Supervising Committee.

Phoenix From the Ashes or the Goose is Cooked: 
Critical Reflections on Liberal Democracies and the Neoliberal International Economy.

By

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Abstract.

Liberalism can be generally characterized as a political ideology that assumes the rational, self-interested nature of human beings. However, two distinct strands of liberal theory have evolved from this shared construction of the human agent, namely state-oriented and market-oriented liberalism. It will be shown that state-oriented liberalism provides the theoretical core of liberal democratic states, whereas market-oriented liberalism provides the theoretical core for the globalized market economy. This thesis will uncover a profound tension through a discussion of the new constitutional effects of the investor-state regime. Furthermore, this thesis will show that the recent changes of the investor-state regime have failed to resolve the theoretical tension between liberal democracies and the investor-state regime. And finally, this thesis argues that the only way to resolve the tension between the two strands of liberalism is to incorporate liberal democratic principles into the investor-state regime.
Acknowledgements.

Before I began my graduate school experience, I set a goal to finish my MA in one year. Two things stood between me and this goal. The first was the birth of my son Huxley, who was born on June 11, 2014. My wife and I decided that having our first child while I was in school would put us in the position to support each other as new parents, and I was excited to experience as much time as school allowed with my son in the first year of his life. Unfortunately, Huxley's birth was complicated by an injury that he received in utero, and he was born with hypoxic-ischemic encephlopathy. Roughly translated, Huxley experienced a loss of oxygen that caused significant damage to the part of his brain that controls motor functions, which will undoubtedly lead to a cerebral palsy diagnosis when he turns two. As terrifying as this event was, my wife and I decided that the best thing that we could do for our new family was to move forward with our initial plan: I would finish grad school in one year.

The second thing that stood in my way was my own arrogance. I actually believed that finishing grad school as a parent and in one year was possible! I had taken six classes in one semester during undergrad. I had a clear plan regarding what I was going to write my thesis on. I was a good student. How hard could grad school really be? I was in for a rude awakening, both from my new born son (multiple times a night in fact), and from the requirements of graduate coursework coupled with TA and RA positions. The sleepless nights, endless reading requirements, and expansive writing assignments were well beyond what I was expecting, and the usual grad student self-doubt set in quickly. On top of this, medical and therapy appointments were in no short supply.

In looking back at my graduate school experience, to say that I am on the brink of achieving my goal despite the lived experience, and that I am proud of myself is an understatement. However, it is equally the case that I could not have done this without the group of people that stood with me. I want to thank the University of Victoria for proving me with the financial and institutional opportunity to complete the work that follows. I have loved my time here, and am proud to call UVic my alma mater.

To my grandparents Larry and Margaret Szafron, your support and advice has gotten me farther than I could have ever made it on my own, for which I am eternally grateful.

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Introduction.

This thesis examines the nature of the relationship between the state and the global political economy for systems generally characterized as liberal and democratic in political form and organized according to market-based capitalism. In a word, this thesis explores the relationship between the state, as the dominant form of political organization, and the market, as the dominant form of economic organization, today. It argues that in order to understand the nature of this relationship it is necessary to review both the history and evolution of the state system and the global political economy.

Often associated as a tipping point for the development of the modern international state system, the Peace of Westphalia, 1648 has been cited as a definitive lynchpin for modern conceptions of statehood and the international state system. In particular, the principles of territorial integrity and internal sovereignty are often discussed in reference to this treaty, with the treaty itself often characterized as a fundamental break with the prior feudal era. On this point, it is important to note the work of Stephen Krasner, who importantly problematized the romanticism of Westphalia, in particular by noting the unequal institutionalization of the before mentioned principles and the limited articulation of these principles within the treaty itself. Furthermore, Krasner points to the fact that the Peace of Westphalia was comprised of two treaties that ended the Thirty Years War, namely the Treaty of Osnabruck and the Treaty of Munster. While Krasner provides us reason to pause when considering the conventional framing of the Peace of Westphalia in political science literature, his observation does not take away from the force of the principles of territorial integrity and sovereignty in the current international arena. In addition to the development of sovereign states and the state-based international order, is the increasingly complex and globalized economy. Long distance trade has come a long way since the 11th century, but many of the principles that informed and regulated long distance trade share

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the same level of importance in the international economy as the principles of sovereignty and territorial integrity do for modern states. For example, the principle of *pacta sunt servanda* has its roots in merchant trade from as early as the 12th century, and has been argued to have reached the status of *jus cogens* in the modern age.²

International law, from its humble beginnings in the three principles noted above, has evolved to form a complex web of global governance, with compartmentalized yet overlapping legal frameworks and fragmented legal personalities occupying the attention of scholars of varying locales and disciplinary perspectives. In following the liberal tradition of the public/private distinction, international law can be traditionally understood to form two distinct branches. Important to note is that these concepts operate differently in domestic legal systems than in international law. Domestically, the “public” is associated with the sphere where the state can legitimately exercise authority, and includes areas including public health, the maintenance of law and order, and the regulation of market activity. When read in terms of the democratic tradition, the public realm is associated with issues such as political participation and positive freedoms of expression in public areas. In contrast, the “private” constitutes the realm beyond state intervention, where citizens can legitimately engage in private affairs.³ In moving to the international level, the public/private distinction changes in important ways.

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² A. Claire Cutler, *Private Power and Global Authority*. (Cambridge University Press, 2003): 113-124; Historically, *jus cogens* or *ius cogens* flagged certain principles of natural law that could not be violated by a treaty. As international law is no longer informed by principles of natural law, *jus cogens* principles are defined as “the basic principles of international law, which states are not allowed to contract out of.” These principles, in order for them to rise to the level or status of *jus cogens*, must be principles of general international consent. Basically understood, these principles are meant to inform international conduct by indicating the boundaries of acceptable international conduct. For a fuller discussion, see Peter Malanczuk, Akehurst's *Modern Introduction to International Law* 7th Edition. (New York: Routledge Press, 1997), 57-58 and Mark W. Janis, “The Nature of *Jus Cogens,***” in *Philosophy of Law: Classic and Contemporary Readings*. Edited By Larry Man And Jeff Brown (Wiley-Blackwell Publishing, 2010). 184-186.
According to Peter Malanczuk, public “international law... primarily governs the relationship between states, whereas in the nineteenth century private international law was thought of as regulating transborder relationships between individuals, in the sense of the old 'law merchant'.”\(^4\) Importantly, this distinction informs a particular type of legal proliferation that has emerged along side rapid changes in the material production and manufacture of market goods. Specifically, states, powerful private actors, and international civil society have developed and instituted an increasingly complex and comprehensive legal framework in order to gain sufficient legal protections for the changing landscape of economic relations.

International law has been both celebrated and criticized on a number of grounds. Mainstream approaches to international relations oscillate between celebrating international law as a form of multilateral governance on the one hand, and downplaying the binding force of international law as mere idealism in the face of traditional conceptions of power on the other. Scholars ranging from John Ruggie to Joshua Karton see the development of international law as providing a positive contribution to maintain peace, stability, and predictability within international community.\(^5\) This is starkly contrasted by the realist and neorealist traditions of international relations. From this perspective, international law fails to account for power in the international community, and as such international law should be viewed as something to be either ignored as a minor inconvenience in reference to


powerful state actors or as disregarded as naively idealistic.\(^6\)

Critical approaches within the discipline of international relations have offered a similarly varied set of critiques of international law. For example, many international relations scholars from the Global South argue that international law is essentially imperialistic in nature. For example, Antony Anghie points to the historical evolution of international law. He argues that western states manoeuvred understandings of international law to accommodate colonial interests in the era of European expansion, and that this essentially hides the imperial roots and dominance of international law in the language of legal neutrality. By pointing to international law's imperial past, Anghie challenges the claims to the neutrality of international law by pointing to the asymmetrical construction of international law by framing international law as a mechanism or tool of imperial dominance.\(^7\) More recently, critical scholars have argued that former colonies seeking development assistance were required to implement principles of “good governance” and “civilized” notions of economic prudence in order to receive loans from international financial institutions such as the World Bank and the International Monetary Fund. These lending practices, commonly known as structural adjustment programs, forced the institutionalization of neoliberal economic ideology on receiving states, including privatization of state assets and service provision and the lowering of “artificial” trade barriers such as taxes and tariffs.\(^8\) As such, former colonies were forced to engage with international financial institutions on the condition that they internalize the established economic norms of the global

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economy, and alternative economic arrangements have been increasingly forced to bend to the logic of neoliberal market ideology.  

Another branch of critical scholarship points to the increasing difficulty in maintaining the traditional legal distinction between private and public international law. In particular, Claire Cutler characterizes international law as “transnational”, as elements of public and private law blend into a hybrid legal form.  

As will be discussed at length below, Cutler points to international agreements and the settlement of disputes, which have become institutionalized in international organizations. Importantly, the movement toward international dispute settlement effectively removes decision making powers from sovereign states in favour of “neutral” private institutions. Furthermore, many of the issues that spark international dispute resolution encroach on traditional notions of the public sphere, including environmental, health, and public safety issues. As such, the traditional theoretical distinction between the private and public spheres fails to adequately explain changes in international governance, a point that will be demonstrated in reference to international investment dispute resolution in the discussion that follows.

A particularly compelling strand of critical scholarship is well situated to engage with transformations towards transnational law, as it applies to both states in the Global South and the Global North. This branch of critical scholarship centres on the concept of “new constitutionalism”. New constitutionalism can be defined as the institutionalization of “ideological, institutional, and

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9 While I acknowledge that different countries have unique institutional arrangements, the focus of this thesis is to flesh out general commonalities that can be said of across individual case studies. For a nuanced discussion of how different countries have arranged their economic and political institutions through the rise of globalized economic integration, see Peter A. Hall and David Soskice, eds., Varieties of Capitalism: The Institutional Foundations of Comparative Advantage, (Oxford University Press, 2001).

productive forces and structures that govern local societies and political economies according to the
demands and legal disciplines of global capital accumulation.”

