like climate change.

As noted earlier Koskenniemi does admit of the inexorable tendency of teleologies to reduce to the ‘particular interests’<sup>142</sup> of their enthusiasts, for example in the largely concealed

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<sup>137</sup> Ibid 415 (emphasis added).

<sup>138</sup> Koskenniemi (n 109) 23.

<sup>139</sup> Ibid 26.

<sup>140</sup> Koskenniemi (n 50) 415.

<sup>141</sup> Koskenniemi (n 109) 4–7 for an historical account of teleologies.

<sup>142</sup> Ibid 9.

Eurocentricity and liberal bias of modern IL. He also admits of the importance of both natural law, particularly in times of transformation or crisis, and positivism in times of stability.<sup>143</sup> But in terms of its teleological project he sees IL's end as 'an international community ruled by law', albeit without having had much success in institutionalizing this ambition. The climate change regime speaks to both the ambition of internationalism (the universalism of the Paris Agreement) and the lack of success in attaining its goal (temperature increase limited to 1.5C degrees) as state's NDCs prove inadequate – recall the opinions of various writers (Chapter Two) that there is only a 5% chance of avoiding a temperature increase of at least 2 degrees (the upper limit of the Agreement's ambition and the threshold of 'dangerous').<sup>144</sup> One despondent climate change commentator puts it that '[t]he Paris Agreement is just the latest instance of governments failing to respond to the fact that we are dealing with the single largest existential crisis humanity has ever faced'.<sup>145</sup>

Notwithstanding his optimistic and redemptive vision for IL Koskenniemi also reminds us of the ever-present tension in IL between *apologia* for its malleability and vulnerability to manipulation and on the other hand hope for its universalising, *utopian* teleological ambition of moving humanity further along some continuum of progress (however defined). Indeed he says '[a]t its best it may offer, for a cynical world, a vocabulary for imagining better futures'.<sup>146</sup> This latter ambition would not be a characteristic of instrumental rule through the application of technical vocabularies, but rather one of legal expertise that requires judgement and includes a 'sense of accountability for the choices one makes',<sup>147</sup> such choices to (presumably) be made by well-informed, decisive governments bent on realising collective interests in issues like climate change.

If we look to the global climate change regime in terms of Koskenniemi's 'six steps' through which IR has permeated IL they are manifest in certain ways. First (fragmentation into 'regimes') is evident in the many aspects of a complex problem giving rise to particular sub-regimes. Examples would be regimes for particular areas of scientific enquiry (oceans,

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<sup>143</sup> Ibid 13.

<sup>144</sup> Oliver Milman, 'Planet has just 5% chance of reaching Paris climate goal, study says' (*The Guardian Australia*, 1 August 2017) <<https://www.theguardian.com/environment/2017/jul/31/paris-climate-deal-2c-warming-study>>. Note, however, that this claim is disputed – see, for example, Damian Carrington 'Ambitious 1.5C Paris climate target is still possible, new analysis shows' (*The Guardian*, Sep.19, 2017); see also Agence-Press, 'Worst-case global warming scenarios not credible, says study' (*The Guardian* 18 Jan. 2018).

<sup>145</sup> Dahr Jamail, *The End of Ice* (The New Press, 2019) 168.

<sup>146</sup> Koskenniemi (n 109) 3.

<sup>147</sup> Koskenniemi (n 50) 416.

glaciers, forests, etc), for mitigation measures (various non-fossil fuel energy sources), for adaptation (carbon storage, coastal barriers, agricultural practices), for technology, for finance, for preferred institutional forms, for particular policy options and choices, for compliance, for human rights issues, for displacement and migration aspects, and so for the myriad complications of a super-wicked problem. But that expertise is required in all these areas must be a given and the problem is likely more one of coordination, of keeping the big picture and the motivating impulse to the forefront – what Koskenniemi would reference as ‘judgement’.

The second step – the move from regulation to accommodation and soft law seems more clear and problematic in the earlier critiques of the Paris Agreement and particularly of the NDCs (Chapter Two). Similarly and relatedly the third step – the move from *government* to *governance* (Chapter Three) as a foundational neoliberal policy. The fourth step of ‘soft’ compliance was indicated above in, for example, the ‘light touch’ self-regulation of NDCs in the Paris Agreement and Kyoto Compliance mechanisms.

The fifth step – a move from (concrete) ‘law’ to ‘legitimacy’ was said to suggest a misleading normativity to ‘legitimacy’ when in fact it was a legitimacy grounded in normative substance already decided. In the present context that already-decided normativity takes a neoliberal form, hence, for example, the accepted ‘legitimacy’ of market measures like carbon trading rather than (say) state-imposed carbon regulation, and as well (according to Koskenniemi) an unspoken but immanent U.S. preference for particular policy and ideological choices.

Finally, regarding authorial dominance, as already suggested the influence of the U.S. in formulating both the Kyoto Protocol and the Paris Agreement (Chapter Two) followed by its ambivalent commitment is evident. As well Koskenniemi’s reference to the guiding motivation of Law and Economics (see also Chapter Four) as a characteristic neoliberal principle is apt.

But what of his claim to a redemptive normative strain in IL and, in particular, how to reconcile it with the tensions evident in climate change law – a failing regime seemingly inured to moral claims and the inevitable misfortunes to be visited upon innocents in non-culpable publics present and future? Certainly the neoliberalism critiqued in Chapters Three

and Four does not seem a likely candidate for realising Koskenniemi's optimism in regard to a presently inadequate climate change regime (Chapter Two).

*C Koskenniemi and 'the Point of Law'*

This debate on interdisciplinarity between IR and IL has for one commentator crystalized into a direct question. In a response to Koskenniemi a prominent IL/IR interdisciplinary writer (Dunoff) quotes Koskenniemi's comment that such (interdisciplinary) approaches are 'blind to the difference between the objectives of particular, especially dominant, actors and the point of law' – that is to say, Koskenniemi is accusing IR scholarship of failing to distinguish between the exercise of (particularly U.S.) power and the claims of law to be something more than that. Dunoff then asks of Koskenniemi '*what, exactly, is the point of law?*'.<sup>148</sup> It is a provocative question and demonstrates the tension between the two disciplines.

Either Dunoff has missed this 'point of law' or perhaps Koskenniemi needs to articulate a more satisfactory response. If one wishes to sequester a particular (privileged) and believable normative place for IL, notwithstanding alleged attempts by IR scholars to colonise it, then a fulsome and persuasive response is reasonably to be expected. Does Koskenniemi give one? Is he able to articulate 'the point of law'? It a crucial question for present purposes for an effective climate change regime must be collective, that is to say 'international' and ought to take account of the normative claims of excluded 'others', notably future generations but also present innocents. It is not sufficient to say that the present regime is a 'legal' one. Not only is inadequate but, like IL generally, it is weakened by the influence of IR to the point of becoming epiphenomenal (as the Realists would hold). That is to say, it lacks the kind of normative influence of IL that characterise its aspirational moments – recall Koskenniemi's claims of a universality and an 'inner morality' rather than a merely instrumental reason employed by functional 'experts' informed by unacknowledged relations of power and ideology.

He offers some hints about his vision of IL in his critique of a recent addition to the IL/IR literature by Brunnée and Toope.<sup>149</sup> It will be recalled from the earlier discussion of

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<sup>148</sup> Jeffrey L Dunoff, 'From Interdisciplinarity to Counterdisciplinarity: Is There Madness in Martti's Method?' (2013) 27 *Temple International and Comparative Law Journal* 309, 326 (emphasis added).

<sup>149</sup> Martti Koskenniemi, 'The Mystery of Legal Obligation' (2011) 3(2) *International Theory* 319 (in 'A Symposium on *Legitimacy and Legality in International Law: An Interactional Account* by Jutta Brunnée and

constructivist theory that these international law academics undertake a constructivist account of IL including in particular its application to climate change law. Theirs is an ‘interactional’ account; that is to say, it is ‘constructivist’ in that it looks to the interactions among not just states but a variety of other actors such as ‘elites, the media, NGOs and ‘ordinary citizens’.<sup>150</sup> In drawing on Fuller’s jurisprudence they reference a model which is one of ‘function, form and procedure rather than one primarily of moral content’.<sup>151</sup> It recognizes the variety of non-state actors whose interests are the subject of modes of ‘governance’. Such interactions are said to take on the character of legal obligation when they meet certain criteria (drawn from the legal theory of Lon Fuller).<sup>152</sup> In applying their analysis to the climate change regime Brunnée and Toope say it represents ‘a sound basis of shared *procedural* understandings and foster[s] *procedural* legality’ but are less optimistic regarding ‘*substantive* interactional law’.<sup>153</sup> They claim, for example, that the principle of common but differentiated responsibilities (CDM, discussed in Chapter Two), explicit in the division of Annex I and II countries in the Kyoto Protocol, ‘appears’ to be approaching their legality requirements<sup>154</sup> (though this claim was made before the 2015 Paris Agreement which did not replicate this formal division of states). Notably they do not consider the claim (Chapter Two) that the CDM principle has effectively played out as a (neoliberal) market mechanism benefitting powerful states at the expense of its motivating goal of sustainable development – an indication of the absence of critical ‘bite’ in constructivist theory.

In response to their account Koskenniemi reminds us of his suspicions of ‘the campaign by U.S. political science departments ... to initiate ‘interdisciplinary studies’ of international law’.<sup>155</sup> Similarly he remains deeply sceptical of theories, including those of Brunnée and Toope, in which we might characterise their ‘interactions’ between actors as simply a managerial project of interest accommodation. Koskenniemi’s concern is that they do not make ‘[their] own (contested) moral and evaluative assumptions explicit’, particularly in the case of those managerial models that are only subject to questions ‘over the legitimacy of

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Stephen J Toope). Brunnée and Toope offer a model which is part constructivist but woven through the neo-naturalist theory of Lon Fuller (see also Brunnée (n 78) 19).

<sup>150</sup> Brunnée (n 13) 5.

<sup>151</sup> Brian H Bix, *Jurisprudence: Theory and Content* (Sweet and Maxwell, 7<sup>th</sup> edition, 2015) 87.

<sup>152</sup> Brunnée (n 13) 6 – the criteria go to principles of ‘generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action’.

<sup>153</sup> *Ibid* 217 (emphasis added).

<sup>154</sup> *Ibid* 217–8.

<sup>155</sup> Koskenniemi (n 149) 319 (although he asserts that ‘[n]ot much remains of this campaign’).

institutions to which everyone is assumed to have already committed'.<sup>156</sup> Deeper ideological assumptions which inform such managerial models are, he suggests, unexamined. The implication from Koskenniemi is that Brunnée and Toope do not take adequate account of such assumptions – for example, the deep structure of neoliberalism which this thesis demonstrates as informing, indeed shaping, those managerial models to the detriment of plausible climate change policy. Thus Koskenniemi sees Brunnée and Toope as reducing law to 'a tool of *governance* ... a strategic *instrument* in the hands of the advocates of the climate change project'.<sup>157</sup> As suggested above and in the following chapter, it is in these systems of governance that core climate change objectives dissipate into interest accommodation. The point is that this is *all* that climate change law is for it lacks (or has lost) the normative vision that informs IL at its best, and which might motivate an efficacious regime.

Koskenniemi's critique clearly echoes earlier discussion (Chapter Three) wherein 'governance' is singled out as an important signifier in the epistemology of neoliberalism. Anticipating Brown's characterisation, he articulates the tension between *government* which operates through 'law, policing, punishment, and top-down directives' and *governance* operating through 'soft power ... its focus on problem solving through team-based and consensus-based efforts'.<sup>158</sup> Just as we have seen Brown claiming that law, the traditional tool of the regulatory state, is reduced to governance and the negotiated compromises of interest accommodation, so too does Koskenniemi in the case of international law.