In particular, the concept of new constitutionalism refers to a particular species of transnational law that facilitates the expansion and institutionalization of free trade, neoliberal market ideology. At the heart of this ideology is the liberal distinction noted above, namely between the “public” state and the “private” market, and the appropriate role that each is seen to play in the conduct of human affairs. New constitutionalism scholars note that the current balance between the state and the market in favour of the latter, has become increasingly enshrined in transnational law, which forms constitution-like constraints on sovereign states by reconfiguring the private/public divide to facilitate improved market access. Importantly, these constraints are constructed from a variety of sources, ranging from traditional state-state agreements to industry sensitive conventions that become international standards. Thus, the new constitution locks states into a set of legal commitments that facilitate the flow of capital at the expense of policy autonomy that has been traditionally associated with sovereign states. As such, the concept of new constitutionalism powerfully articulates the ability of transnational law to challenge the pedigree of the principle of state sovereignty, as well as pose challenges to states in fulfilling their traditional obligations to their citizens. Notions of political sovereignty over internal affairs are effectively drained of explanatory relevance in reference to domestic governmental regulation over the


This transformation and constitutionalization of neoliberal discipline is particularly evident in the field of international investment law, which has created a mechanism for private actors that invest internationally to protect their investments through binding international arbitration. In essence, international investment arbitration allows investors to enforce a set of rights for international investors, as well as a mechanism for private actors to seek redress from states that devalue their investments by infringing on investment rights, which has come to be called the “investor-state regime.” Critics of the regime point to a wide range of perceived deficiencies, ranging from a lack of transparency, accountability, and inconsistency. In response to these criticisms, changes have been made on the part of states altering their investment agreements and changing arbitration proceedings to accommodate a greater degree of transparency and legitimacy to the investor-state regime, and two of the major organizations that facilitate investment dispute settlements have also amended their rules and procedures. However, it will be shown that the changes made to the investor-state regime have failed to fully address the fundamental tension that is created through participation in the investor-state regime.

While all states that participate in the global economy are subject to these developments in international law, the new constitutionalism of neoliberalism provokes a unique set of tensions for liberal democratic states. This is the case because liberal democracies are often celebrated as the crowning achievement in human political organization, with authors such as Francis Fukuyama serving as an archetypical example of this argument. Fukuyama argues that liberal democracies, unlike other political systems, provide not only protections for individuals in the pursuit of their own interests in the form of legally enshrined rights and duties, but also provide a mechanism for political participation in the governance of state conduct.\footnote{Francis Fukuyama, \textit{The End of History and the Last Man}, (New York: Avon Books, 1992).} Principles such as the rule of law, pluralism, constitutional protections for inalienable rights, judicial review, and social welfare provisions are put forward as ideals for the world to strive for, and failures to entrench and commit to liberal democratic principles are perceived as a failure on the part of the deviant state. Furthermore, liberal democracies are taken to represent the ideal form of political organization as a result of the “public” and “private” division, in that it is assumed that humans are only ever truly free when their privacy is respected by governments. Make no mistake, this paper is far from a rallying cry for democratic vigilantism. But, the crux of this analysis does focus on how transnational law, as it applies to liberal democratic states, provokes a high degree of tension, if not a direct challenge to, what is celebrated about liberal democratic states. In essence, the new constitutionalism of neoliberal ideology challenges the constitutive essence and core legitimacy of liberal democracies.

In order to clearly articulate this point, two concepts will be developed over the course of the following chapters. The first concept is the “liberal democratic state.” As alluded to above, a state may be called liberal and democratic if it fulfils certain requirements, including protections in the form of
rights, adherence to the rule of law, protection of property, and the execution of free and fair elections. Furthermore, it will be shown that the historical construction of liberal democracies, according to Robert Cox, relies on the foundational division between the realm of public authority that is legitimately exercised by the state, and the essentially private market. The construction of liberal democracy, in its early history, essentially set the stage for the modern contest over the limits of appropriate state interference in the international economy. In particular, the development of this concept will present the theoretical framework that provides the democratic state with its foundation, its **raison d'être**. And it is this foundation, as will be shown, that is challenged through new constitutionalism by fundamentally redefining what is public and what is private.

The second concept that will inform the analysis below is the concept of the “market.” While it is worth noting that the state/market interface has been realized in a variety of ways, the particular kind of market that is the subject of analysis is the neoliberal market that concerns new constitutional scholarship. As will be shown, market theory and the organization of the international market have undergone profound transformations. However, it will be shown that the narrative informing market logic and market theory is essential for understanding the relationship between the current neoliberal organization of the international economy under new constitutionalism. It will be shown that canonical

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18 For fear of being accused of conflating republicanism and democracy, the author notes that while the differences between these two forms of governmental arrangements may be substantial, the family resemblances between the two of them, to draw from Ludwig Wittgenstein, are the focus of this analysis. In essence, Wittgenstein believed that language and our ability to understand each other, relied on the ability to use language, words, and context in such a way so as to be understood. In essence, we know a language when we can make ourselves understood. Wittgenstein rejected formal or strict categories as problematic when objects that we intuitively want to categorize together do not fit nicely in the mold. Using the example of a game, chess, cards, and tag can be intuitively categorized as a game, even if their physical properties differ substantially. In replacement of formal categories, Wittgenstein advocated for the family resemblance approach to language, in that things that share enough properties to be usefully organized in the same category, are of the same family. For Wittgenstein's argument on this point, refer to Lutwig Wittgenstein, *Philosophical Investigation* 2nd Edition, trans. G.E.M Anscombe (Oxford: Blackwell Publishers, 1999).
liberal economists, such as Adam Smith, theorized market activity as “natural”, that is, as something that humans engage in by virtue of being human. Furthermore, it will be shown that the market was theorized as a peace and stability creating mechanism, as a check on the abuse of arbitrary political power, and as a mechanism for the creation of material prosperity.\textsuperscript{19} The market \textit{qua} peace mechanism has been the subject of rigorous scholarly enquiry. Specifically, Karl Polanyi wrote extensively on the peace-creating market system in place prior to the World Wars, the collapse of which he links to the resulting hostilities. Many scholars have taken up Polanyi’s perspective and argued that we now live in a market civilization, where the entire system is held subject to the “natural” international market.\textsuperscript{20}

Usefully, the bundle of principles that inform liberal democratic states and the international market, once disentangled from within general liberal theory, will be organized under two distinct labels. In establishing the theoretical core or motivation for the state-oriented liberal tradition, the set of principles that compose the theoretical core will be labelled as the “holistic common good.” In contrast, the organization of market principles that inform market-oriented liberal institutions will fall under the label of the “material common good.”

Methodologically, liberal democratic principles and market principles, and the influential role they play in the interaction and institutionalization of state-oriented and economic-oriented liberalism, will be developed through a mixed methods approach. First, the concepts will be theoretically developed through a discussion of canonical liberal theorists, critical international political economy scholars, and social theorists. Having established the concepts by situating them in reference to the two


strands of liberal theory, the holistic common good and material common good concepts will then inform a historical analysis that focuses on the historical and institutional development of both the liberal democratic state and the market economy. Importantly, this historical analysis will not only demonstrate the significance of the holistic and material common good concepts, as they inform state-oriented and market-oriented liberalism, but will also serve to demonstrate the historical tension between these two concepts. And finally, I will demonstrate that tensions within liberal theory, as demonstrated through theoretical development and historical analysis, can be empirically observed in the current interaction between liberal democratic states and the investor-state regime. As such, my thesis illustrates the role of history, theory, and practice in the tensions within the current constitution of world order, as understood through the liberal lens.

Implicit in the discussion of the state and the market, as they are understood through liberal ideology, is the subtle division between liberal state theory and liberal economic theory. Particularly useful to the construction of the concepts presented above is the work of Philip Cerny and his concepts of the “welfare state” and “competition state.” He notes that all states, democratic or otherwise, have the dual role of providing the conditions necessary for an appropriate level of welfare within the state, and the appropriate level of stability and protection necessary to participate in the international economy. According to Cerny, the welfare state's primary focus is on the provision and maintenance of the public welfare of its citizens. In contrast, the focus on the competition state is to provide the necessary means to be competitive in the global economy, even at the expense of societal welfare.21 As such, Cerny's concepts will provide important conceptual tools in the analysis to follow, because this

distinction clearly speaks to the dynamics between current balance between the principles of liberal democracies and the international economy under new constitutionalism.

Implicit in Cerny's distinction, and in the tension that will emerge through the discussion below, are two distinct yet interrelated branches of liberal thinking. On one hand, there is a strand of liberal thinking that places more emphasis on the role of the state in the provision of social welfare. On the other, there is a strand of liberal thinking that places a higher degree of emphasis on the market economy. In a similar vein, Polanyi identifies the transition from economic exchanges performed for the benefit of society to the liberal market economy, where “the control of the economic system by the market is of overwhelming consequence to the whole organization of society: it means no less than the running of society as an adjunct to the market. Instead of economy being embedded in social relations, social relations are embedded in the economic system.”

In essence, both Cerny and Polanyi point to the interaction between society, state, and market regarding the role that each is made to play in the execution of the other. Both strands of liberalism appeal to notions of human freedom, rationality, and self-interest. What is contested, then, and what will be made explicit below, is dynamic exchange between which strand of liberal thinking is emphasized and appealed to in the current international political economy, which institution takes priority in the execution of human freedom. Specifically, the tension between the two threads of liberal theory emerge in relation to the role or priority that is assigned to the market and the state, which is a inherently political choice made on the part of states that have been accorded the power to legislated and implement law. By critically engaging with liberal theory, and by analyzing the nuanced differences that provide theoretical support for both the liberal democratic state and market economy, I aim to show that the principles that motivate liberal

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Polanyi, *Great Transformation*. 60.
democracies that are informed by state-oriented liberal theorists are being fundamentally challenged by the new constitutionalism of disciplinary neoliberalism, which is theoretically aligned with market oriented liberalism.

In framing this analysis, Cox provides a useful distinction between two types of theory, namely “problem-solving” theory and “critical” theory. According to Cox, problem-solving theory operates within the present, meaning that the existing arrangements, institutions, or system are taken as an unquestionable baseline. Problems that arise from within the system are addressed in reference to the system itself, and solutions aim to return the system to equilibrium. When put into action, Cox argues that political leaders often use this type of theory, and this point provides a strong explanatory function when analyzing democratically elected representative actions concerned with election cycles instead of long term gains. In contrast, critical theory does not assume the current arrangements as a necessary baseline. Critical theory, then, goes beyond reaction to engage with the system itself, in order to understand and evaluate the types of outputs or outcomes that are produced. As such, critical theory has an explicitly normative component, in that it evaluates the current system and proposes changes to the structure of the system itself. Cox believes that the time frame of critical theory is long term, and that it is the work of scholars to engage with the system itself by grappling with questions of just relations and normative expectations. Furthermore, Cox believes that because critical theory is concerned with the improvement of the system, and he explicitly frames this improvement as “emancipatory.” By this, Cox believes that the role of critical theory is to analyze the existing structure, uncover and expose unjust relations, and seek solutions to improve upon current arrangements.\textsuperscript{23} For the purpose of this thesis, critical theory provides a powerful analytic tool in the assessment of divergence between theory and

\textsuperscript{23} Cox, “Crisis in World Order,” 101.
practice from within the liberal tradition.

Through the adoption of a critical approach concerned with the theory and practice of liberal democratic states, the tension that arises from their participation in the international economy under new constitutionalism emerges as a theoretical and structural dissonance between the principles of liberal democratic states and the current international economy under new constitutionalism. To illustrate this, I aim to provide a historical and theoretical exposé of the foundational principles that informed the evolution of both institutions. By undertaking this critical analysis, my aim is threefold. First, I aim to establish that liberalism can be in fact arranged along two distinct yet related strands. In essence, this divergence hinges on the role assigned to the state and market in reference to emancipatory mechanisms designed for the promotion of rational, self-interested realization of the liberal subject. Second, presenting the historical development of both market and liberal democratic principles disrupts the claims that the “natural” order of the market and state relationship has been reproduced as the common sense of the international economy under new constitutionalism. This common sense, according critical scholars, is evident in the pervasive and hegemonic understandings that inform market civilization. For example, Jacqueline Best writes that “[together] with the World Bank, the [IMF] has so far developed standards to cover twelve different areas of economic governance, ranging from accounting practices through banking regulation to guidelines for fiscal and monetary policy... The development of these specific standards is embedded in a broader discussion of what have variously been called the 'basic principles' of good economic governance or 'good housekeeping practices', which include a much wider range of political economic norms.”

And finally,

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my aim is to demonstrate the profound tension between the theory that informs the actions and expectations of liberal states, and the practice of liberal democratic engagement with the international economy under new constitutionalism. By returning to the foundational theory that informs liberal democracies, the challenges that emerge from new constitutionalism generally, and the investor-state regime in particular, will become clear.

In order to substantiate these claims, my thesis is organized in the following way. The aim of chapter one is to construct the theoretical foundation of liberal democratic states and to uncover the historical development of the same. Section 1.1 brings canonical liberal thinkers into conversation around the notion of the state, and in so doing will focus upon the theoretical purpose of the liberal democratic state. Next, section 1.2 will provide a narrative concerning the evolution of the Westphalian state form, informed by the principles of sovereignty and territorial integrity and characterized by a central political authority as it arose out of the feudal era. And finally, section 1.3 will focus on the historical evolution of liberal democracies.

Chapter two will follow a similar organization structure, but with a focus on the market. Section 2.1 will construct the liberal perspective on the market, as understood by foundational liberal economic thinkers such as Adam Smith. Importantly, this discussion will provide important insights into the current organizational logic of the modern international economy, specifically in reference to the construction of the market as “natural”. Sections 2.2 and 2.3 will focus on the evolution of the international economic relations through a focus on the concept of *lex mercatoria*. By tracking the dialectical relationship between the states and markets through the various stages of the law merchant, it will be shown that the current stage of *lex mercatoria* can be seen as a revival of many of its first phase characteristics, which places a great deal of power into the hands of private actors outside of
government control.

From this discussion, it will become clear that the divergent strands of liberal theory that inform liberal democratic states and the international market economy are suffering from a profound internal inconsistency, if liberalism is to be taken as a unified political ideology. It is the task of chapter three to support this claim empirically. This will be accomplished through a discussion of international investment arbitration, with a specific focus on the investor-state regime. Section 3.1 will present some of the rights that international investors have gained through international investment agreements that can be exercised against liberal democratic states through international arbitration. Section 3.2 will discuss some of the major criticisms that have been launched against the investor-state regime by linking them to liberal state-oriented principles that are associated with liberal democracies. In addition, two sets of responses to the presented criticisms will be presented. And finally, section 3.3 will critically analyze the responses taken. Furthermore, in this section I will argue that the changes made to the investor-state regime have failed to resolve the fundamental tension that is faced by liberal democracies participating in the investor-state regime.

The claim that liberal economy and liberal democracies are in conflict as they are theoretically, historically, and legally constructed to interact under new constitutionalism provides an important foundation from which to give pause. Through the use of critical analysis, it will be shown that the murmurs of contestation and incremental changes to the investor-state regime are merely symptomatic of the underlying tension between liberal democratic and market principles. Furthermore, the recent changes to the investor-state regime fail to adequately resolve the tensions between the motivating theory that underpins liberal democracy and the investor-state regime. As well, as the investor-state regime is merely a component of the new constitution, resolving the tension between the investor-state
regime and liberal democratic theory falls short of addressing the influence of new constitutionalism writ large. However, having recognized this point, reforming the investor-state regime to remove the tension between state-oriented and market-oriented liberalism has the potential to both solidify the trend towards new constitutionalism, as identified by Cutler, Gill, and Schneiderman, as well as address the criticism that the aforementioned authors raise regarding the emphasis on private governance. In essence, the transition from the private governance that is characteristic of transnational law, the emphasis on the economic-oriented liberalism that provides the theoretical support for private governance, and the tensions that this creates for liberal democratic principles, can be removed only by constitutionalizing the alternative liberal strand, the social move of Polanyi's double movement.
Chapter 1- The Construction of the Liberal Democratic State.

The aim of this chapter is to present the theoretical core and historical evolution of liberal democratic states. As will be discussed in the sections that follow, the state emerged as a political organization through changes in technology, ideology, and economic organization. In particular, the liberal democratic state institutionalized liberal conceptions of human beings as rational agents, and expanded the rights we now associate with liberal democratic states such as freedom of expression, the right to own property, and the establishment of the rule of law. In order to begin to understand the power and influence of transnational law on liberal democratic states, it is first important to develop the concept of liberal democracy. Proponents such as Fukuyama have argued that the advent of liberal democracies represents an end of history, arguing that human potential and political participation have achieved their highest form in this type of government. However, a liberal democratic state is a compound of three interrelated concepts: the state, liberalism, and democracy. Each of these concepts will be addressed in turn.

The modern state-centric international system is often understood to have emerged out of feudal Europe. Constitutive principles of modern statehood, such as territorial integrity, sovereignty, and monopolies over the use of force and the making of law have become core features of states, regardless of their internal composition. Liberalism, touted in its day as a revolutionary movement against the divine right of kings and the ascribed status associated with the feudal social order, has come to be celebrated by liberals as the pinnacle of human freedom by way of its focus on the individual. Often associated with human rights, respect for human dignity, and individual freedom, liberalism constructs the human agent as a capable rational agent, and actively seeks to limit perceived barriers to the

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25 See generally, Fukuyama, *The End of History*.
26 Terence Ball et al., *Political Ideologies and the Democratic Ideal*, 2nd Canadian ed. (Toronto: Pearson, 2010), 37-63. This paper takes no stance concerning the validity of this particular fixation on the individual subject, and acknowledges competing conceptions of human social organization.
exercise said agency. Important for this thesis is the strong connection between liberalism and capitalism, in particular through the construction of rational human agency, as capitalism emerged as the form of economic organization best suited to the realization of the rational human agent, or so it is argued by many liberal thinkers.\textsuperscript{27} And finally, democracy has come to be celebrated in the West as the ideal political institution through its ability to foster liberal individuality by both protecting rights and freedoms through law and the connection between the ruled and rulers through democratic practices. As a political institution, the origin of democracy is often linked to direct democracy of Athens. And while our conceptions of citizenship and representation have changed to accommodate the material realities faced by massive territorial states, an expansion of qualified citizens who are empowered to engage in the democratic process, and an increasingly complex international system, the democratic ideal of the active participation in the governance of state affairs remains a constitutive element of liberal democracies.

While the role of the state in liberal democratic thought has undergone significant transformation since early liberal theorists, there is a sense in which early liberal theory serves as the foundation for the legitimacy of liberal democratic states. By undertaking a critical historical analysis of liberal ideology and the evolution of democratic practices, the aim of this chapter is to uncover and make explicit the core theoretical foundation of liberal democratic states, as they participate in the post-Westphalian international system. Furthermore, it is argued that the forces of new constitutionalism challenge the strand of liberalism that supports liberal democratic states. This chapter is divided into three sections. The first section focuses on foundational political theorists who have come to form the cannon of western liberal thinking concerning liberal conceptions of the state. By consulting early liberal thinkers, it will be shown that the state was taken to provide an instrument for the development of what will come to be defined as the “holistic common good.” In essence, the fundamental political

\textsuperscript{27} Wood, \textit{Democracy Against Capitalism}, 19-47.
problem for liberal democracy is to balance between empowering and respecting the liberal subject in the pursuit of their interests, and restraining this self-interested pursuit so as to limit the harms done to other liberal agents that comprise the political community. Furthermore, the construction of the holistic common good developed in section 1.1 will provide the point of critical analysis, as it is this theoretical core that is being redefined or undermined by the forces of new constitutionalism. The second section focuses on the crystallization of the state in international law, in order to understand the how the international state system legally and materially constructs the state. The final section focuses on a particular kind of state, namely liberal democracies, by engaging in a historical analysis concerning their evolution. In particular, the focus of section 1.3 is to engage with the twin developments of liberal values becoming encoded in law and of democratic institutions that comprise our modern understanding of liberal democratic states. By reading the evolution of liberal democratic states with the concept of the holistic common good, it will be shown that the institutional development of liberal democracy can be seen as a strategy for empowering the liberal subject through the development of the state. When read in relation to the concept of the holistic common good, the institutionalization of liberalism and democracy can be usefully interpreted as means to serving the end provided by the state-oriented liberal theory.

Section 1.1- The Theoretical Core: Developing the “Holistic Common Good”.

This section seeks to provide a plausible theoretical articulation of the liberal democratic state. Outside of the variety of its organizational idiosyncrasies, the argument that I present is that states that follow in the liberal democratic tradition can be conceived of as institutions that are designed for achieving a specific social purpose. I argue that purpose can be fruitfully constructed as the promotion the “holistic common good,” as it is negotiated between the members of the political community.