Thus, says Koskenniemi, Brunnée and Toope's attempt to find 'law' in the (Kyoto) climate change model fails to duly recognize

the mystery of obligation – that is to say, the way in which the very same law can also be used to create deviated understandings, reservations, and critiques regarding the climate change project itself ... the possibility that the institutional path chosen ... might itself be part of the problem.<sup>159</sup>

So, for example, the market-oriented institutional paths of the legal regime for climate change, grounded in an informing but unacknowledged context of neoliberalism, undermine the regime and become part of the problem. This then is a fundamental aspect of his critique of interdisciplinarity in IR and IL – the failure to make the '(contested) moral and evaluative

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<sup>156</sup> Ibid 320.

<sup>157</sup> Ibid 322 (emphasis added).

<sup>158</sup> Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Zone Books, 2015) 141.

<sup>159</sup> Koskenniemi (n 149) 322.

assumptions explicit<sup>160</sup> and to examine them. Such is the ambition of this thesis – to make explicit the informing ideology of neoliberalism and its consequences for climate change policy.

On constructivism generally Koskenniemi sees it as ‘concentrating on subject formation but avoiding examining the relations of domination that controlled it ... it is about instrumental effect and managerial control’.<sup>161</sup> The same applies to fragmented IL regimes which, as noted above, may pursue power within the context of their prior commitments to, for example, a clean environment or (liberal) human rights. IL in its aspirational modes, on the other hand, he says ‘highlights the *polemical* aspects of the ‘constructed’ world’<sup>162</sup> rather than concealing them behind unspoken ideological assumptions. It is these ‘polemics of the constructed world’, in particular for present purposes the polemic of neoliberalism, that Chapters Three and Four demonstrated in the particular context of climate change. Koskenniemi seems to be saying that to the extent that IR scholarship has impacted IL it has served to conceal those (particularly US, and particularly neoliberal) polemics. This is useful as critique but there remains the question of just what *is* Koskenniemi’s vision of IL.

He declines to view IL as a ‘discipline’ so much as an ‘argumentative *practice* in which political claims are defended and attacked, rather than as a governance tool or institutional blueprint’.<sup>163</sup> So (to apply his claim) he might be inclined to see the Paris Agreement as an exercise in governance whereas in his ‘argumentative practice’ view of IL he would critique its justificatory claim to universalism as concealing an exercise of U.S. power. One reviewer of Koskenniemi’s *Apology to Utopia* book put it that ‘[d]isciplinary perspectives and political positions are all inevitably the stuff of language games, and international law is the best game in town’.<sup>164</sup> This invocation of ‘practice’ is central to Koskenniemi’s vision of IL, which he says ‘is not a social science’ but rather has a ‘craft-likeness’ in which ‘legal practice, argument and persuasion’ produce ‘correct’ legal decisions, correct that is in being a product

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<sup>160</sup> The point is similarly illustrated in an otherwise positive book review of *Brownlie’s Principles of Public International Law* wherein Koskenniemi has this to say: ‘As thorough, detailed and well-structured as the work now is, it still leaves a gaping hole in the place where the reader would wish to enquire ‘how well do these rules and institutions work?’ Or indeed, ‘for whom do they work?’ ... [t]he way rules and institutions operate to distribute material or spiritual resources in the world remains invisible ... [n]or is the works’ implicit ideology – functionalism and problem-solving – ever raised as a topic of reflection’.

<sup>161</sup> Koskenniemi (n 109) 16.

<sup>162</sup> *Ibid* (emphasis added).

<sup>163</sup> *Ibid* 3 (emphasis added).

<sup>164</sup> Haskell (n 15) 667, 670.

of that process or ‘phronesis’ (that is to say, a type of wisdom relevant to practical things).<sup>165</sup> This point regarding argumentative practices in IL presupposes a thriving political space and motivation to argue leading ultimately to hard decisions that can be implemented. Alternatively this political space may be diminished or lost in the managerial drive of interest accommodation and avoidance of conflict in the pursuit of ‘efficient’ wealth accumulation and power. It may also be eroded domestically in neoliberalism and the diminution of a public political space as neoliberal subjects are encouraged to pursue income and wealth accumulation (Chapter Four).

He tells us further that ‘a plausible legal vocabulary will have to show not only its realistic connection to the world of factuality but also its *normative distance from that world*’.<sup>166</sup> IL (including the climate change regime) must connect to the actual world, for example in recognizing different obligations and capacities, yet it must also be normatively distinct from it. Thus, as discussed above, the CDM principle recognizes the different capacities and responsibilities of states but lost its normative grounding in sustainable development. In relation to climate change practical issues would include concrete policies, technological advances, new regulation, quantitative commitments, re-allocation of resources, and so on. But for Koskenniemi there must also be some normative commitment to certain ideas and values, some consensus ethics. Climate change experience to date suggest this normative commitment is weak.

So if the constructivist climate change model proposed by Brunnée and Toope makes a comforting claim of ‘shared understandings’, suggesting accommodations between stakeholders, which reinforce the critical element of obligation, that is not all of it. Koskenniemi warns of other possible contributing factors in their model such as ‘force, fraud, manipulation, ideology, or ignorance’ which he says might inform a critique of the climate change project ‘or its manner of realization’.<sup>167</sup> In such a critique one might, for example, read climate change law as a universalising discourse (the Paris Agreement) that attempts to erase massive contributory differences and culpability between states and as well in the beneficiaries from the careless consumption activities of states. It does so via its voluntarism and its ‘responsibilising’ of even developing states. It does not acknowledge its neoliberal

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<sup>165</sup> Koskenniemi (n 109) 19.

<sup>166</sup> Koskenniemi (n 149) 322 (original emphasis).

<sup>167</sup> Ibid 322.

drivers and their aberrant consequences – obsession with growth, private self-serving markets at the expense of the state, the drift to an accommodating governance, a reconfiguration of the individual subject as an economic unit, a diminished field for political argument. We need to be alive to those alternative readings in a way that those caught up in the managerial routines of functional regimes likely are not. It is only IL's normative *distance* from its constituent parts that might preserve this critical and utopian aspect and claim to at least the pursuit of universality informed by cosmopolitanism and moral goodness.

For Koskenniemi '[l]aw's power and attraction lie in its offering what appears a universal point of view, its ability to raise mere opinions onto a status of what is universally right' even though 'this universal standpoint constantly eludes us' and indeed is apt to be in the eye of the beholder.<sup>168</sup> He seems to be saying that an authentic, normatively distanced IL is capable of transcending the anarchy of self-interested states, their concealed ideological drivers and their drift into self-serving managerial regimes and yet still aspire to a detached universalism.

But in conclusion it is questionable whether or not Koskenniemi provides an adequate response to Dunoff's sceptical Realism in asking 'what, exactly, *is* the point of law?'.<sup>169</sup> His response is arguably unsatisfying – too amorphous and obfuscatory to be of much guidance. Nonetheless, his critique of unarticulated ideologies behind the managerial models of IR and their influence on IL is useful in making tangible and affirming Brown's critique of neoliberalism (Chapter Four). He shows how the diffusion of neoliberalism in IR, and particularly through the agency of U.S. scholarship, has in turn permeated IL through the adoption of techniques of *governance* (rather than government), a misleading *legitimacy* (rather than legality), and *management* leading to negotiated *compliance* (rather than regulation). Thus are the interests of diverse stakeholders mediated through a process of accommodation and concrete goals and enforcement rules are compromised or sacrificed. For example, we saw in the Paris Agreement a requirement of states to make a plan (Nationally Determined Contributions) but not to set any particular or binding mission reduction targets.

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<sup>168</sup> Ibid 324.

<sup>169</sup> It is interesting, and relevant to Dunoff's pointed question, that in an early review of Koskenniemi's *Apology to Utopia* book David Kennedy (an equally eminent commentator on International Law) complains that: 'At times his agnosticism annoys. Although balance is normally considered essential to scholarly objectivity, Koskenniemi seems to have taken things too far. His refusal to take a stand tempts us to doubt his sincerity, perhaps even his objectivity. Either he is hiding his preference or his analysis is so sweepingly critical as to be of little use to either the scholar or practitioner'.

David Kennedy, 'Review of *Apology to Utopia: the Structure of International Legal Argument*, by Martti Koskenniemi' (1990) 31(1) *Harvard International Law Journal* 385, 387.

Even the requirement to submit NDCs still lacks an enforcement mechanism but note the language in requiring that ‘the [Article 15 Committee’s] modalities and procedures are carefully designed to respect the transparent, *non-adversarial*, *facilitative* and *non-punitive* nature of the Committee’s work ... [t]hey also respect parties’ sovereignty’.<sup>170</sup> The language of ‘management’, ‘governance’, and ‘accommodation’ is clear – it presents as a soft law regime of negotiated compliance and weak ambition.

#### *D Summary of Koskenniemi’s Vision of International Law*

Koskenniemi invokes a utopian impulse in IL that he claims works alongside, and apart from, the interest accommodation that characterises the *apologia* of IL. Regrettably he does not spell out details of a transformative conception of IL beyond the ‘mystery’ of its utopian modes.<sup>171</sup> He is critical of inroads of IR theory into IL, of the constructivist accounts of IL including the climate change regime, and would have even less regard for the Realist dismissal of IL as merely epiphenomenal, though he is disappointingly vague on IL’s utopian impulses and processes. However, he offers a critique of IR and IL models of the global order that resonates strongly with, and affirms, the critical themes of neoliberalism which are the subject of this thesis. He also offers an inchoate assertion of hope for IL in its universalising and normative ambitions but reinforces the concern that such ambitions are not presently realised in the global climate change regime. In short he offers a critical view of the field of IL and IR and clarifies a vision and a critique – a perspective from which we can see the shortcomings of the global order as a context for a plausible and efficacious climate change regime even if we cannot yet see the realisation of the normative promise in IL that he asserts.

Turning from Koskenniemi and broad conceptions of the global order among IR and IL scholars it will be useful to look to a fundamental question for this thesis: having characterised the influence of neoliberalism on nation states can it also be said that the global order itself is demonstrably ‘neoliberal’?

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<sup>170</sup> Gi Zihua, Christina Voigt and Jacob Werksman, ‘Facilitating Implementation and Promoting Compliance With the Paris Agreement Under Article 15: Conceptual Challenges and Pragmatic Choices’ (2019) 9 *Climate Law* 65, 98 (emphasis added).

<sup>171</sup> Koskenniemi (n 149).

## V IS THE GLOBAL ORDER 'NEOLIBERAL'?

Chapters Three and Four explored neoliberal ideology in terms of its fundamental principles and practices which, it was claimed, are largely incommensurable with efficacious climate change policy. Although neoliberalism is said to be a hegemonic informing ideology among (particularly industrialised) nation states they have not for present purposes been considered in any detail individually. The intent, particularly in Chapters Three and Four, was rather to deconstruct generally the manner in which neoliberalism re-shaped the role of the state and as well reconfigured economic, social, political and legal relations. Actual policies and practices will vary between states. The intent was to show how its reconfigured institutional forms undermined climate change reform.

But as well as individual state practice there is a context of global ordering in which states also assert their interests and, where necessary, aspire to converge on issues of common interest or threat, climate change being a paradigmatic example. The analysis above explored and critiqued that global order as a context for the global climate change regime described in Chapter Two. States act not only domestically but internationally and the 'international' too is an informing context for supra-state relations. We have seen how that context is variously characterised by IR and IL theories and have looked to Koskenniemi's analysis for a critical perspective. But a final question of interest is whether the 'international' is also a field permeated by neoliberalism, and if so how.