On this point, it is acknowledged that there is an inherent tension within the state-oriented liberalism, as it is embodied in liberal democratic states. However, it is also the case that liberal democratic institutions, such as political participation and the constitutional protection of fundamental rights are aimed at striking a balance between liberal subjects.
Furthermore, from this theoretical core, the following sections show that liberal and democratic values are designed as means to serve the end of the holistic common good. The differing opinions of the philosophers concerning how the state/society relationship should be organized to achieve this end, while interesting, is not the topic for this thesis. Rather, this sections aims to uncover the essence and theoretical core of liberal democratic states.²⁹

In turning to the theorists themselves, the first political philosopher to be discussed is Thomas Hobbes, a seventeenth century English thinker who is usually credited for originating the social contract tradition. In his particular version of the social contract, Hobbes begins with his conception of people found in the state of nature. He argues that people found in the state of nature are both rational and self-interested agents who are also in direct competition with each other over scarce resources, which Hobbes constructs as a perpetual state of war. As such, and because of a lack of authoritative presence to mitigate this conflict, every person finds only that security that can be furnished by their own innovation and strength.³⁰ Furthermore, Hobbes posits that our inherent rationality brings individuals together by way of entering into the social contract. By entering into the social contract, atomistic rational individuals transfer their natural rights to protect and provide for themselves to a centralized sovereign.³¹ In order to maintain peace, the Hobbesian sovereign is empowered through the social contract to pass laws, apply coercive measures for compliance, and decide between conflicting interests. Hobbes believes that these powers are necessary tools to condition the rational self-interest of competing individuals. As such, the explicit purpose of the sovereign state is to prevent the state of war by providing protection to the citizens in the pursuit of their interest, against the constant threat to their existence found in the state of nature.³²

²⁹ Hirschman, Passions and Interests, 16-21.
³¹ Hobbes, Leviathan, 119.
³² Hobbes, Leviathan, 82-86.
In order to achieve its end, Hobbes constructs the sovereign as a unified entity, in that the powers of coercion and legislation cannot be fragmented or delegated from the sovereign. This requirement of unity, according to Hobbes, entails that the sovereign is the sole source of authoritative judgement within its jurisdiction. Importantly, Hobbes believed that any transfer away from the central sovereign renders the social contract void, which has important bearing for international law generally, and the investor-state regime specifically.33 The clearest articulation of Hobbes' support for the argument that I am developing here is as follows: “The office of the sovereign (be it a monarch or an assembly), consisteth in the end, for which he was trusted with sovereign power, namely the procuration of the safety of the people.”34 As such, the Hobbesian sovereign is constructed with the sole purpose of moving rational individuals from the dangers of the state of war, and into a state of safety by creating an entity empowered with the legitimate monopoly over law, violence, and coercion. Importantly, the sovereign must be empowered as a unified entity to eliminate competing sources of authority that could give rise to the state of war. What follows is that entry into the social contract, the rational calculus of rational individuals who are pursuing scarce resources is effectively constrained or conditioned by laws and legitimate coercion imposed and exercised by the sovereign. As such, Hobbes' contributes security of the liberal agent from the state of war to the concept of the holistic common good that informs state-oriented liberal theory.

The second political philosopher to consider is John Locke, a late seventeenth century Englishman who also worked within the discursive framework of the social contract tradition. Again, Locke begins his argument with a portrayal of the human condition in the state of nature. However, in contrast the state of war version displayed in Hobbes' framework, Locke writes that in their natural

33 Hobbes, Leviathan, 120-122. Hobbes describes the rights or powers of the sovereign in Chapter 18, including the notion that the sovereign cannot breach the covenant that constitutes it, that the minority that may not agreed to the initial covenant must consent or be justly destroyed. Interestingly, the Hobbesian sovereign is empowered to achieve the end of peace and security by whatever means necessary.
34 Hobbes, Leviathan, 222.
state, people are primarily concerned with adding value to the worthless materials found in nature through their labour, the mixture of which creates private ownership over what is produced. Importantly, it is this mixture of labour and material that creates the right to what is produced by transforming the product into private property. The problem in the state of nature for Locke is that without a central authority to protect this property, the ownership of the labour/material mixture lacks a guarantee. In a similar vein to Hobbes, Locke constructs human beings as naturally rational. As such Locke writes that rational human beings move towards the institution of a sovereign to create an institutionalized guarantee for the terms of ownership, which is accomplished through the creation of a centralized sovereign.\footnote{John Locke. \textit{Second Treatises of Government}. ed. by C.B. Macpherson. (Cambridge: Hacket Publishing Company, 1980) 66-78, 111-115.} This is not to say that the Lockean sovereign is constructed to guarantee property alone. Locke also argues that the establishment of a state creates what is lacking in nature, such as a set of known laws and the means to enforce them. What follows for Locke is that the state is more than just a guarantor of private property, but a guarantor of stability and predictability through law.\footnote{Locke, \textit{Second Treatise}, 66-75.} The major difference between Hobbes and Locke is that for Hobbes the interest of human beings is their personal security because of the perpetual danger found in the state of war, whereas for Locke, people are moved to the state as a guarantor of private property and the predictability of law. Taken together, these two theorists contribute three basic elements that have become entrenched in modern understandings of the liberal democratic state and the holistic common good. These elements include the creation of known laws, the guarantee of personal security through legitimate coercion, and the protection of private property.

The third political philosopher is Jean-Jacques Rousseau, who was a Genevon philosopher during the eighteenth century. Beginning again with the state of nature, Rousseau argues that people “reach a point where the obstacles to their preservation in a state of nature prove greater than the
strength that each [human] has to preserve [his or her self] in that state. Beyond this point, the primitive condition cannot endure, for then the human race will perish if it does not change its mode of existence.”37 Rousseau characterizes this change in the mode of existence is the move to a centralized form of political organization, namely the state. Under the Rousseauean contract, individuals perform an equivalent exchange between what Rousseau labels “natural liberty” found in the state of nature, and “civil liberty” that people gain through the social contract. By that, Rousseau means that the perfect freedoms and rights that individuals have in the state of nature are transferred to the central sovereign, and transformed into civil rights. Importantly, the value of these two competing sets of rights is equivalent or greater on the side of civil rights, as civil rights allow for the development or improvement of the human condition that was impossible in the state of nature.38

Another important difference between Rousseau and theorists such as Hobbes and Immanuel Kant is the relationship between citizens and the sovereign. Rousseau constructs the sovereign as a close association with the people under sovereign rule, in that the interest of the sovereign is not to be seen as something separate from the people that comprise it; the interests of the people and the interests of the sovereign are one and the same because the people themselves are the sovereign.39 Therefore, the interests of the social community, framed in terms of the social good and the benefits that are assumed to emerge through the constitution of the social contract, are closely linked under Rousseau's contract.

As such, Rousseau contributes the democratic notion of the popular interest being linked to the

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39 Rousseau, Social Contract, 17-21. This point is worth noting, in that it is sharply contrasted in Rousseau's “Discourse on Inequality.” There, he writes that “the origin of society and laws, which gave new fetters to the weak and new forces for the rich, irretrievably destroyed natural liberty, established forever the law of property and of inequality...” which are important points that will be taken up below. (79). Specifically, written in 1754, the “Discourse on Inequality” portrays the move towards an institutionalized political community as something that took away something fundamental to humans in the state of nature. As such, the change in tone regarding the institutionalized state in the Social Contract, as well as the close link created between citizens and the sovereign written in 1762, can be usefully interpreted as Rousseau's solution to inequality under the institutionalized sovereign.
execution of state power. In sharp contrast to the Hobbesian sovereign, which limits the ongoing legitimating function of popular opinion to the violation of natural rights, Rousseau postulates that “[whatever] services the citizen can render the state, he owes whatever the sovereign demands them; but the sovereign, on its side, may not impose on the subjects any burden that is not necessary to the community.”40 Importantly, the Rousseauean sovereign's authority emanates from the populace, which is a notion that has become constitutive principle of the liberal democratic tradition by linking notions of democratic accountability to the concept of holistic common good.

The fourth philosopher to consider is Adam Smith, who wrote during the eighteenth century. While more famous for his work in economics, which will be taken up at length in chapter 2, Smith was fundamentally concerned with the relationship between the state and the market. A free market proponent who influenced the construction of the liberal human being as rational actors, Smith believed that the role of the state should be limited to three realms. First, Smith believed that the state should maintain external security. Second, the state should maintain the internal cohesion of the state by protecting private rights and ownership. And finally, Smith believed that the state should provide against what the market neglects, such as infrastructure and education.41 Importantly, Smith's version of the liberal individual importantly contextualizes the role that the state plays in his work. Smith argued that “[the] natural effort of every individual to better his condition... [was] capable of carrying on the society to wealth and prosperity.”42 Here, Smith relies on the construction of the liberal individual as naturally driven towards material prosperity, to “truck, barter and trade.”43 Furthermore, Smith believed that human beings naturally recognized that cooperation was essential for their own prosperity, and

40 Rousseau, Social Contract, 33.
42 Smith, Wealth of Nations, 508.
43 Christopher J. Berry, “Adam Smith's 'Science of Human Nature'” in History of Political Economy 44:3 (2012): 474; See also Smith, Wealth of Nations, 13, 508; Worth noting is that liberal theorists since Smith have adopted and developed the concept of “homo economicus” in an effort to naturalize Smith's particular construction of the liberal agent.

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positioned that the recognition through the division of labour and specialization, the common good of societies would be realized.\textsuperscript{44} In this sense, Smith is similar to John Stuart Mill, who will be discussed below, and Locke, who saw the state as a guarantor of property. However, it is important to acknowledge that Smith saw the market as the only appropriate conduit for the fulfilment of human development.\textsuperscript{45} In terms of the holistic common good, Smith's contribution is the role that the market and material prosperity plays in to pursuit of rational self interest, a point that will serve as constitutive of the material common good to be developed in section 2.1 below.

The fifth philosopher to address Immanuel Kant, who was a late eighteenth century German thinker. According to Kant, the purpose of the state is to provide for the flourishing of human potentials. Kant's conception of the transition from the state of nature to the civil constitution relies on his portrayal of human beings. He argues that people are constituted in terms of “asocial sociability,” which means that while we are social creatures, we are also antagonized by each other. This concept of asocial sociability is complemented by the construction of human rationality found in the \textit{Critique of Pure Reason}, where Kant sketches out the model for the efficient use of human reason.\textsuperscript{46} This antagonism, coupled with his vision of human rationality, is what leads to conflict in the state of nature and the subsequent move away from it by the creation of the state.\textsuperscript{47} Kant portrays the move towards a

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\item \textsuperscript{44} Smith, \textit{Wealth of Nations}, 3-22.
\item \textsuperscript{46} Immanuel Kant, \textit{Critique of Pure Reason}, trans and eds by Paul Guyer and Allen W. Wood (Cambridge University Press, 1998), 99-277. Kant's metaphysical construction of the human being is complicated and open to wide ranging interpretations. However, basically understood, the aim of \textit{Critique of Pure Reason} is to construct the machinery of human rationality. Kant does this by first acknowledging the limits of knowledge by recognizing that we can only know the world as a human being, and will therefore never truly claim ontological Truth, and second, by developing a the machinery that human rationality must operate within in order to properly reason as a human being, through the development of his categories of understanding. His work in the \textit{Critique of Pure Reason}, while not traditionally associated with his political writings, has important relations to his politics and his ethics, which will be discussed in the main text.
\item \textsuperscript{47} Immanuel Kant, \textit{Political Writings} ed. and trans. by H.S. Reiss (Cambridge University Press, 1991). 44-47.
\end{itemize}
civil constitution as a move from a “purposeless state of savagery... [that held] up the development of all the natural capacities of human beings...” to a state of political organization that could constrain and channel human antagonisms towards social improvements. As such, the move to state-based political communities, according to Kant, pushes the entire human race towards its full potential as a rational community, which is what Kant conceived of as the move towards “enlightenment.”

In essence, this is Kant's contribution to the holistic common good. In regards to the state, Kant argued that to fulfil its function as a mediating force, the sovereign is the only body or member of the political community who could not be legitimately coerced without being displaced as the highest authority within the political community. Similar to Hobbes, Kant believes that only by empowering the sovereign in this particular way can the sovereign perform its necessary function as a centralized mechanism of restraint, which creates the conditions for human beings to achieve their potential capacities and capabilities.

The final philosopher to be discussed is John Stuart Mill, a nineteenth century British thinker. What sets Mill apart from the previous philosophers is that, to certain extent, he begins from a point where the state already exists. Mill contributes an important enquiry on the appropriate limit on government authority over the people they rule, which has arguably become one of the most important debates within the discipline and practice of state-based politics. In much the same vein as Rousseau, Mill believed that “the rulers should be identified with the people; that their interest and will should be the interest and will of the nation.” Mill concludes that the appropriate limit for government authority should rely on one important maxim, which is 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.”

Mill privileges the individual over the state, in that he believes that the individual should be free from

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48 Kant, Political Writings, 42-49, 73-76, 137-149.
49 Kant, Political Writings, 75.
51 Mill, On Liberty, 52.
all but the most essential government restraint. Therefore, the state is seen as providing a minimalist, although still very much essential role in ordering human interactions.\textsuperscript{52} In order to institutionalize this minimalist conception, Mill argued that government power should be limited in two ways: “First, by obtaining a recognition of certain immunities, called political liberties or rights, which it was to be regarded as a breach of duty in the ruler to infringe... A second, and generally later expedient, was the establishment of constitutional checks...” on the exercise of state power.\textsuperscript{53} Worth noting is the stark contrast between Mill and Hobbes, where the Hobbesian sovereign is left unchecked in its exercise of power over its citizens. Furthermore, Mill's restriction on state power through the protection of rights is an important addition to Smith's views on the role of the state, as addressed above. As will be discussed below, both of these strategies for the restriction on government power are still employed in many contemporary states. As such, the government is designed to limit the harm of people who are pursuing their own interests, which is Mill's contribution to the holistic common good.

As my thesis is primarily concerned with a critique of the effects of new constitutionalism of economic law on liberal democratic states, it is also worth while to briefly address the role that law was seen to play in the theories presented above. An essential component these theorists have in common is the role that the state or sovereign has in the articulation and implementation of law. For Hobbes, laws can be understood as dicta of the sovereign, which prevent citizens from exercising their perfect natural freedoms. Where there is no preventative law backed by legitimate force, is precisely where citizens find their civil freedom to pursue their own ends. These freedoms are further complemented by the guarantees of civil rights and contract enforcement that the sovereign provides through the social contract.\textsuperscript{54} What is worth noting in the Hobbesian framework is the sovereign is assumed to be above the law. For Hobbes, the sovereign must be the highest authority in the land, or else it fails to become

\textsuperscript{52} Mill, \textit{On Liberty}, 159-161.
\textsuperscript{53} Mill, \textit{On Liberty}, 44.
the highest power necessary to exercise legitimate power and authority over the body politic. Because the sovereign is empowered to conduct itself in any means necessary for the preservation of the political community, it must be free to act in any manner it deems as necessary. Under the Hobbesian contract, there is a distinct lack of accountability that can be exercised over the actions for the sovereign after the initial contract.\textsuperscript{55} Furthermore, any limits imposed upon the Hobbesian sovereign dissolves the social contract. This follows from the manner in which Hobbes constructs the sovereign as a unitary political actor at the pinnacle of authority within an established political community. For Hobbes, in order for the sovereign to be the highest political authority, it must be free to act without constraint. Any derogation from this construction of the sovereign voids the social contract because it fundamentally violates the purpose of the social contract. As such, law, as a constitutive feature that flows from the sovereign, cannot be utilized to restrict the power of the sovereign.\textsuperscript{56}

In Locke's framework, law serves as an articulation of protections under which citizens can claim to be free from the issues of the state of nature; “\textit{liberty is, to be free from restraint and violence from others; which cannot be, where there is no law.}”\textsuperscript{57} Furthermore, “[the] freedom then of man, and liberty of acting according to his own will, is \textit{grounded on} his having \textit{reason}, which is able to instruct him in that law he is to govern himself by.”\textsuperscript{58} Laws for Locke, then, are grounded in the rationality of human beings in their pursuit of freedom from the lack of predictability in the state of nature, as discussed above. The power to make law is assigned to the overarching sovereign, and this power, as with Hobbes, is indivisible as a necessary condition to actually be sovereign.\textsuperscript{59}

For Rousseau, laws follow his close linkage between the sovereign and the general will. As Rousseau constructs his version of the social contract as a co-constitutive relationship between ruler

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\item \textsuperscript{55} Hobbes, \textit{Leviathan}, 116-117.
\item \textsuperscript{56} Hobbes, \textit{Leviathan}, 132-148.
\item \textsuperscript{57} Locke, \textit{Second Treatise}, 32.
\item \textsuperscript{58} Locke, \textit{Second Treatise}, 35.
\item \textsuperscript{59} Locke, \textit{Second Treatise}, 47-51,
\end{itemize}
\end{footnotesize}
and ruled, he argues that “when the people as a whole makes [sic] rules for the people as a whole, it is dealing only with itself.” As Rousseau creates a close connection between the sovereign and the people, he argues that the citizen body actively participates in the construction of the rules of governance through a shared sovereign will. As such, if the sovereign enacts law and the people remain silent, which for Rousseau is the act of consent that legitimates the continuation of the social contract, then the laws are seen to be legitimate, and apply equally to all members of the political community. Here, we see a stark contrast between the Hobbesian sovereign, in terms of absolute authority to legislate and coerce with almost no check on the exercise of power, and Rousseau's sovereign, characterized by a continuous contingency that hinges on popular support for sovereign action.

In turning to Smith's treatment of law, it appears as though he limits the state's legislative power to provide for favourable market conditions. For Smith, the role of the state is to provide for system of predictable and enforceable rights and duties which are importantly linked to facilitating market relations. Law, for Smith, is to be used in the enforcement of private exchanges, and to protect ownership rights. As for Mill, his treatment of law in *On Liberty* is admittedly brief. Here, we again return to the notion of legitimate government interference in the lives of private persons and the principle of limiting harm as the only legitimate exercise of government authority over individuals. He writes that “for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected wither to social or to legal punishment.” As Mill appears to advocate for a body politic that respects the individual freedom of rational human beings, it appears that Mill would limit laws that unnecessarily restrict said freedom.

Kant's treatment of law is problematic. In “Theory and Practice,” Kant is of the opinion that law

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62 Mill, *On Liberty*, 52-54
and the creation of rights within a political community is summarized by a positive articulation of rights for citizens. However, Kant acknowledges that law serves as a “restriction of each individual's freedom so that it harmonizes with the freedom of everyone else.”\textsuperscript{64} In this sense, it appears as though Kant takes a stance that is similar to Mill's, in that the place of the state is to interfere as little as possible in the lives of citizens. However, Kant is not only concerned with law as the creation of rights to be enjoyed by citizens. He also writes “[the] aim [of law] is not, as it were, to make the people happy against its will, but only to ensure the continued existence as a commonwealth.”\textsuperscript{65} As such, laws are designed by the sovereign to maintain the continued existence of the commonwealth, which, as argued by Kant, is necessary to the continued historical trajectory towards enlightenment. On the surface, this position is contrasted in “Metaphysics of Morals,” where he writes that “legislative power can only belong only to the united will of the people... the laws it gives must be absolutely \textit{incapable} of doing anyone an injustice.”\textsuperscript{66} Thus, on the one hand, it appears as though Kant takes a position similar to Hobbes, in that law is understood to facilitate the continuation of the political community. On the other hand, Kant takes a position similar to Rousseau, where law is seen as a community act to facilitate the development of human capacities. Perhaps one way of squaring this circle is to argue that because the state exists to facilitate the development of human capabilities, and this cannot be achieved unless the state is preserved, then laws must strike a balance between what is necessary to preserve the state and laws that undermine the purpose of the state. And while it is far beyond the scope of this paper to address this particular point of Kant's philosophy, it is enough to say that this tension has remained a fundamental political problem in the contemporary political landscape.