It will be suggested that the global order of states is itself a 'neoliberal' order the following ways – its member states are themselves ideologically 'neoliberal', its institutional frameworks (particularly finance and trade) manifest neoliberal principles, in the absence of central authority it operates on 'soft' systems of governance rather than *government*, and as a system of some two hundred largely unconstrained and self-interested states it, by its very nature, mirrors a neoliberal marketplace of 'competitors' endowed with certain resources asserting power in pursuit of profit and security.

### *A The Constituent States of the Global Order Are Themselves Neoliberal*

Chapter Three included commentary on the evolution and spread of neoliberalism in states. For present purposes the claim is simply that if states themselves are neoliberal then they can reasonably be expected to bring that ideological framework to their conduct of international

relations, albeit not perfectly or always consistently. In that sense if the states are ideologically neoliberal then too the ‘society’ of states will likely similarly reflect the ideology of its constituent members – for example, in favouring minimal and ‘light touch’ regulation and market solutions, private rather than state actors, minimal limits on sovereignty and a suspicion and resentment of external authority. There is evidence of that in the Paris Agreement’s voluntarism, its eschewing of binding emissions targets, and in ‘market’ solutions such as carbon trading carried over from Kyoto. Given variations in the application of neoliberal principles in different states it is difficult to quantify how widespread it is across the global order. David Harvey, however, puts it that:

[t]here has everywhere been an emphatic turn towards neoliberalism in political-economic practices and thinking since the 1970s ... [a]most all states ... have embraced, sometimes voluntarily and in other instances in response to coercive pressures, some version of neoliberal theory and adjusted at least some policies and practices accordingly.<sup>172</sup>

It would therefore be surprising if neoliberal ideology did not significantly filter through the global climate regime via its constituent state actors, though not necessarily to the same degree, in all of the discursive communities that seek to influence climate change policy. It is simply that neoliberalism as a deep structure infuses all aspects and conditions of its host states including their climate change policies (Chapters Three and Four).

### *B Neoliberal Institutional Frameworks in Global Finance and Trade*

Whilst the global order lacks a central sovereign ‘state’ it does include a variety of international institutions with various degrees of authority to facilitate collective actions, organise relations between states, implement agreements, and so on.

The explicit invocation of neoliberal policies can be found in international finance and trade institutions such as the International Monetary Fund (IMF), the World Bank (WB) and the World Trade Organization (WTO) which are in turn resourced and motivated by neoliberal states.<sup>173</sup> These institutions implement neoliberal economic policies – for example, austerity, deregulation, privatisation, free trade – as conditions for providing funding.<sup>174</sup> Their motivating neoliberal agenda is clearly articulated in the so-called ‘Washington

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<sup>172</sup> David Harvey (n 118) 2–3.

<sup>173</sup> Ibid 3, 29, 73, 92–93.

<sup>174</sup> Ibid 92–98; Naomi Klein, *The Shock Doctrine* (Penguin Books, 2008) 163.

Consensus'<sup>175</sup> which was imposed on troubled developing economies via the IMF, the World Bank and the U.S. Treasury.<sup>176</sup> It should be noted that a global free trade order – sometimes conflated with ‘globalisation’ – is not *necessarily* ‘neoliberal’. But the driving motivations of efficiency and wealth creation in free markets, utilising comparative advantage, mirror neoliberal principles. Neoliberalism thus aligns with trade reform policies such as the removal of price controls, the deregulation of capital markets, eliminating trade barriers and the pursuit of national government programs of privatization and austerity.

It is not only neoliberal states but as well ‘the remarkable role of international organizations in spreading neoliberalism ... UN agencies and other international organizations are an integral ... part of the story of the rise and diffusion of neoliberalism’.<sup>177</sup> The means employed are ‘new forms of global governance in general, and public–private partnerships (PPPs) in particular’.<sup>178</sup> The governance model for PPPs was ‘as far as possible, a governing body that would resemble a board of directors in a for-profit enterprise’.<sup>179</sup> The language is telling.

The idea is that a neoliberal global economic order driven by ‘a world market order based on the principles of free trade and minimum regulation is the guarantee of liberty, efficiency and limited government’.<sup>180</sup>

The neoliberal Washington Consensus, said to represent a ‘paradigm shift’,<sup>181</sup> has been ‘the dominant orthodoxy over the last twenty years in leading OECD countries, and in the international financial institutions’,<sup>182</sup> albeit as Held argues as an instrument of U.S.

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<sup>175</sup> The term was originally coined in 1989 by British economist John Williamson. It is also defined as ‘the norms of a liberal international economic order’ (Charles Gore, ‘The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries’ (2000) 28(5) *World Development* 789, 792.

<sup>176</sup> David Harvey (n 118) 29: ‘Stiglitz refers to ... a “purge” of all Keynesian influences from the IMF in 1982. The IMF and the World Bank thereafter became centers for the propagation and enforcement of ‘free market fundamentalism’ and neoliberal orthodoxy. See also John Williamson, ‘What Washington Means by Policy Reform’ in John Williamson (ed), *Latin American Readjustment: How Much has Happened* (Washington: Institute for International Economics, 1989) <[https://en.wikipedia.org/wiki/Washington\\_Consensus](https://en.wikipedia.org/wiki/Washington_Consensus)>.

<sup>177</sup> Nitsan Chorev, ‘Neoliberalism and Supra-National Institutions’ in Damien Cahill, et al (eds) *The SAGE Handbook of Neoliberalism* (Sage Publications, 2018) 260–261.

<sup>178</sup> Ibid 261. Even UN organizations such as the World Health Organization have been ‘transformed to become more compatible with the dominant neoliberal logic’ (at 261), and (at 262) ‘seemingly capitulated to the neoliberal logic’.

<sup>179</sup> Ibid 264.

<sup>180</sup> David Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus* (Polity Press, 2004) 29.

<sup>181</sup> Gore (n 175) 790.

<sup>182</sup> Held (n 180) 55.

geopolitics<sup>183</sup> (recalling Koskenniemi's comments above). Its 'narrow agenda is focused typically on free trade, capital market liberalization, flexible exchange rates, market-determined interest rates, the deregulation of all markets, the transfer of assets from the public to the private sector'.<sup>184</sup> It was implemented via 'structural adjustment policies' as a condition of aid to ailing developing states.<sup>185</sup> It is said to represent 'extreme market fundamentalism' which represented 'the intrinsic ethical superiority of economic liberalism'.<sup>186</sup> It has been argued by some that it has evolved into a (still neoliberal) 'post-Washington Consensus'.<sup>187</sup>

It is unsurprising that this global neoliberalism articulated in the Washington Consensus includes a 'turn to governance', an important 'social embeddedness for the functioning of markets' and a move to 'depoliticize the economic decision-making process, if not the society at large and to restrict the domain of democracy as a means of fostering the smooth and speedy implementation of market-based economic reforms'.<sup>188</sup> The significance of 'governance' was explored above and will be again in the following chapter.

In this globalized economic order states have also jointly and collectively entered into free trade agreements, for example the North American Free Trade Agreement (NAFTA) between the U.S., Canada and Mexico. By such means neoliberal policies aim at moving away from powerful 'Keynesian' state authority and enabling free markets globally. The pursuit of a global impartial, rule-based free trade order, promoted and enforced by the WTO, thus mirrors the domestic neoliberal privileging of free markets and a diminished role for state authority. As with the neoliberal re-ordering of state-market relations in domestic contexts, '[i]ronically, while the neoliberal economic globalization of recent decades is justified on

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<sup>183</sup> Ibid 55–56 (note 1).

<sup>184</sup> Ibid 55.

<sup>185</sup> See, for example, Arne Ruckert, 'Towards an Inclusive-Neoliberal Regime of Development: From the Washington Consensus to the Post-Washington Consensus' (2006) 39(1) *Labour, Capital and Society* 41, 43.

<sup>186</sup> Gore (n 175) 792–793.

<sup>187</sup> See generally Ruckert (n 185) 41. See also Gore (n 175) 800; Eric Sheppard and Helga Leitner 'Quo Vadis neoliberalism? The remaking of global capitalist governance after the Washington Consensus' (2010) 41 *Geoforum* 185, 188. In this conception Ruckert (at 62) says the IMF and World Bank 'still seem to be unwilling to move substantially beyond their neoliberal macroeconomic policy prescriptions' but with a shift in emphasis toward poverty reduction in developing states.

<sup>188</sup> Eric Sheppard and Helga Leitner, 'Quo Vadis neoliberalism? The remaking of global capitalist governance after the Washington Consensus' (2010) 41 *Geoforum* 185, 187–188 (quoting Onis and Senses).

deregulatory grounds, it depends ultimately on a deepening of state capacities, reconfigured for the benefit of powerful private actors'.<sup>189</sup>

The WTO serves as a kind of 'market-enabling' authority analogous to those of its constituent state members. Given its focus on economic growth through free trade globally there is inevitable tension with environmental values (typically an 'externality' to production) and concerns for sustainability.<sup>190</sup> It should also be noted that the growth in world trade<sup>191</sup> also conceals a distorting affect in terms of how greenhouse gas emissions are attributed between states. Goods consumed in developed countries but produced in developing countries are attributed to the latter, with the result that 'the rise in emissions from goods produced in developing countries but consumed in industrialized ones was *six times* greater than the emissions savings of industrialized countries'.<sup>192</sup>

The detailed architecture of the WTO – including a compulsory dispute settlement process and robust enforcement measures for compliance (including counter measures and compensation)<sup>193</sup> also stands in stark contrast to the weaknesses of the climate change regime, and in particular the 2015 Paris Agreement. The climate change regime effectively depends on a legally unenforceable honour system with weak penalty provisions.<sup>194</sup>

Klein, for example, notes that

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<sup>189</sup> David Singh Grewal, 'The Domestic Analogy Revisited: Hobbes on International Order' (2016) 125 *The Yale Law Journal* 618, 677.

<sup>190</sup> See, for example, Elaine Hartwick and Richard Peet, 'Neoliberalism and Nature: The Case of the WTO' (2003) 590(1) *The ANNALS of the American Academy of Political and Social Science* 188 – for example, at 197: 'the increased international competitiveness favored by a neoliberalized WTO trading system reduces the political and economic ability of member countries to environmentally regulate production. The argument is so compelling that the WTO, through its 1999 report, for instance, has to address the relations between trade, growth, and environmental degradation previously so neglected that its committee on trade and environment had *never met!*' (emphasis added).

<sup>191</sup> For example, based on 1913 as a base year indexed at 100, world trade (in constant dollars) has grown to 165 in 1951 to 1809 in 1991 to 4928 in 2010; exports as a proportion of GDP have grown from 9.6% in 1951 to 26% in 2007 <<https://ourworldindata.org/trade-and-globalization>>.

<sup>192</sup> Naomi Klein, *This Changes Everything: Capitalism vs. The Climate* (Simon & Schuster, 2014) 79–80 (quoting (at footnote 35) a *Proceedings of the National Academy of Sciences* study) (original emphasis).

<sup>193</sup> See, for example, Joost Pauwelyn, 'Enforcement and Countermeasures in the WTO' (2000) 94 (2) *American Journal of International Law* 335, 336.