In sum, each theorist above contributes an essential element to the construction of the holistic common good. For Hobbes, the state serves to provide security. For Locke, it provides a set of known

\textsuperscript{64} Kant, \textit{Political Writings}, 73.
\textsuperscript{65} Kant, \textit{Political Writings}, 80.
\textsuperscript{66} Kant, \textit{Political Writings}, 139.
laws and functions as a guarantor of property ownership. For Rousseau, the state provides for the exchange of civil rights for natural rights, which empower humans to live in way not possible in the state of nature. For Smith, the role of the state is to create favourable market exchanges by providing infrastructure and by guaranteeing agreements. For Kant, it enables human beings to achieve their full human potential, and for Mill, the role of the state is to prevent or limit harm done to others in the pursuit of their self-interest. When read together, I argue that each theorist provides an important component to what can be useful considered as the essence of liberal democratic states, what I am calling the holistic common good. Furthermore, the authority to maintain monopolies over the enactment of law and the exercise of legitimate force are important powers granted to the state to fulfil its end. As will become apparent in Chapters 2 and 3, it is the authority to enact and enforce law, which served as a lynchpin for the rationale for having a state at all, that has become increasingly transnationalized and privatized under new constitutional governance. This challenges traditional understandings concerning the role of the state and the related essential characteristics of liberal democracies. As noted above, enacting law and exercising the legitimate use of force are two of the major tools assigned to the state in the pursuit of the holistic common good. In the discussion below, the first of these two powers will become increasingly important in the analysis of the investor-state regime, as the creation, implementation, and execution of law has become increasingly institutionalized outside of the traditional state logic of the international system.

**Section 1.2- From Feudalism to Centralization to Fragmentation: The Evolution of Statehood.**

Over the course of human history, communities have been organized in varying degrees of complexity and formality. However, the modern international system has become increasingly homogenous, in that a particular political form has crystallized as the dominant political institution in international influence and law; namely the Westphalian state. The state, as we have come to
understand it through the discussion of the holistic common good, was conceived of as a solution to a certain set of problems associated with the human experience, and as a tool that empowered rational human beings. From this theoretical core, the modern international state system has articulated the social, legal, and material construction of the state in a variety of international legal texts and international conventions, such as the 1933 Montevideo Convention on Rights and Duties of States.\(^{67}\)

As noted above, states have come to be the dominant political form in the modern international system, and are usually defined in reference to the 1648 Treaty of Westphalia, which ended the Thirty Years War.\(^{68}\) Mainstream narratives within the discipline of international relations often link the treaties forming the Peace of Westphalia to the principles of territorial integrity and sovereign control within clearly defined borders. However, the principles that have become constitutive of the modern international system emerged out of the contest between competing claims to authority. In order to make sense of how the state system came to be in the modern age, and the changes that it is currently undergoing, this section will unpack the concept of the state by critically engaging with its historical development. This will be accomplished by discussing the transition from political and social organization during the feudal era to the modern international system and the state construction in international law. In essence, the aim of this section is to provide a broad narrative that tracks the development of the state as it has come to be defined in modern international law.\(^{69}\)

Prior to the move towards centralized political authority, European political communities were organized under “feudalism,” which broadly applies to the period of time between the ninth and the fifteenth centuries. During this period, political authority and social relations were characterized as a “complex interaction among particular forms of territorial fixity, the absence of exclusive territorial

\(^{67}\) Malanczuk, *Akehurst's Introduction*, 75.

\(^{68}\) Malanczuk, *Akehurst's Introduction*, 9-12. See also Krasner, “Westphalia and All That,” for a historical discussion of the treaty.

\(^{69}\) It is essential to point out that the transition from the feudal era to the modern state system was hardly a uniform transition, as many individual states moved towards modern statehood on divergent paths and at different times.
authority, the existence of multiple crisscrossing jurisdictions, and the embedding of rights in classes of people rather than in territorial exclusive units.”

During the feudal era, political authorities derived their right to rule by linking themselves to a higher power, and their legitimacy followed from the connection between themselves and the divine. However, this authority was not monopolized over a particular geographic location. Prior to notions of centralized political authority over fixed territory, multiple sources of authority such as religious institutions or compartmentalized lordships, claimed legitimate authority over the same territory. Furthermore, John Ruggie writes “these inclusive legitimations posed no threat to the integrity of the constituent political units because these units viewed themselves as municipal embodiments of a universal moral community.” In regards to political organization, a lack of political centralization entailed competing authorities asserting jurisdiction and the reliance of customary rule. Socially, feudalism was constructed through a complex set of hierarchical and class relations. Specifically, under feudalism, “every person occupied a rank or station in society and was expected to perform duties and enjoy the privileges of that rank or station. In this way everyone supposedly contributed to the common good...” and social relations, roles, and duties to the community were constructed through religion and customary practice.

The transition from localized customary rule, multiple and competing authorities, fragmented territorial boundaries, and strict social orders did not occur during a clearly defined century. But broadly speaking, two major developments occurred during the eleventh and twelfth centuries. The first major development was the assertion of the nobility against the power of the monarchy. According to

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73 Ruggie, “Territoriality and Beyond,” 150; see also Ball et al., *Political Ideologies*, 119.
74 Cutler, *Private Authority*, 133.
76 Ball et al., *Political Ideologies*, 21.
Saskia Sassen, during the eleventh century, “the nobility asserted their distinctive character and the legitimacy of their claim to a privileged status.” As such, assertion of rights against the monarch began to both challenge the traditional feudal social relations. The result of these assertions began to redefine the relationship among elites, in that lords began to change the conditions under which they were obligated to their king. As a consequence, traditional or customary social relations began to become increasingly codified under a common civil code of law.

In addition to nobility rights and an increasingly formalized civil legal system, another key development in the transition from the feudal system came in the form of increased urbanization, the development of an increasingly centralized bureaucracy, and an efficient tax collection system. The urbanization of feudal society is a point that is worth going into greater detail. Coupled with changes in material production, which will be discussed in greater detail in the following chapter, urbanization led to a class of citizens that broke traditional notions of master and servant hierarchy that characterized the feudal social order. The emerging petit bourgeoise put pressure on the social order by claiming an increasingly comprehensive set of rights, including protection for property and maximum autonomy in terms of self-interest pursuits. As their economic successes grew, the pressure that emerging merchant class exerted over the political elite led to the successful institutionalization of what have come to be fundamental liberal principles. Furthermore, in concurrence with the institutionalization of a civil code, increasingly influential middle class citizens forced the successful institutionalization of rights, duties, and obligations, which replaced the conditions of customary rule under the feudal era.

A clear example of this development was the French Capetian Kings. Ruling between the twelfth and thirteenth centuries, they made fundamental changes to the manner in which a political

77 Sassen, Territory, Authority, Rights, 36.
78 Marshall, Social Class, 12.
79 Sassen, Territory, Authority, Rights, 40-54.
80 Habermas, Structural Transformations, 80-81; Sassen, Territory, Authority, Rights, 57.
81 Sassen, Territory, Authority, Rights, 62-70.
community was to be governed, which became an early model for the modern state form. Sassen writes that the French Kings “succeeded in launching a territorial monarchic state that contested and then superseded the Christian commonwealth.” This was done by successfully redefining legitimate authority from the divine right to rule, which was characteristic of the feudal era, towards a more humanistic understanding of political authority. Furthermore, Sassen notes that the Capetian Kings were successful in creating and implementing a central bureaucracy and taxation system, notable for the institutionalization of predictable tax rates set for cities. The cities supported this move, because it removed the uncertainty of taxation, which further reinforced the legitimacy of the French Kings. As such, the success of Capetian Kings in the implementation of a central bureaucracy and a system of taxation served as an early model for the institutionalization of the modern state form.

Ruggie's insightful analysis of the transition towards centralized states focuses on the period between the thirteenth and fifteenth centuries. Between the thirteenth and mid-fourteenth centuries, Ruggie points to rapid population growth, advances in agricultural practices, and urbanization as movements to the modern state form. However, these advances were curtailed during the mid to late fourteenth century due to a number of events, such as the bubonic plague and the Hundred Years' War. Combined with “the feudal structure of property rights and forms of labour control, inadequate investment, especially in agriculture, the maze of secular and ecclesiastical jurisdictional constraints that pervaded medieval society, and the socially parasitic nature of the multiplicity of territorial rulers...” the transition from feudalism remained incomplete. The deficiencies of the feudal political arrangements, combined with the negative effects of war and famine, opened the door for what Ruggie calls “entrepreneurial politicians.” Specifically, political actors sought for new ways to empower their

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82 Sassen, *Territory, Authority, Rights,* 48-54.
83 Sassen, *Territory, Authority, Rights,* 45.
84 Sassen, *Territory, Authority, Rights,* 45-53.
85 Ruggie, “Territoriality and Beyond,” 154.
position by gaining greater legitimacy through contributing to social improvements and creating and maintaining the conditions to facilitate commerce. On the latter point, local lords encouraged long distance trade and trade fairs as a means of generating revenue necessary for infrastructure expansion and the execution of successful military operations.86

Centralized states became increasingly dominant as a form of political organization by the end of the fifteenth century. By this time, political organization in Western Europe had successfully uprooted competing sources of authority that characterized the feudal era, and had attained a monopoly of legitimate political authority. States, based on the Capetian model discussed above, had emerged with a strong centralized political organization that was perceived as legitimate by the population at large. Ruggie writes that a “fundamental shift was occurring in the purposes for which power could be deployed by rulers and be regarded as socially legitimate by their subjects. Internally, legitimate power became fused with the provision of public order, steadily discrediting its deployment for primitive extraction and accumulation. Externally, legitimate power became fused with statecraft, steadily discrediting its deployment for primitive expansion and aggrandizement.”87 Furthermore, the newly established centralized political unit was further entrenched in the European consciousness through the mutual recognition on the part of European leaders by way of reciprocal sovereignty, as well as through the establishment of effective bureaucracies, courts, and systems of taxation.88

Ruggie writes “[the] chief characteristic of the modern system of territorial rule is the consolidation of all parcelled and personalized authority into one public realm. This consolidation entailed two fundamental spatial demarcations between public and private realms and between internal and external realms.”89 Perhaps the clearest indication of the change from the feudal order came in the