<sup>194</sup> Raymond Cléménçon, 'The Two Sides of the Paris Climate Agreement: Dismal Failure or Historic Breakthrough' (2016) 25(1) *Journal of Environment and Development* 3, 18 – in summary, the Paris Agreement 'defines no emissions peak year, no specific emissions reduction timeline, and no concrete plans to phase out of fossil fuel subsidies, to stop construction of new coal-fired power plants, and to substantially and transparently increase financial support to developing countries'.

during the same years that our governments failed to enact a tough and binding legal architecture requiring emissions reductions, supposedly because cooperation was too complex, they managed to create the World Trade Organization – an intricate global system that regulates the flow of goods and services around the planet, under which the rules are clear and violations are harshly penalized.<sup>195</sup>

The WTO comprises some 164 members who account for more than 98% of world trade.<sup>196</sup> Indeed ‘the WTO has been compared to a constitution for the global economy’,<sup>197</sup> albeit ‘as a central institution in the American-led project of neoliberal globalization’.<sup>198</sup> In contrast to the Paris Agreement the WTO is ‘one of the only international institutions whose rules are legally binding on states and backed by a powerful enforcement mechanism’,<sup>199</sup> reinforcing the neoliberal imperative of free trade in that a quasi-central authority is created to reinforce markets. The market-threatening imperatives of climate change lack similar legality. Although there has more recently been a threat to the traditional hierarchy of the WTO by countries of the ‘global South’ (notably India, China and Brazil) it nonetheless remains part of the ‘institutional project of neoliberalism’.<sup>200</sup> Unsurprisingly climate change policy is typically mediated as well through the lens of trade agreements.<sup>201</sup>

It will be recalled from Chapter Four that Brown drew attention to the gravitational force of neoliberalism in (particularly American) courts, and as well that Chapter Four analysis drew attention to the influential Law and Economics movement. In the context of global trade regimes, and particularly with regard to dispute resolution processes under the WTO, ‘international legal commitments to economic integration often entail new forms of transnational dispute resolution that bypass national courts’.<sup>202</sup> Thus neoliberalism in the global trade context will similarly continue the erosion of *homo juridicus* in domestic neoliberal orders.

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<sup>195</sup> Klein (n 192) 16. Note also (at 69–73) the constraints that international trade rules place on certain environmental measures.

<sup>196</sup> Valbona Zenele and Michael R Czinkota, ‘WTO as a Reflection of Emerging ‘New’ World Order’ *The Diplomat* (Feb. 11, 2019) 2.

<sup>197</sup> Kristen Hopewell, *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project* (Stanford University Press, 2016) 7. See also at 181: ‘new powers are challenging the hegemony of the US *rather than the neoliberal paradigm of the WTO*’ (emphasis added) – indeed (at 16) neoliberalism is being used as a justificatory *tool* by rising powers seeking to challenge US hegemony.

<sup>198</sup> *Ibid* 19.

<sup>199</sup> *Ibid* 181.

<sup>200</sup> *Ibid* 8.

<sup>201</sup> Elliott (n 16) 43: ‘Presently, nation states enter climate negotiations on the terms established for trade agreements. It is a given that each state will pursue exclusively its own interests and will cooperate with others only to the degree that these interests are served or at least not obviously hurt’.

<sup>202</sup> Grewal (n 189) 677.

### *C 'Governance' in the Global Order*

From the discussion above with respect to Koskenniemi's critique of the constructivist climate change model of climate change, and from the critique by Wendy Brown in Chapter Three,<sup>203</sup> the importance of 'governance' as a signifier and core practice of neoliberalism is clear. The liberal image of international law as including an array of non-state actors indicates the range of interests to be accommodated by regimes of governance.<sup>204</sup> The means for facilitating governance are suggested in terms of the soft law options available in international law and noted above – for example, declarations and statements of principle, codes of practice, voluntary non-binding undertakings (for example, the Paris Agreement), and negotiated standards and compliance (for example, the Kyoto Protocol). In fact many countries – the EU and countries likely to be worst affected – argued for hard (binding) treaty law in Paris but the U.S. insisted on non-binding commitments.<sup>205</sup> The contrast is with declarative and enforceable regulatory regimes sponsored by firm and if necessary intrusive *government*. Put simply 'there is no substitute for strong political will to reduce emissions'.<sup>206</sup>

Thus the Paris Agreement has been described as 'a decisive shift ... towards a governance model ... [that] is strongly linked to neoliberal principles that have dominated global governance over recent decades.'<sup>207</sup>

### *D The Global Order as Metaphor for a Neoliberal 'Marketplace'*

If the global order can be broadly characterized as ideologically neoliberal by virtue of its constituent members, its institutional frameworks, and governance practices there is a more fundamental underlying argument to be made going to the architecture of the global political and legal order itself. It is within this global order that collective global responses to climate change must manifest but how can we describe this order-without-a-central-governing-authority and how is climate change policy affected by its architecture?

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<sup>203</sup> Brown (n 158) 141 – *government* operates through 'law, policing, punishment, and top-down directives' whilst *governance* operates through 'soft power ... its focus on problem solving through team-based and consensus-based efforts'.

<sup>204</sup> See, for example, Karin Bäckstrand et al, 'Non-state actors in global climate governance: from Copenhagen to Paris and beyond' (2017) 26(4) *Environmental Politics* 561–579.

<sup>205</sup> Lawrence (n 124) 276.

<sup>206</sup> *Ibid.*.

<sup>207</sup> *Ibid* 277.

If a benign global climate is a common aspiration, but if states can and do behave as maximisers of self-interest by minimising any sacrifices they make to the collective effort (the opportunity to be a ‘free rider’) then the prospects for a viable regime are obviously jeopardised. The individual state pursuit of self-interest becomes collectively irrational but there is no empowered and legitimate central authority to constrain it. The weakness of the climate change legal regime will likely reflect both the structural weaknesses of the global order within which it had to function, and the neoliberal ideology driving state behaviour domestically and globally. Theories of state behaviour were considered above as subjects of IR and IL.

But to venture an analogy suggested earlier, the global order itself, as an international system of self-seeking actors absent a central sovereign authority, is structurally pre-disposed to operate as a quasi-‘free market’ of 197 states endowed with resources and driven by (Realist) motivations of power, profit and survival – as are markets of competing private commercial actors in domestic societies who also seek profits, market power and longevity in the interests of owners / shareholders rather than publics.

The global order does not even have a central and potentially powerful state actor and competing state actors are even less inhibited by any threat from an external authority. The pre-neoliberal Keynesian state was a powerful (and legitimate) presence in macroeconomic management and regulation of the economy as well as a promoter of the collective will in matters of common concern. The equivalent never existed in the global order. To stretch the analogy further, if the neoliberal state has been reconfigured as market-enabling (Chapter Three) then it is similarly arguable that the Paris Agreement is also ‘market enabling’ in its centrepiece voluntary, non-binding, self-driven Nationally Determined Contributions, as well as in specific policy instruments like carbon markets and the CDM. That is to say, it further enhances the freedom of its (competing) state actors to steer their own self-interested course even where it is collectively irrational.

Thus the argument here is that the global ‘marketplace’ of states is not only neoliberal by ideological inclination but also in its architecture – by analogy as an *a priori* ‘neoliberal’ marketplace, a field of competing actors possessing resources and driven by economics and power. By its characteristic architecture as a marketplace of competing state interests and exercise of ‘market’ power it is quintessentially ‘neoliberal’ and therefore fertile ground for

neoliberal practice. It's very essence is that of competition and lack of regulation by any sovereign authority, driven by aspirations for wealth and power. That it is in fact also suffused with neoliberal ideology (shown above) is far from being a surprise, it seems almost endemic or 'natural' to such an order. It is an order not by its nature given to voluntarist, collectivist concerns for 'others' (such as non-culpable states or future generations) and is unlikely to forego self-interest in pursuit of uncertain future benefits (or loss avoidance) to others even if it would ultimately be rational to do so. Recall the fable of the scorpion and the frog:

*A scorpion asks a frog to carry him over a river. The frog is afraid of being stung, but the scorpion argues that if it did so, both would sink and the scorpion would drown. The frog then agrees, but midway across the river the scorpion does indeed sting the frog, dooming them both. When asked why, the scorpion points out that this is its nature.*

## VI NARRATIVES ON INTERNATIONAL LAW AND THE GLOBAL ORDER AS CONTEXTS FOR CLIMATE CHANGE

This thesis seeks to explain the shortcomings of the international climate change regime in terms of two broad claims – first, that neoliberal ideology is inimical to collective action on climate change and second, that the structures and limitations of the global order of states renders effective collective action extraordinarily difficult, even in the face of a common existential threat such as climate change.

The intention in this chapter has been to demonstrate the second claim – to characterise and evaluate the global order of states as context for the climate change regime. This global order is the subject of political (IR) and legal (IL) disciplines and the relationship between them. Each is informed by the other but with a tendency for IR, dominated by Realism, to exert greater influence on IL. As well Liberal models take account of the influence of a variety of non-state actors which, it is argued, require states to accommodate a wide range of interests as they 'manage' various international regimes including climate change. Similarly Constructivist models take account of the processes of identity and interest formation which will ultimately determine the positions states will take.

It will be clear from the discussions and arguments above that characterisations of IL veer between 'a utopian vision of law as a set of impartial normative constraints on state will' (for example Koskenniemi's vision) and 'an apologetic vision of law as the concrete expression

of state behaviour ... merely politics by other means ... primarily instrumental' (typically a Realist vision from IR).<sup>208</sup> As one author puts it 'legal reasoning does not provide determinacy, but it brings weighted direction to political conflict'.<sup>209</sup>

Koskenniemi has been a prominent critic of the interdisciplinary dialogue and in particular of the 'managerialism' and concealed ideological agendas that characterise international legal practice. He includes the climate regime and its practices of 'governance'. Although he nonetheless maintains a normative role for IL generally that may at times impel IL past this managerialism to something like 'worldmaking' he offers little in the way of programmatic argument. Indeed the marginalisation of IL in IR scholarship, and Koskenniemi's own scepticism, make this redemptive claim for IL look at best fragile.

A second purpose, anticipating the following chapter, has been to show how and why this global order can be characterised as 'neoliberal' as a consequence of the ideology of its principal actors and institutions. The global order is said to manifest neoliberal ideology first via the ideology of its constituent states as they assert their preferences in international agreements such as the climate change regime; second, in its financial and trade institutions; third, in its shift to 'governance' strategies; and finally and systemically in its very architecture as a kind of anarchic 'neoliberal' marketplace of self-interested state actors pursuing wealth, power and security in the absence of any central sovereign 'state-like' authority.

Finally by way of illustration an overtly neoliberal strain of international law is offered by Goldsmith and Posner,<sup>210</sup> both law professors from the University of Chicago (an institution whose significance in the evolution of neoliberalism was noted in Chapter Three). They write in the distinctly neoliberal Law and Economics tradition (Chapter Four). It will be clear that their vision of IL reflects a distinctly Realist position and sharply at odds with that of Koskenniemi.

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<sup>208</sup> Haskell (n 15) 669.

<sup>209</sup> Ibid 667.

<sup>210</sup> See Stacie Goddard, 'Book review of Jack L. Goldsmith and Eric A. Posner 'The Limits of International Law' (Oxford University Press, 2005)' (2005) 120(4) *Political Science Quarterly* 711.

They claim that ‘it remains doubtful that liberal democracies can engage in strong cosmopolitan action’, including (at that time) the Kyoto Protocol. They claim the reasons (in the case of the U.S.) go to a lack of public support due to cost concerns and mistrust of other states regarding compliance, though they do admit of the possibility of leaders nonetheless going beyond this limitation especially where publics are uninformed.<sup>211</sup> More generally they claim that ‘[i]nternational law scholarship ... [has been] dominated for decades by an improbable combination of doctrinalism and idealism’.<sup>212</sup> They, on the other hand, explicitly endorse a Realist view of IL, employing rational choice theory in the pursuit of ‘state power and state interest’, and they ‘consistently *exclude* one preference from the state’s interest calculation: a preference for complying with international law’.<sup>213</sup> Not only is there no central ‘state’ authority but even to the extent there is an ‘international law’ system of rules and conduct it is not considered authoritative – international law is simply not relevant.

They characterize ‘state interest’ as ‘merely descriptive of leaders’ perceived preferences and as morally neutral’<sup>214</sup> (in contrast to Koskenniemi). These preferences are focused around ‘security and economic growth’<sup>215</sup> though these are likely contradictory in the case of climate change which is very much a security issue<sup>216</sup> and may well result in disruption, if not lower or even negative growth, in economies undertaking significant emission reductions and/or adaptation measures. They see no independent space for IL either normative or instrumental (except as a tool of state interests).<sup>217</sup> Even among ideologically sympathetic states, for example the industrialised democracies which have historically dominated greenhouse gas emissions, there is said to be little hope for collective action and for Goldsmith and Posner ‘it remains doubtful that liberal democracies can engage in strong cosmopolitan action’.<sup>218</sup>

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<sup>211</sup> Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, 2005) 215–218.

<sup>212</sup> Ibid 3.

<sup>213</sup> Ibid 9 (emphasis added).

<sup>214</sup> Ibid 7.

<sup>215</sup> Ibid 9.

<sup>216</sup> For example, by increasing conflict and chaos abroad, destructive impacts domestically, hampering the functionality of the military to operate (see Michael Klare, ‘If the US military is facing up to climate change, shouldn’t we all?’ (*The Guardian*, 13 Nov. 2019).

<sup>217</sup> For a more nuanced discussion of cosmopolitanism and international law see, for example, Wouter Werner and Geoff Gordon, ‘Kant, Cosmopolitanism, and International Law’ in Anne Orford et al (eds) *The Oxford Handbook of International Law* (Oxford University Press, 2016) Ch.25.

<sup>218</sup> Goldsmith (n 211) 215.

It is, however, interesting to note in passing that in rejecting the influence of any moral aspect to state behaviour Goldsmith and Posner are unable to explain why ‘statesmen and nations utilize the language of the law in masking pursuits of self-interest’, the implication being that ‘international law does have a moralistic component that provides legal action with greater legitimacy than nakedly self-interested actions’.<sup>219</sup> Whilst they see international law as only a ‘mask’ there is an echo of the earlier discussion of Koskenniemi’s normative ambition for international law.

Posner subsequently co-authored a book with David Weisbach on the particular issue of climate change. Both are Law and Economics academics whose prescriptions and advocacy can reasonably be taken to represent a neoliberal response to climate change.

#### VII A NEOLIBERAL APPROACH TO CLIMATE CHANGE

An interesting set of arguments that crystallize, albeit in discomfiting ways, many of the difficult ethical issues surrounding climate change ironically comes from two Law and Economics (‘neoliberal’) academics in Posner and Weisbach. In their book *Climate Change Justice*,<sup>220</sup> published shortly after the controversial COP-15 (Copenhagen Accord) but before the 2015 Paris Agreement, they advocate a pragmatic stance that nonetheless acknowledges ethical arguments. Whilst itself controversial their contribution has received some perhaps surprising praise.<sup>221</sup>

They make four claims.<sup>222</sup> First, that individuals absent in time or space are of equal moral worth, but second, that any obligations to them need not be met in a climate change treaty but rather through other mechanisms. Third, the most important obligation is ‘to develop a broad, deep, and enforceable treaty that achieves appropriate climate goals’ – there is an obligation to cooperate and not be a free rider. Fourth, any surplus generated should reward states that have been aggressive in their measures.

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<sup>219</sup> Dino LaVerghetta, ‘The Limits of International Law’ (Review) (2005–2006) 38 *New York University Journal of International Law and Politics* 930, 933.

<sup>220</sup> Eric Posner and David Weisbach, *Climate Change Justice* (Princeton University Press, 2010).

<sup>221</sup> See, for example, Jacaranda Turvey, ‘Book Review “Climate Change Justice”’ (2010) 23 (4) *Studies in Christian Ethics* 464; Arvind Subramanian, ‘Book Review “Climate Change Justice”’ (2011) 10 (2) *World Trade Review* 277; Daniel A Farber ‘Book Review “Climate Change Justice”’ (2012) 110(6) *Michigan Law Review* 985 (for example at 986: ‘[t]he book ... makes some important pragmatic and ethical points that may surprise readers with a stereotyped view of Chicago-style law and economics’.)

<sup>222</sup> Posner (n 220) 169–170.

Unsurprisingly they insist on the economic efficiency principle of International Paretianism<sup>223</sup> as a prerequisite for any successful treaty – that is to say, that all nations must believe themselves to be better off with a treaty than without.<sup>224</sup> They admit of the moral claims of innocent publics – ‘the moral worth of individuals transcends spatial and temporal boundaries’.<sup>225</sup> However, they reject the notion that issues of corrective and distributive justice should be dealt with in a climate change treaty – other means should be employed, for example, via the trading system, or direct aid, including cash payments.<sup>226</sup> This is odd, or at least optimistic, given their admission elsewhere that ‘most nations have only modest forms of altruism ... the actual amount of foreign aid that reflects altruistic or moral considerations is extremely low’.<sup>227</sup>

Rather, they say, any climate change treaty ought to concentrate on appropriate climate change goals and be enforceable,<sup>228</sup> implying they would not approve of the Paris Agreement. The ethical issue here, they say, is the duty to cooperate, to not be a free-rider – thus setting the ethical bar low.

They reject what they agree is the ethically justifiable notion of basing a treaty on equal per capita emissions on the pragmatic grounds that wealthy nations would suffer and never consent. It would simply not be feasible.<sup>229</sup> In fact they reject the possibility of altruism generally in international relations.<sup>230</sup> international Paretianism is necessary – all states must perceive themselves as economically better off as a pragmatic requirement for negotiation.<sup>231</sup>

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<sup>223</sup> An allocation of resources is ‘Pareto efficient’ if there is no other allocation in which some other individual is better off and no individual is worse off’. There is no element of equity in such cases <<https://www.economics.utoronto.ca/osborne/2x3/tutorial/PE.HTM>>.

<sup>224</sup> Posner (n 220) 195.

<sup>225</sup> Ibid 169.

<sup>226</sup> Ibid 169–170.

<sup>227</sup> Ibid 179.

<sup>228</sup> Ibid 170.

<sup>229</sup> Ibid 191.

<sup>230</sup> Ibid 180: ‘in the entire history of international relations, it is impossible to think of a treaty, based entirely or mainly on ethical ideals, that requires sacrifices or transfers anywhere near the magnitude of those entailed by idealistic climate treaty proposals’.

<sup>231</sup> Ibid 181.

In such a case a treaty would likely generate an economic surplus (because, as the Stern Review showed,<sup>232</sup> reducing emissions now generates more benefits than costs). Rather than employing this surplus in pursuit of ethical notions of corrective or distributive justice it ought to be used, they say, to reward states that have historically been aggressive in reducing emissions<sup>233</sup> – presumably European states. This is because, notwithstanding justified claims of poor states there are difficult ‘moral and practical factors’ and they are sceptical of the efficacy of such a transfer. They prefer the notion that rewarding states that were more proactive in reducing emissions would affirm an important precedent in international relations.<sup>234</sup> There is a telling (and again pragmatic) qualification to this suggestion. The authors admit that poor states should receive some portion of the surplus, not for ethical reasons but because if they are not included in a treaty then ‘they can become havens for greenhouse gas emitting industry and in the long run subvert much of the progress that would come from a treaty that included only powerful states as parties’.<sup>235</sup> They seem to be saying that poor states need to be bribed in order to prevent them hosting market forces willing to undermine any treaty, suggesting moral corruption in both states and markets.

In summary their general claim is that only a disinterested pragmatism will drive a treaty that is efficacious in achieving appropriate emission goals and that to insist on pursuing ethical issues of corrective and distributional issues in the same instrument may well doom prospects for international agreement. Indeed they conclude that ‘it is inconceivable that a climate change treaty would properly address a problem of corrective justice’.<sup>236</sup>

Whatever misgivings this pragmatism may give rise to, the history to date of climate change treaties (Chapter Two) might be said to support the claim. Farber, however, in a lengthy book review, concludes ‘they do not move far enough toward including ethical considerations’.<sup>237</sup> A particular problem for Farber lies in the inadequacy of their cost–benefit approach in the event of catastrophic outcomes whose probability is low (perhaps a five percent risk of

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<sup>232</sup> Stern (n 2) xv – estimating the cost of inaction at 5% of global GDP annually forever versus a loss of 1% of global GDP annually if action is taken ‘to avoid the worst impacts of climate change’, and (at 191) ‘[c]omparing the costs and benefits of strong, early action on climate change outweighs the costs’.

<sup>233</sup> Posner (n 220) 170.

<sup>234</sup> Ibid 186.

<sup>235</sup> Ibid 188.

<sup>236</sup> Ibid 117.

<sup>237</sup> Daniel A Farber, ‘Climate Change Justice’ (2012) 110 (6) *Michigan Law Review* (Survey of Books) 985, 1002.

temperature increases of 6 C degrees or more).<sup>238</sup> More generally Farber thinks that their economic analysis methodology cannot produce the ‘optimal treaty’ they seek for ‘a problem with large downside risks that are not well understood’;<sup>239</sup> rather he speculates that the driver of necessarily drastic reductions needs to be ‘the non-negligible probability of worldwide catastrophe’.<sup>240</sup>

Posner and Weisbach are so sceptical of normative claims relating to climate change, and indeed of international law generally, that they advocate excluding them from a substantive emissions treaty altogether. We have seen in the preceding chapters the overwhelmingly force of instrumental rationality in the neoliberal pursuit of wealth maximisation through efficient markets and in this chapter in the self-interested Realist pursuit of power by states in the global order. For better or worse this ‘disinterested pragmatism’ of Posner and Weisbach, magnified through the lens of neoliberalism, seems to sum up appropriately the global order and in particular its response to climate change. Regrettably it is a pragmatism that at present does not appear likely to deliver us from a non-negligible risk of climate crises and catastrophe. Where might we go from there?

## VIII CONCLUSIONS

This chapter began by identifying various theories about the nature and behaviour of the global order of states, drawing on relevant literature from the discipline of International Relations and its relation to International Law. The prevailing orthodoxy suggests the so-called Realist model of states relentlessly pursuing self-interest, notwithstanding Koskeniemi’s critique. His view of a shift toward ‘governance’ and ‘managerialism’ suggest a current of neoliberal techniques which are reinforced in further claims made in this chapter as to the neoliberal character of the global order – informed both in the neoliberal practices of its constituent state actors and in characteristic architecture of the global order itself, for example, in globalised trading and finance systems and the underlying image of some two hundred self-interested states competing to assert power and advantage. Koskeniemi’s claim

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<sup>238</sup> Ibid 999.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid 1001.

to an idealist strain in International Law, in contrast to the Realist model, appears unconvincing and unrealised at least in the context of climate change policy.

On the other hand a distinctively neoliberal approach to climate change which acknowledged the Realist view, was put forward by Posner and Weisbach. Whilst the seriousness of climate change was appreciated their approach was typically neoliberal in its emphasis on economic efficiencies and specifically denied the relevance of international law in either its normative (as claimed by Koskenniemi) or instrumental forms. Significantly they put seemingly intractable normative ethical issues outside any achievable climate change treaty, thus consigning to the margins an important driver of the cosmopolitanism which must be a *sine qua non* of collective action.

In summary it appears the global order of state is by its very architecture inimical to cosmopolitan, collective action in pursuit of even a common threat like climate change. As well it is informed by neoliberalism as a guiding ideology in its institutional forms, thus amplifying an already distinctly unfavourable context for credible and efficacious climate change policies.'

## CHAPTER VI: SUMMARY, CONCLUSIONS AND PROSPECTS FOR A PLAUSIBLE CLIMATE CHANGE REGIME

### I INTRODUCTION

This thesis grapples with humanity's seemingly irrational reluctance to devise and implement a plausible and efficacious climate change regime notwithstanding thirty years of cumulative and increasingly persuasive evidence of the dangerous risks which will largely fall on innocent publics. As Chapter Two suggested, there is likely much to fear in this including non-negligible risks of tipping points<sup>1</sup> and catastrophe.