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86 Ruggie, “Territoriality and Beyond,” 154. The rise of long distance trade, trade fairs, and the revenue production for political actors will receive a greater depth of treatment in the following chapter.
87 Ruggie, “Territoriality and Beyond,” 161.
88 Krasner, “Westphalia and All That,” 238; Ruggie, “Territoriality and Beyond,” 162.
89 Ruggie, “Territoriality and Beyond,” 151.
form of the *Treaty of Westphalia, 1648*. After *Westphalia*, the state has been understood to represent a distinct political container for the community that resides within its borders. Furthermore, states were understood to be sovereign, which meant that they were free from the exercise of external interference in regards to their domestic politics.\textsuperscript{90} The dominant narrative concerning *Westphalia*, as mentioned above is that it formalized two important features of the modern international system, namely the principles of sovereignty and of non-intervention. It is often argued that the *Peace of Westphalia* was meant to serve as a peace making mechanism to prevent conflict between sovereign bodies through the recognition of state sovereignty and territorial integrity.\textsuperscript{91} However, it is essential to note that the *Peace of Westphalia* is a composition of two peace treaties that ended the Thirty Years War. Specifically, Krasner points out that the *Peace of Westphalia* is comprised of the *Treaty of Osnabruck* and the *Treaty of Munster*.\textsuperscript{92} Furthermore, he writes that “[for] the conventional interpretation of the Peace of Westphalia [sic], which underscores 1648 as a break with the past, the most important provisions of the treaties are the ones that gave the princes of the Holy Roman Empire the right to conduct their own foreign policies, to conclude treaties with other states within and without the empire.”\textsuperscript{93} On Krasner's reading of the *Peace of Westphalia*, topics such as the exercise of religion were treated with a greater degree of detail, which undermines the conventional narrative of the *Peace of Westphalia* adopted throughout much international relations scholarship. Furthermore, Krasner notes that the principles of sovereignty and territorial integrity existed in practice prior to the *Peace of Westphalia*, and the principles were far from universally adopted until well into the modern era.\textsuperscript{94} However, it is worth noting that changes in thinking were not enough to provoke the transition from feudalism to central state; changes in thinking required changes in institutional design and

\textsuperscript{91} Malanczuk, *Akehurst's Introduction*, 11.
\textsuperscript{92} Krasner, “Westphalia and All That,” 240.
\textsuperscript{93} Krasner, “Westphalia and All That,” 245.
\textsuperscript{94} Krasner, “Westphalia and All That, 235-246

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effective execution as well.\textsuperscript{95} What are particularly important with this development are the formalization of a respect for demarcated territory, an increasing respect for the political authority that presides over said territory, and the crystallization of the state form itself in international law.\textsuperscript{96} The actual legal construction of the state has been codified in the \textit{Montevideo Convention}, which articulates four “qualifications” in order to achieve the status of statehood. They include a permanent population, a clearly defined territory, a government, and the capacity to enter into agreements with other states.\textsuperscript{97} Peter Malanczuk writes, “[the] criterion of a 'permanent population' is connected with that of territory and constitutes the physical basis for the existence of a state.”\textsuperscript{98} The mixture of population and place, stated again, provides for the raw materiality of the state as a distinct place. The third criterion is the effective control of this territory by a government. The “existence of a government implies the capacity to establish and maintain a legal order.\textldots,” in essence through the existence of an effective sovereign empowered with monopolies over law and force.\textsuperscript{99} In addition, the notion of effective government is closely linked to the principle of sovereignty, which is freedom from state intervention in internal affairs. As such, a government is understood to be effective only when it legislates without external influences.\textsuperscript{100} The \textit{Montevideo Convention} is complemented, albeit problematically, by the principle of recognition of statehood on the part of the international community. As noted above, the principle of mutual recognition in the legitimacy of centralized political authority was a mechanism for the usurpation of feudal claims to power during the fifteenth century. Now, the act of recognizing the legitimacy of a state or of a government complements notions of institutional capacity and the ability to

\textsuperscript{95} Kransner, “Westphalia and All That,” 237-244.
\textsuperscript{96} As mentioned in the introduction, Stephen Krasner, “Westphalia and All That” represents an important challenge to the mainstream treatment of the \textit{Peace of Westphalia}. Krasner correctly points out that the actual manifestation of territorial integrity and sovereignty did not begin with the enactment the treaties that constitute \textit{Westphalian settlement}, and concepts of territorial control and sovereignty remain contested concepts to this day. His comments are insightful, and I attempt to form my discussion of the rise of the state in reference to his observations.
\textsuperscript{97} Malanczuk, \textit{Akehurst's Introduction}, 75.
\textsuperscript{98} Malanczuk, \textit{Akehurst's Introduction}, 76.
\textsuperscript{99} Malanzcuk, \textit{Akehurst's Introduction}, 77.
\textsuperscript{100} Malanczuk, \textit{Akehurst's Introduction}, 77-79.
enter into international agreements.\textsuperscript{101}

These qualifications have been further complemented in the current United Nations system. According to the \textit{Charter of the United Nations (UN Charter)}, Article 2(7) asserts that nations are obligated to respect the domestic jurisdiction of member states, which is a key element of sovereignty.\textsuperscript{102} The principle of sovereignty was further complemented with the notion of non-aggression under the rules of war. Prior to the United Nations, war making was understood to be a right of a state, and the reasons for going to war were solely at the discretion of the sovereign of that country. By providing legal equality to the states of Europe and codifying the mutual recognition of authority, the hope was that conflict would be mitigated. Furthermore, the intention behind the implementation of the United Nations was to mitigate future wars. As such, many of the provisions within the \textit{UN Charter} place important conditions on the use of force and on internal sovereignty, by empowering the United Nations to act in circumstances that grossly violate the provisions of the \textit{UN Charter}.\textsuperscript{103}

For example, the \textit{UN Charter} specially states in Chapter I that aim and purpose of the United Nations is to maintain peace, security, and stability in the international system. This aim is accomplished through articles such as Article 2(4), in that all member states must refrain from the threat or use of force against the territorial integrity of political independence of other member states. When force becomes necessary to be deployed for the explicit aim of maintaining peace, stability and international order, Chapters VI and VII place the authorization of the use of force in the hands of the United Nations Security Council, which is comprised of five permanent members and an additional rotating ten members. Specifically, Chapter VI discusses the role of the Security Council in relation to

\begin{itemize}
\item \textsuperscript{101} Malanczuk, \textit{Akehurst's Introduction}, 82-90
\item \textsuperscript{103} Malanczuk, \textit{Akehurst's Introduction}, 306-319.
\end{itemize}
international disagreements or conflicts that undermine the peace and stability of the international system, where Chapter VII discusses the authorization of military force with the sole intent of returning the international system to a state of peace. These provisions serve to uphold state sovereignty while simultaneously challenging it concerning issues that the UN is authorized to intervene.

In public international law, states are understood as the primary subjects and sources of international law. According to the Statute of the International Court of Justice, Article 38(1), international law has four basic sources, which includes international agreements or treaties, international customary law, general principles of law, and judicial decisions. In addition, The Vienna Convention on The Law of Treaties provides that only states and their legitimate representative can enter into a treaty or other form of international agreement. Worth noting is that this power and ability of the state to create and participate in international law as a formal legal subject, when understood in reference to the theoretical core for liberal democratic states developed in section 1.1, is important to the discussion that follows in terms of new constitutionalism. As will be shown in later chapters, the formalization of international law and the strong link drawn between the state and law diminishes or renders invisible the power of private actors to enact legal standards under new constitutional governance that bind states to international standards. Furthermore, the assumed divide between the public law agreements between states and private international law that facilitates the workings of the international economy fails to account for changes in the internal composition within states, as well as changes to the category of subjects claiming legal personality in international law.

In sum, the shift from feudalism to centralization required a shift in the relationship between territory and authority. Specifically, feudal conceptions of overlapping jurisdiction and flexible territorial associations gave way to central political authority over fixed territorial associations. As

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such, appeals to the moral community of Europe that relied on a general consensus regarding the uniformity of natural and divine law, became compartmentalized and replaced by emerging national communities and their internal construction.106 However, it is also important to acknowledge some of the contemporary issues that have emerged in the discourse of statehood in the modern era. Under the blanket notion of state sovereignty, the international community has been historically unable to assess the quality of sovereign actions undertaken in another state due to the principle of non-intervention into the domestic jurisdiction of other states, articulated in the \textit{UN Charter}, article 2(7).107 The chipping away of state sovereignty manifested itself in doctrines such as the politics of development, human security discourses, humanitarian intervention, and the Responsibility to Protect. These doctrines share a common theme concerning the improvement of the human condition outside of the traditional privileging of the principle of sovereignty.108 One of the more powerful legal or philosophical points that can be raised in support of this issue is the concept of \textit{jus cogens}. \textit{Jus cogens} refers to overriding principles of international law that are accepted by the international community and cannot be derogated from through international agreements or domestic actions. No state can act in such a way so as to violate the principles that the international community has deemed as fundamental aspects of international order. While the claim to \textit{jus cogens} is nebulous, it is often associated with crimes against humanity, war crimes, genocide, and keeping international agreements. As such, sovereignty has begun to be referred to in terms of respect for fundamental issues of concern, and the monolithic projection of sovereignty is increasingly conditioned by respect for these fundamental principles.109

\begin{itemize}
\item \textsuperscript{106} Ruggie, “Territoriality and Beyond,” 150-155.
\item \textsuperscript{107} Malanczuk, \textit{Akehurst's Introduction}, 21-22, 364-430; Teitel, \textit{Humanity's Law}, 19-59; \textit{UN Charter}.
\end{itemize}
Throughout the history of the state system, political and legal scholars have fretted over the balance between the principle of non-intervention into the domestic jurisdiction of sovereign states and humanitarian issues demanding intervention. And while the Westphalia Treaties and the Montevideo Convention assign sovereignty to the state under particular empirical and legal conditions, how that sovereignty is exercised has become a topic of increased scrutiny. For example, states that abuse the rights of their citizens or are unable or unwilling to provide protections for their citizens are increasingly regarded as failing to fulfil the basic requirements of sovereignty.\footnote{Peters, “Humanity as Sovereignty,” 514-516.} In one sense, the international community has begun to question its wholesale commitment to notions of sovereignty, which has been evolving from an absolute concept to a conditional concept that depends primarily on the ability to maintain the monopoly on the use of force and the treatment of the domestic population.

In terms of the language developed in section 1.1 of this paper, one could make the argument that sovereignty has become, in a transitional sense, conditional on the ability of the state to fulfil its obligations to its purpose, in providing the conditions for the holistic common good.\footnote{Peters, “Humanity as Sovereignty,” 513; Judith Resnik, “Globalization(s), Privatization(s), Constitutionlizaion, and Statization: Icons and Experiences of Sovereignty in the 21st Century” in International Journal of Constitutional Law 11:1 (2013): 171-175.}

Section 1.3- Liberalism and Democracy.