The thesis has considered two broad and related constraints on responses to climate change. First, an informing ideology of neoliberalism which unfortunately became ascendant in the same period as awareness of dangerous climate change trends. Second, the thin architecture of the global order of states, never conducive to collective action on common problems and now also informed by neoliberal ideology.

Chapter II sought to demonstrate the seriousness and urgency of climate change – the motivating force driving the thesis - and the present failure to achieve a credible global regime to manage it. This was shown through an analysis of the international legal instruments of the Kyoto Protocol and the Paris Agreement. With regard to the latter it was argued that it had become an increasingly neoliberal regime and that that was a problem. It was therefore necessary to demonstrate how and why that is a problem. The stage was thus set for an analysis of neoliberalism itself and why, as a deep structure ideology, it has problematic implications for, *inter alia*, climate change. The claim was not that climate change was exclusively 'caused' by neoliberalism but that neoliberalism amplified and intensified a process already in train, and furthermore held little or no promise for its amelioration – on the contrary. This was the first identified constraint on climate change policy – an ideological argument grounded in the governing policies of individual states.

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<sup>1</sup> For a perspective at the time of writing (June 2021) see, for example, <<https://www.theguardian.com/environment/2021/jun/23/climate-change-dangerous-thresholds-un-report>>.

Chapters Three and Four considered the dominant trajectory of neoliberalism as an informing domestic ideology, particularly in those industrialised states which have historically been major emitters of greenhouse gases. Neoliberalism has reconfigured the role of the state, shifting from Keynesian macroeconomic manager and regulator to enabler of ‘efficient’ markets; privatised formerly public goods and transformed the regulatory state into a mediator for interest accommodation in processes of governance; reconfigured the individual neoliberal subject as self-interested wealth maximiser; diminished the field of politics and possibilities for democratic argument; and re-oriented the ‘point of law’ toward instrumental economic efficiency.

The evolution of neoliberalism as a ruling ideology has coincided historically with the growing threat and awareness of climate change. The claim has been that failures in climate change policy are not merely an unfortunate corollary of neoliberalism; rather neoliberalism is deeply implicated in those failures. Elliott similarly makes the general point that

[t]here is no reason, in principle, why nation states could not agree to internationally enforced policy that would mitigate and eventually reverse climate change ...[w]hat fundamentally prevents this is the particular determination and limitation of state agency within the neoliberal paradigm.<sup>2</sup>

As another writer puts it, neoliberalism ‘can be visualised as a glass ceiling that prevents radical environmental transformation’.<sup>3</sup>

Neoliberalism’s impulse is to further weaken whatever fragile bonds might motivate effective collective values and interests – between citizens, in their relations with government in national societies, and between states in the largely anarchic international society of states.

The second constraint, considered in Chapter Five, related to the architecture of the global order of states, international institutions, globalised economic interests and other non-state actors absent a central state-like actor with the authority and legitimacy to steer and realise collective interests. By its very nature, or lack of a nature, the structural limitations of the global order have always rendered the possibility of collective, consistent and effective efforts to deal with collective problems such as climate change, and indeed environmental

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<sup>2</sup> Brian Elliott, *Natural catastrophe: climate change and neoliberal governance* (Edinburgh University Press, 2016) 50.

<sup>3</sup> Sophia Hatzisavvidou, ‘Inventing the environmental state: neoliberal common sense and the limits to transformation’ (2020) 29(1) *Environmental Politics* 96, 98.

problems generally, problematic. Now, exacerbated by an informing neoliberalism, those limitations become more problematic.

Chapter V thus returned to the institutional forms of climate change policy in international law considered in Chapter II but now in the context of the global order of states itself. Not only was its characteristic nature as a kind of ‘war of all against all’ as states struggle unceasingly to assert self-interest in a ‘market’ of power relations but to the extent that any kind of collective agreement is reached at all it has been increasingly taken neoliberal forms that reflect those of its constituent actors – the subject of Chapters III and IV. The neoliberal model for climate change proposed by Posner and Weisbach provided a paradigmatic if pragmatic case for the claims made in Chapter V – that international law was largely irrelevant in a Realist global order, that normative claims held no weight and therefore that ethical issues ought to be considered outside a climate change treaty, that any such treaty must be grounded in economic efficiency, and that success must depend on the (unlikely) Pareto principle of every state being better off with the treaty than without. The analysis of present instruments in Chapter II shows how unlikely is that result.

The thesis has attempted to demonstrate through programmatic argument the particular ways in which these two constraints work to undermine possibilities for an effective climate change regime.

If neither the deep structure of the informing ideology of neoliberalism nor the characteristic architecture of the global order of states are at present under any realistic likelihood of radical reform, even in the context of dire threats posed by climate change, then prospects for containing reasonably manageable climate change seem bleak.

## II POSSIBLE/LIKELY FUTURES

### *A Introduction*

Commentators on the climate change crisis locate on a continuum between the poles of utopian hopes and dystopian despair, between the wishful longings of transformative social theory and a melancholic social theory – in Unger’s description, ‘torn between dreams that

seem unrealizable and prospects that hardly seem to matter'.<sup>4</sup> The analysis in this thesis leans to the melancholic – that possibilities for an efficacious climate change regime are fatally constrained by commitments to an informing neoliberal ideology and a global order of states which has always been, and remains, inhospitable to cosmopolitan and collective impulses .

### *B Utopian Hopes*

In imagining an efficacious response to a 'super-wicked' problem like climate change it is difficult to ignore the informing political, economic and social systems – the 'deep structures' – which are both contexts and, as has been argued, drivers of the climate change crisis. So for idealists there is a hopeful inclination toward a pre-figurative account of how those systems might be radically transformed – 'an invitation to worldmaking'<sup>5</sup> in the language of constructivist political theorists (and Koskenniemi in international law). An example of the utopian impulse would be the 'deep' ecologists' dream<sup>6</sup> of environment crises, including climate change, providing the catalyst for a reimagined and symbiotic relationship of humans in Nature, including the realisation of an authentically sustainable economy and as well a redistributive one that addresses broader social and economic inequities.

In this latter vein Naomi Klein, for example, tells us 'I was propelled into a deeper engagement with [climate change] partly because I realized it could be a catalyst for forms of social and economic justice in which I already believed'.<sup>7</sup> Moreover she feels 'the urgency of the climate crisis could form the basis of a powerful mass movement, one that would weave all these seemingly disparate issues into a coherent narrative about how to protect humanity from the ravages of both a savagely unjust economic system and a destabilized climate system'<sup>8</sup> and that 'a world view will need to rise to the fore that sees nature, other nations, and our neighbours not as adversaries, but rather as partners in a grand project of mutual reinvention'.<sup>9</sup>

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<sup>4</sup> Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Cambridge University Press, 1987) 331.

<sup>5</sup> Martti Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity' (2011) 26(1) *International Relations* 3, 23.

<sup>6</sup> See, for example, Alan Drengson and Yuichi Inoue, *Deep Ecology Movement: An Introductory Anthology* (North Atlantic, 2011). Prominent writers on deep ecology include Aldo Leopold and Thomas Berry. See also <<https://plato.stanford.edu/entries/ethics-environmental/#DeeEco>> 3.1.

<sup>7</sup> Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Metropolitan Books, 2007) 58–59.

<sup>8</sup> Naomi Klein, *This Changes Everything: Capitalism vs The Climate* (Simon & Schuster, 2014) 8.

<sup>9</sup> *Ibid* 23.

In this view climate change is seen as a catalyst for a progressive, emancipatory politics that includes corrective and distributional justice, ecological transformation, and a re-invigoration of social and political life in a new, authentically democratic *polis*. Even where there is fundamental moral disagreement some writers imagine reaching a ‘justice-based normative meta-consensus’ through processes of ‘facilitated deliberation’.<sup>10</sup> In looking to transformative movements in history Klein considers the anti-slavery movement as similarly raising fundamental issues of morality and economics<sup>11</sup> – not strictly analogous to the issue of climate change but raising comparable questions of economic benefits and justifications mixed with moral and ethical questions.

Similarly Elliott puts it that ‘there is no environmentalism worthy of the name that does not entail radical social critique’.<sup>12</sup> Other writers look to more recent social transformations with regard to tobacco use (where scientific evidence eventually gained wider public acceptance ‘despite strenuous efforts by industry’) and HIV/AIDS (drawing on education, public funding and a human rights framing) – successful examples of top-down and bottom-up strategies that might be crudely analogized to the climate change challenge.<sup>13</sup>

In terms of transformative policy proposals the Green New Deal proposed in the U.S.<sup>14</sup> seeks not only to curb greenhouse gas emissions, create new well-paid green energy jobs but also ‘to fix societal problems like economic inequality and racial injustice’ and indeed to ‘end all forms of oppression’.<sup>15</sup> The Federal Government is the nominated agent,<sup>16</sup> suggesting a return to a Keynesian-type model of state-led direction of political, social and economic life. A related alternative is suggested by proponents of Modern Monetary Theory who see the state monopoly over money supply as empowering a neo-Keynesian state to manage fiscal and monetary policy and achieve full employment (subject to inflationary limitations).<sup>17</sup> Similarly a European Green Deal proposal recognizes the existential threat of climate change and

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<sup>10</sup> Rosemary Lyster, ‘The Idea of (Climate) Justice, neoliberalism and the Talanoa Dialogue’ (2019) 10(1) *Journal of Human Rights and the Environment* 35, 42.

<sup>11</sup> Klein (n 8) 455–456.

<sup>12</sup> Elliott (n 2) 121.

<sup>13</sup> Charles Travis and Poul Holm, ‘Lessons for the Anthropocene from the recent past: Tobacco use, HIV/AIDS, and social transformation’ (2017) 156 *Global and Planetary Change* 167–175.

<sup>14</sup> H Res 109 – 116<sup>th</sup> Congress (1<sup>st</sup> Session) In The House of Representatives (Feb. 7, 2019) (Ms Ocasio-Cortez and others).

<sup>15</sup> Lisa Friedman, ‘What is the Green New Deal? A Climate Proposal, Explained’ (*The New York Times*, Feb.21 2019).

<sup>16</sup> H Res (n 14) para.3(1) (‘it is the duty of the Federal Government to create a Green New Deal’).

<sup>17</sup> <[https://en.wikipedia.org/wiki/Modern\\_Monetary\\_Theory](https://en.wikipedia.org/wiki/Modern_Monetary_Theory)>

environmental degradation and seeks to decouple economic growth from resource use and implement a 'just and inclusive' transition to a sustainable economy, including a funded 'Just Transition Mechanism'.<sup>18</sup> The question must be whether this is a 'green capitalism' which continues to motivate ongoing (and likely unsustainable) capitalist accumulation or whether it represents a more emancipatory paradigm change in which, for example, justice and inclusivity displace accumulation as motivation.<sup>19</sup>

The sociologist Ulrich Beck saw climate change as 'creating existential moments of decision' which would likely lead us through a 'metamorphosis' (as opposed to transformation) which 'embodies the power of change toward cosmopolitan horizons of normative expectations'.<sup>20</sup> He saw this as moving to a new 'frame of reference', one that included more cosmopolitan states, the rise of world cities as 'cosmopolitan actors', and a 'cosmopolitan egoism' that requires that we 'distinguish between a neoliberal form of self-interest and the self-interest of humanity'.<sup>21</sup> Whilst there are no assurances as to the forms that might flow from this metamorphosis he envisages 'goods' as well as 'bads' – for example, the 'necessity to overcome neoliberalism', the foregrounding of notions of 'transnational responsibility' and of 'cosmopolitan justice' in global politics, patterns of cooperation between states, changes in world markets, lifestyles and consumption patterns, inducing 'a strong source of future-oriented meanings' and finally 'new forms of understanding and caring for nature'.<sup>22</sup> These 'goods' would indeed address the limitations highlighted in this thesis – the operant conditions of the global order of states and the consequences of neoliberal ideology for climate change action.

Other writers look to particular exponents of a different individualism. For example, Pendenza and Lamattina reject the neoliberal model of self-responsibility and draw rather on Durkheim for an image of the individual as 'the product of society and ... defended by the State'.<sup>23</sup> We are all subject to 'vulnerability and precariousness' and this makes us

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<sup>18</sup> <[https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en)>

<sup>19</sup> For a re-imagining of a post-neoliberal future see, for example, David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) ch 7 ('Freedom's Prospect').

<sup>20</sup> Ulrich Beck, 'How Climate Change Might Save the World: Metamorphosis' *Harvard Design Magazine* (available at <http://www.harvarddesignmagazine.org/issues/39/how-climate-change-might-save-the-world-metamorphosis>).

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> Massimo Pendenza and Vanessa Lamattina, 'Rethinking Self-Responsibility: An Alternative Vision to the Neoliberal Concept of Freedom' (2019) 63(1) *American Behavioural Scientist* 100, 105.

interdependent, relational and moral. Durkheim's remit for the state is 'to persevere in calling the individual to a moral way of life' and 'it is [the State] that must serve as the pole-star for public as well as private conduct'.<sup>24</sup> If we are vulnerable and precarious then, according to Wrenn and Waller for example, we have a capacity for 'communal care' as well as a capacity for selfishness'.<sup>25</sup> They say that '[a]s an accurate historical reflection of human life, the individualistic conception of the autonomous individual fails completely' and that an ethic of care is the response to our state of dependency. Such an ethic must apply to future generations dependent on present climate change responses.

Yet another redemptive post-neoliberal imaginary comes from religious writers who see a place for a re-assertion of Christian (or other religious) values as part of 'the challenge of navigating beyond "neoliberalism"' and the 'present daunting civilisation crisis – of which disruptive climate change is the most prominent (albeit not the only) symptom'.<sup>26</sup> For Barns '[d]ealing with unfinished Christian business is actually a crucial part of the challenge of imagining a good society beyond neoliberalism'.<sup>27</sup>

But uplifting and transformative as these longings may be they will require pragmatic and instrumental programs, or even a pre-figurative politics,<sup>28</sup> that might plausibly see their realisation, at least as compared to the extant paradigm of neoliberalism with its programs rooted in the practices and ideology of the last half-century. As well there is the question of agency – which actors have the motivation, power and legitimacy to motivate change? That is not to say that such longings are irrelevant or that some transformative moment will not come. Rather it seems more likely that if it comes it will be at the point of some crisis or catastrophe.<sup>29</sup> That will be too late for victims. So in the alternative, given that there presently appears to be no existential threat to neoliberal ideology (except ultimately climate change

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<sup>24</sup> Ibid 107–108.

<sup>25</sup> Mary V Wren and William Walker, 'Care and the Neoliberal Individual' (2017) 51(2) *Journal of Economic Issues* 495, 495.

<sup>26</sup> Ian Barns, 'Can we re-imagine a good society after neoliberalism?' (2018) 49/50 *Arena* 122, 122.

<sup>27</sup> Ibid 168.

<sup>28</sup> See, for example, Anton Törnberg, 'Prefigurative politics and social change' (2021) 22(1) *Distinktion: Journal of Social Change* 83, 85 (broadly defining a prefigurative politics as 'the attempted construction of alternative or utopic social relations in the present' (quoting Yates), and including 'the newly created structures and processes [that] must prefigure the desired end by instantiating the central values that should underlie the new society').

<sup>29</sup> Recall (Chapter 2) the UNEP 'Emissions Gap Report 2020' – notwithstanding a slight fall in emissions due to the COVID-19 pandemic, '[t]he world is still heading for a catastrophic temperature rise in excess of 3°C this century – far beyond the Paris Agreement goals of limiting global warming to well below 2°C and pursuing 1.5°C' (<<https://www.unep.org/interactive/emissions-gap-report/2020/>>).

itself) no plausible ‘ideas lying around’, and no indication of a fundamental re-ordering of the global order of states, then at least in the dangerous near-to-mid term how might the climate change regime more likely evolve?

### *C Dystopian Continuities*

Rather than foreseeing a generalised and radical reconfiguration of economic, political and social life a more melancholic strain of social theory suggests a more plausible future in the ongoing reproduction of neoliberalism. For example, it is said that ‘[s]cholars in the social sciences predominantly expect a continued dominance of the neoliberal paradigm ... [t]here is no politically viable alternative to neoliberalism on the horizon’.<sup>30</sup> For Harvey ‘[t]he idea that capitalism is encountering a fatal contradiction in the form of a looming environmental crisis is widespread in certain circles ... [but] I consider it a plausible but controversial thesis’.<sup>31</sup> He echoes Klein’s view (below) that ‘capital has turned environmental issues into big business ... creat[ing] abundant opportunities for a “disaster capitalism”’.<sup>32</sup> Existing markets for emissions trading are cited as an example.<sup>33</sup>

Elliott puts it more strongly: ‘we can say with certainty that neoliberal capitalism is incapable of meeting the environmental challenges it generates’<sup>34</sup> and yet ‘there are few if any cogent signs that neoliberalism is weakening’.<sup>35</sup> Indeed his claim is that ‘[t]he rhetoric of natural catastrophe will inevitably allow the *current neoliberal policies* pursuing resource security to remain *the only viable environmental politics*’.<sup>36</sup> Climate change can, for example, be reconfigured from an environmental issue to a security issue that can then be mobilised by political and economic elites to condition a fearful public. Similarly Brown’s fears of a degraded *polis* under neoliberalism (Chapter Four) become even more cogent under the threat

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<sup>30</sup> Jens Beckert, ‘The exhausted futures of neoliberalism. From promissory legitimacy to social anomaly’ (2019) 13(3) *Journal of Cultural Economy* 318, 320.

<sup>31</sup> David Harvey, *Seventeen Contradictions and the End of Capitalism* (Profile Books, 2014) 246.

<sup>32</sup> *Ibid* 248–249 (Harvey is nonetheless a trenchant critic of capitalism. On the one hand (at 260) ‘[t]he bulk of the evidence now available does not support the thesis of an impending collapse of capitalism in the face of the environmental dangers’; on the other hand it operates (at 236) ‘by producing commodities that do not last, pushing hard towards planned and sometimes instantaneous obsolescence, by the rapid creation of new product lines ... accelerating turnover by mobilising fashion and the powers of advertising ... and concomitantly produced vast amounts of waste’ ... (at 260) ‘capital can construct an economy (and to some degree has already done so) based on a fetish world of fantasy and imagination built upon pyramiding fictions that cannot last’.

<sup>33</sup> Robert Fletcher, ‘Capitalizing on chaos: Climate change and disaster capitalism’ (2012) 12 (1/2) *ephemera: theory and politics in organization* 97, 97.

<sup>34</sup> Elliott (n 2) 49.

<sup>35</sup> *Ibid* 15.

<sup>36</sup> *Ibid* 50 (emphasis added).

of climate change – she and others see a threat to democratic politics. The argument is that promoters of neoliberalism well know the threat climate change represents to the existing order and will pre-empt policy by doubling down on market solutions and a minimal state (other than as a condition-provider for markets). Margaret Thatcher famously did so in claiming that ‘there is no alternative’, illustrating the difficulty of imagining beyond present dominant ideologies.

The sobering suggestion from even these critics of neoliberalism is that disasters and catastrophes magnified by neoliberal practices in economics and politics will not necessarily undermine neoliberalism itself – they may even fortify it. Milton Friedman, one of the neoliberal Chicago School economists promoting market fundamentalism, was quoted in Chapter Four as saying ‘[o]nly a crisis – actual or perceived – produces real change ... [w]hen that crisis occurs, the actions that are taken depend on the ideas that are lying around’.<sup>37</sup> There is a climate change crisis but, notwithstanding the ‘utopian’ ideas put forward above, are there presently *plausible* ideas ‘lying around’ which credibly challenge neoliberalism?

A similar theme is echoed in Andreas Malm’s recent book<sup>38</sup> which claims a link between the occurrence of pandemics, business-as-usual capitalism and resultant climate change.<sup>39</sup> He claims that ‘the capitalist state “is constitutionally incapable” of taking the necessary steps, and yet “there is no other form of state on offer”’.<sup>40</sup> He also claims, however, that rather than (neoliberal) antagonism toward the state it will be necessary to harness state power (as per argument in Chapter Three) to deal with such emergencies.

Rather there are claims that for now neoliberalism will more likely demonstrate resilience and adaptability, and the hold it still retains on ideology, by re-imagining environmental disasters as opportunities for ‘efficient’ resolution via neoliberal economic policy – that is to say, ‘managed’ by for-profit or public/private enterprises enabled by the state.

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<sup>37</sup> Quoted in Klein (n 7) 6.

<sup>38</sup> Andreas Malm, *Corona, Climate, Chronic Emergency: War Communism in the Twenty-First Century* (Verso, 2020).

<sup>39</sup> Simon Butler, ‘Book Review: Corona, Climate, Chronic Emergency’ *Climate & Capitalism* (September 30, 2020) <<https://climateandcapitalism.com/2020/09/30/book-review-corona-climate-chronic-emergency/>>.

<sup>40</sup> Gareth Dale, ‘Global Fever: A Review of Andreas Malm’s “Climate, Chronic Emergency: War Communism in the Twenty-First Century”’ (*Spectre*, Aug.1 2020) (quoting Malm).

In this view ‘neoliberal capitalism both precipitates disasters and employs those same disasters ... as an opportunity to facilitate its expansion’.<sup>41</sup> The likelihood is of a dominant ongoing neoliberal ideology that simply assimilates environmental problems and manages them without acknowledging its own role in framing them. Elliott, for example, asserts that rather than Klein’s hope of a ‘popular progressive uprising’ there is ‘much more evidence that climate change is being embraced by corporations and neoliberal national governments as the big *security* issue of the immediate future ... an object of concern within the all-pervasive neoliberal horizon’.<sup>42</sup> Significantly Elliott claims ‘that no amount of reform possible within the schema of neoliberal governance (as the latest variant of capitalist modernity) will be sufficient to meet the social challenges raised by environmental concerns ... [t]his holds *a fortiori* in relation to climate change’.<sup>43</sup>

Thus climate change can be re-formulated in terms of a ‘risk management’ problem – even Beck, well known for his writing on the ‘risk society’,<sup>44</sup> is surprisingly sanguine about climate change outcomes and even contemplates an ‘emancipatory catastrophism’.<sup>45</sup>

Klein, on the other hand, explains the exploitation of such disasters as being possible under a ‘shock doctrine’ whereby in the event of a disaster it is possible ‘to act quickly, to impose rapid and irreversible change before the crisis-racked society slip[s] back into the status quo’.<sup>46</sup> She describes the resultant ‘disaster capitalism’ as ‘orchestrated raids on the public sphere in the wake of catastrophic events, combined with the treatment of disasters as exciting market opportunities’.<sup>47</sup> Examples include the imposition of neoliberal economic policy in Chile after the Pinochet coup and in Iraq after the American invasion. At a localised level she cites the imposition of private charter schools in New Orleans following Hurricane Katrina (unsurprisingly at the urging of Milton Friedman).<sup>48</sup>

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<sup>41</sup> Fletcher (n 33).

<sup>42</sup> Elliott (n 2) 34 (emphasis added).

<sup>43</sup> Ibid 42 (referencing Latour).

<sup>44</sup> See generally Beck (n 20).

<sup>45</sup> Ulrich Beck, ‘Emancipatory catastrophism: What does it mean to climate change and risk society?’ (2014) 63(1) *Current Sociology* 75.

<sup>46</sup> Klein (n 7) 6–7.

<sup>47</sup> Ibid 6.

<sup>48</sup> Ibid 4–6.

There is a temptation to caricature climate change villains and opportunists in terms of ‘moustache twirling depravity’<sup>49</sup> but other writers have taken this line of thinking still further. Gardiner, for example, distinguishes the ‘gradualist paradigm’ of climate change impacts manifesting as ‘linear and incremental’<sup>50</sup> (a serious but less dramatic and more manageable scenario) from the ‘abrupt paradigm’ of sudden, disastrous impacts such as a rapid disintegration of the ice sheet. He contemplates a kind of inter-generational ‘war’ in which present generations, faced with abrupt change, might actually increase emissions in order to boost economic output and thereby boost adaptation measures, provoking an iterative effect down through generations.<sup>51</sup>

In *Climate Leviathan* the authors too envisage a darker future in which ‘the drive to defend capitalist social relations will push the world toward ... adaptation projects to allow capitalist elites to stabilize their position amidst planetary crises ... the likely emergence of a *planetary sovereignty*’.<sup>52</sup> These adaptation projects can present more attractive opportunities for entrepreneurs than do difficult and unpredictable mitigation measures, if indeed there is still time for them. Similarly Ramey sees neoliberalism as ‘producing or allowing catastrophic situations, states of emergency that only the already-largest firms and interests can manage’.<sup>53</sup>

In these dystopian views climate scientists have been cast in the role of Cassandra in making what are (on the best information available) likely accurate prophecies about climate and consequences but, judging by their actions, not wholly believed by economic and political elites.

There is, however, a temptation to see the future as unfolding as more of the present, for the present appears to be firmly entrenched – the allure of linear thinking. Nonetheless change happens, equilibria are punctuated, paradigms are replaced, there are alternative imaginaries at work in economics, politics and broader society. Chapter Four showed how the Keynesian paradigm of macroeconomic management by the state was replaced by one in which the role

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<sup>49</sup> Gabrielle Walker, ‘Don’t panic. Yet’ <available at <https://www.the-tls.co.uk/articles/dont-panic-yet/>> (quoting Rich).

<sup>50</sup> Stephen M Gardiner, ‘Saved by Disaster? Abrupt Climate Change, Political Inertia, and the Possibility of an Intergenerational Arms Race’ (2009) 40(2) *Journal of Social Philosophy* 140, 141.

<sup>51</sup> Ibid 151.

<sup>52</sup> Joel Wainwright and Geoff Mann, *Climate Leviathan* (Verso, 2018) 123 (original emphasis).

<sup>53</sup> Joshua Ramey, ‘Neoliberalism as a political theology of chance: the politics of divination’ (2015) *Palgrave Commun* 6 <<https://doi.org/10.1057/palcomms.2015.39>>.

of the state was largely subsumed in a privileging of private markets – neoliberalism. There was an ‘idea lying around’ when the existing Keynesian paradigm appeared vulnerable to stagflation. Similarly political events may result in important policy revisions – at the time of writing, for example, a new Biden Administration in America suggests new possibilities for climate change policy and more forceful global leadership.

But is the underlying deep structure of neoliberalism presently vulnerable? The observers cited above do not seem to think so. Even if it were, are there credible ‘ideas lying around’ now? Utopian theorists and Green New Dealers would say yes but seem to lack so far the necessary critical mass, influence, and programmatic argument to prevail. Worse, the sobering reality is that, on the available evidence, it is already too late – that any post-neoliberal society will have to endure the consequences of historical failures in the climate change regime.

### III CONCLUSION

A defensible conclusion on prospects for meeting the climate change challenge with a ‘broad, deep, and enforceable treaty that achieves appropriate climate goals’<sup>54</sup> is that it is for the present unlikely and in any event likely already too late. Even less likely is the prospect of an ethical resolution of corrective and distributive justice issues for innocent victims. A corrosive neoliberalism and a dysfunctional global order of states are deeply implicated in our failure.

In the face of overwhelming evidence and the logic of fundamental contradictions humanity appears for the present willing to continue to function in a hopelessly divided global order of self-interested states, to continue domestically on a trajectory of neoliberalism and associated climate change failure despite the dangers it not only fails to address but to which it actively contributes. There is a Greek word for it – *akrasia*, a state of mind in which someone acts against their better judgement through weakness of will.<sup>55</sup>

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<sup>54</sup> Eric Posner and David Weisbach, *Climate Change Justice* (Princeton University Press, 2010) 170.

<sup>55</sup> See, for example, Devin Henry, ‘Aristotle on Pleasure and the Worst Form of Akrasia’ (2002) 5(3) *Ethical Theory and Moral Practice* 255, 270 (‘Unlike the drunk akratic ... whose error is the result of culpable ignorance, for the genuinely akratic man it is a want of moral sentiment, not knowledge, that lies at the root of his condition’).

#### IV POSTSCRIPT: THE COVID-19 CRISIS

At the time of writing, coinciding with the global outbreak and management of a virus pandemic (another ‘wicked’ problem), there has been an extraordinary unfolding of contrarian movements in ‘government’. There has been a common global ‘cause’ – management of the pandemic and minimising of loss of life, together with massive economic disruption – as all states face comparable challenges. There has been a commonality (though limited coordination) of policies – closing borders, strategic closures of workplaces, abrogation of civil rights, suspension of much of the legal system (for example, contractual obligations, property rights). There has been, albeit in the short terms, an almost instantaneous reversion to intrusive ‘Keynesian’ state policies on regulation of the economy and civic life and fiscal stimuli to encourage recovery. There has been a general willingness to base policy measures on the best available, evidence-based, science – less evident in climate change policy, though the opportunity is similarly there for politicians to pass responsibility for controversial policies to science experts informed by best available evidence. Further, there has been a remarkably unified and consistent response from national publics. There have (with exceptions) been commendable displays of leadership by political and public health authorities, at least at the levels of national and regional publics though (unlike the case in climate change) there are only limited vested interests resisting policy measures. It is as if inchoate common values and interests suddenly surfaced in the face of a crisis. One such ethical principle appears to be the prioritising of health issues, particularly in regard to the aged, over the economic interests of the larger public. All this in the ongoing absence of any overarching global authority. There are, at the time of writing, heartening signs of success in many states including widespread vaccination programs.

There is an argument that neoliberal policies of austerity and small government contributed to the crisis – for example, in reduced state funding for public health services and a shift to for-profit private providers of post-illness cures rather than state-sponsored preventative activities.<sup>56</sup> As well there have been more general claims that ‘there is no doubt that the destruction of collectivity under neoliberalism exacerbated the impact of the pandemic’ and

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<sup>56</sup> Vassilis Fouskas and Bulent Gokay, ‘COVID-19 and the bankruptcy of neoliberalism in the context of Global Shift’ (*OpenDemocracy*, 5 May 2020) <<https://www.opendemocracy.net/en/can-europe-make-it/covid-19-and-bankruptcy-neoliberalism-context-global-shift/>>; Richard Denniss, ‘The spread of coronavirus in Australia is not the fault of individuals but a result of neoliberalism’ (*The Guardian*, 20 August 2020).

even that the alternative policy of ‘herd immunity’, which saw a long term solution in leaving the pandemic unregulated, itself reflected a neoliberal ‘market’ that eroded social resilience.<sup>57</sup>

At the global level there appears to have been a fairly typical ‘self-help’ culture redolent of the Realist model (Chapter Five). Although academic commentary is as yet limited there can be seen familiar strains of partisanship and tribal thinking – ‘we’ve seen states retreating behind their borders and adopting “beggar-thy-neighbour” policies’.<sup>58</sup> As with climate change there was a conspicuous absence of U.S. leadership (at least until the new Biden Administration).

There is no overarching world authority to govern pandemics – the UN World Health Organization (WHO) ‘works worldwide to promote health’<sup>59</sup> but lacks enforcement powers and is itself arguably subject to manipulation by its state sponsors.<sup>60</sup> This is not a ‘climate change’ issue although it may prove to be related more generally to humanity’s exploitive relations with Nature. But for present purposes it presents a remarkable instance of what may happen, and how quickly, when an urgent global threat arises. In many of the responses we can see a kind of ideal image of how states individually and collectively respond to a common threat – why not climate change?

But the differences are also salient. The virus, except in a remote sense, is likely not ‘man-made’ and was not predictable (except in the sense of ever-present generalised biological risks) on the basis of clear and growing evidence. The threat was global – virtually all states faced comparable degrees of risk (if not in abilities to respond). Most important the threat was immediate – a ‘clear and present danger’ – not one that could be left for future or distant publics to address. Nor was there any significant challenge to ruling orthodoxies such as neoliberalism or to fundamental economic arrangements like fossil-fuel capitalism. Rather there was a kind of pausing of political and philosophical contestation as the immediate threat was addressed, but also an assumption of a return to ‘business as usual’. The virus came ‘out of left field’ and will likely return there, posing little or no threat to our political and

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<sup>57</sup> <<https://www.ppesydney.net/coronavirus-crisis-and-the-end-of-neoliberalism/>>.

<sup>58</sup> Monash University, ‘COVID-19: The importance of good governance in responding to a crisis’ (2020, April 20) *Politics and Society* <<https://lens.monash.edu/@politics-society/2020/04/20/1380129/covid-19-the-importance-of-good-governance-in-responding-to-a-crisis>>.

<sup>59</sup> <<https://www.who.int/about/what-we-do>>.

<sup>60</sup> See, for example, <<https://www.theguardian.com/world/2020/apr/14/coronavirus-trump-halts-funding-to-world-health-organization>>.

ideological ways of organising. As well there has been some past experience to draw on with earlier pandemics, for example, recent variants of COVID-19 and the 1918 influenza epidemic. COVID-19 is not a novel threat and likely does not significantly affect unknown future generations. There are moral implications for existing ‘others’ but of a different nature from those posed by climate change. There is no serious contemplation of substantive economic and political reforms other than perhaps in the readiness and robustness of public health infrastructure locally and globally.

In short, based on present evidence, the world will likely return to a close approximation of ‘normal’ relatively quickly. Indeed there may well be an acceleration in austerity programs to redress fiscal deficits resulting from Keynesian measures to shore up economies and markets. Similarly it is more probable that governments will move to nurture and stimulate a market-led recovery. So the lesson is likely not that the COVID-19 pandemic will signify a paradigm shift in national societies or in the global order. Rather it is an unexpected and dramatic demonstration of what is possible when such threats materialise. In regard to climate issues one journalist puts it that ‘most solutions to the [climate change] crisis *require* collaboration, government interventions, global agreements and human solidarity ... much of this is anathema to the conservative values of self-reliance and small government’.<sup>61</sup> Yet virtually overnight just these required elements came to characterise the COVID-19 response, along with respect for, and policies consistent with, evidence-based science.

It is tempting to analogise this crisis to a hypothetical climate-induced catastrophe such as sudden extreme changes in weather patterns or in sea level rises but this would likely be to commit a category mistake. Climate change impacts would likely not be comparably immediate, would often be localised, would not be reversible (there is no ‘vaccine’), and would likely be the subject of contestation over culpability, responsibility and policy direction. Whether or not they might present an ideological challenge to, for example, neoliberalism is a more difficult question – COVID-19 does not present such a challenge, but would climate change? On the evidence it seems unlikely. And the essential point remains – that if it takes a catastrophe to stimulate an efficacious response to what is already a well-understood climate crisis then it is already too late, and a world of neoliberal ordering and

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<sup>61</sup> Walker (n 49) (original emphasis).

unfit-for-purpose state relations in the global order renders that unhappy outcome more likely if not inevitable.

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