From the Westphalia onwards, the conceptions of the modern state are premised on notions of internal sovereignty and territorial integrity, which have become foundational principles of the international system and international law. However, not all states are alike, and aside from these basic principles there is a wide-ranging spectrum in the internal composition of states. This section will narrow the focus from broad appeals to the state by focusing on the development of liberal democratic states. While still a broad term, certain important principles that characterize liberal democracies will emerge through the historical investigation of liberal and democratic developments. Importantly, the
principles that have become constitutive of liberal democratic states to be discussed are the same principles that have come under increasing pressure due to the proliferation and institutionalization of new constitutionalism and transnational economic law.

As mentioned above, liberal democracies are a particular institutionalization of two concepts imposed onto the state form developed in the previous section. Liberalism, basically understood, is a political ideology that takes its central unit of analysis as the individual human agent. As discussed above, the canonical liberal thinkers are liberal in that they share the vision of the individual agent as a rational being, capable of the use of reason. Mill in particular celebrates the individual as a citizen in 

On Liberty, advocating for placing limits on human freedom on the prevention of unnecessary harm as the appropriate role for government.\textsuperscript{112} In general, liberals tend to think of human beings as naturally competitive and self-interested, and place the role of the state in mediating the harmful effects of human nature on both the individual and society in general.\textsuperscript{113} Democracy, on the other hand, is a system of political governance that places varying degrees of political participation and accountability into the hands of citizens.\textsuperscript{114} Early democratic institutions are often linked to the city-state of Athens during the fifth century BC.\textsuperscript{115} However, many (if not all) democracies have institutionalized a mechanism of representation to deal with the practical difficulties faced with large territories and populations. As such, representative democracies are linked to the population through the act of voting for their representatives. The quality of democracy is assessed by indicators such as the fairness of elections, free competition between political actors striving for political office, and the ability to

\textsuperscript{112} Mill, On Liberty, 52.

\textsuperscript{113} Ball et al., Political Ideologies, 35-37; Barry Hindess, “Civilizing Peoples Through State Citizenship and Democracy,” in Global Standards of Market Civilization, 37; Mill, On Liberty, 52-57; return to section 1.1 generally for the construction of the rational and competitive human.

\textsuperscript{114} C.B. Macpherson, The Real World of Democracy. (Toronto: Canadian Broadcasting Corporation, 1965); Macpherson notes that liberalism does not have a monopoly of democratic institutions, and discusses two alternative versions. In brief, the 'communist' variant of democracy focuses popular control, but rejects liberal notions of material inequality. The second alternative is the 'underdeveloped' variant, which appears to be a mixture of communist democracy through appeals to classlessness and liberal democracies that do not have the material resources to offer robust liberal choices.

\textsuperscript{115} Ball et al., Political Ideologies, 16.
communicate and engage with political ideas. A state is thought to be both liberal and democratic when the rights of the individual are emphasized and protected, in addition to the ability to actively participate in the process of democratic governance.\textsuperscript{116}

In historicizing liberal democracies with the more general rise of centralized states, it is important to note that many of the factors that contributed to the process of state consolidation influenced the rise of liberalism and democracy. On the side of liberalism and prior to the formalization of the liberal human being found in the works of canon discussed above, the twelfth century saw the nobility and merchant class beginning to assert rights against feudal authorities. In particular, the merchant class became influential as changes in material production and urbanization led to the concentration of wealth and influence in a class of people that was not accommodated by the feudal social relations. This disrupted the traditional social order. In particular, both the merchant class and nobility advocated for predictable taxation and the protections for private ownership. As such, these early changes in the feudal order laid the foundation for what would later become the private sphere. Through the expansion of rights associated with propertied interests, the notion of the private self, the private sphere, and relations between private individuals grew to become exceptionally important component concerning the evolution of liberalism. In particular, Jürgen Habermas associates the private sphere with the intimate sphere was associated with family interactions, which was seen as beyond the realm of public regulation. As will be shown throughout, this sphere of private autonomy was extended as liberal proponents took this sphere of autonomy and linked it to economic interactions.\textsuperscript{117} On the side of democracy, an example of a post-Athenian democratic practice can be found in Britain. The early eleventh century saw Norman kings convening advisory councils on the topics of taxation and legislation. This practice of consultation was entrenched in the \textit{Magna Carta, 1215}, which created an

\textsuperscript{116}Ball et al., \textit{Political Ideologies}, 31.
\textsuperscript{117}Habermas, \textit{Structural Transformations}, 55-74.
obligation of the parts of nobles to pay taxes to the King. In the years that followed Magna Carta, Parliament came to act as a petitioning mechanism that nobles used in an attempt to influence the monarchy.\textsuperscript{118}

Perhaps the most obvious events that led to the institutionalization of democratic principles, at least in the western democratic tradition, are the revolutions of Britain, France, and the United States. Especially in the case of France and America, these revolutions clearly replaced traditional political power in the form of the monarchy with elected representatives. As noted above, the role of early British Parliament pre-revolution was to advise the monarch in the enactment of legislation, taxation, and the general representation of powerful nobles in the feudal era. However, this relationship between monarch and Parliament was not formally institutionalized until after the revolutions during the seventeenth centuries. Here, the contest was set up between traditional monarchists, who believed that the monarch was the legitimate political authority, and the Parliamentarians, comprised of powerful nobles and the increasingly influential middle class, which included industrialist, artisans, merchants, and others. The reins of power were transferred to the Parliamentarians, back to the Monarchy during the Restoration, and ended on the side of Parliamentarians during the Glorious Revolution of 1688-89, which consolidated Britain as an early democratic state. However, it is important to bear in mind that “[in] so far as parliamentary government was democratic and ensured liberty, it was a democracy of, by, and for property owners, who by virtue of this ownership has a 'permanent interest' in the affairs of the kingdom, and it was their liberties and property rights that it helped to entrench.”\textsuperscript{119} However, early democratic institutions were formally consolidated in the wake of the Glorious Revolution, which opened the door for future democratic developments, which will be discussed below.

In the case of the United States, the formal institutionalization of American democracy came in

\textsuperscript{119} Roper, History of Democracy, 116. See also Gill, Power and Resistance, 45-47.
the wake of the American Revolution (1787-1791). Before the revolution, the territories that were to become the United States were British Colonies. However, one of the major points of contention from the perspective of the American colonies was the distinct lack of representation in the newly established Parliamentary system in Britain. Bernard Crick writes that “in nearly all the state assemblies the franchise was already wider that in all but a few exceptional English constituencies, wider not out of democratic sentiment but because of the wide availability of public land.”\(^1\) A distinctly American contribution to the evolution of democratic thinking is the notion of representative democracy. In stark contrast to traditional notions of democracy, which drew a direct link between citizen and ruler, American democracy was conditioned by the act of voting for representatives. Roper writes that the “representative is considered to be a filtering mechanism and preferable to selection by lot... because the intense competition for a small number of government positions in a representative democracy ensures that those with the greatest talent are selected.”\(^2\) This system was designed by the drafters of the American constitution to compromise between the increasing pressure of citizen groups demanding a say in the political process and traditional notions of rule by elites. This was achieved, in particular, by creating a formal equality for the ability to run for office, and the reality of material inequality, in that only a particular set of citizens had the resources needed to run a successful campaign.\(^3\) However, it is through the enactment of the American Constitution in the wake of the American Revolution where notions of democratic participation, representative democracy, and the continued enshrinement of democratic principles become enshrined as constitutive elements of a state.

In the case of France, it is important to note some of the important differences between the French Revolution and those in America and Britain. Brian Roper notes that the revolutions in Britain


and America were very much led from above by powerful elites within the political community of each nation. Furthermore, the institutional framework that emerged out of both revolutions focused primarily of the protection of property rights and the enfranchisement of a particular set of people.\textsuperscript{124} This is starkly contrasted with the French Revolution, which was supported by a mass of French citizens, including those from rural and urban settings and those from a variety of socio-economic backgrounds. Furthermore, the results of the French Revolution, namely the proclamation on the universal rights of man, “remain enshrined in the constitutional arrangements of liberal democracies to this day.”\textsuperscript{125} For example, principles that have become widely attributed to liberal democracies became entrenched in the constitution of 1791, and included civil rights such as freedom of thought, speech, and expression, economic freedoms such as property ownership, and equality before the law.\textsuperscript{126} The subsequent Constitution of 1793 entrenched liberal government, which included important checks on political leaders and the democratic participation of the male population.\textsuperscript{127} In particular, the “1793 Constitution incorporated the basic rights of the 1789 constitution but greatly expanded and augmented them.”\textsuperscript{128} The rights enshrined equality before the law, the ability of all citizens to hold public office, the freedom from arbitrary arrest or other state coercion, and the presumption of innocence. In addition, the 1793 French government formally abolished the feudal society, by cancelling all existing feudal obligations.

As the United States, France, and Great Britain began to crystallize into formal democracies, changes in technology and continued urbanization saw a second wave of liberal assertions and democratic expansions. In general, the 1800s saw the development of an increasingly complex form of economic production and international interactions. With the advent of the railroad, continental Europe,

\begin{itemize}
\item \textsuperscript{124} Roper, \textit{History of Democracy}, 154.
\item \textsuperscript{125} Roper, \textit{History of Democracy}, 154.
\item \textsuperscript{126} Fukuyama, \textit{End of History}; 199-208; Roper, \textit{History of Democracy}, 167-186.
\item \textsuperscript{127} Worth noting at this point is that the period between 1791 and 1793 is known as the “Reign of Terror.” While my discussion fails to adequately historicize this period in time, for the sake of my argument it is enough to say that each constitution further embedded liberal ideas into French law.
\item \textsuperscript{128} Roper, \textit{History of Democracy}, 173.
\end{itemize}
Britain, and the United States developed rail and communications infrastructure, which further complemented the increasingly centralization of mechanized production.\textsuperscript{129} Even following the loss of its American colonies, Britain maintained colonies in India, Canada, and Australia, and therefore privileged access to raw materials for industrial production. This, combined with the fact that Britain was becoming the first industrial power as a result of the Industrial Revolution, placed Britain at the pinnacle of economic achievement.\textsuperscript{130}

In order to understand the rise of liberalism and democracy in Britain, it is essential to understand the changes in material production that occurred during the Industrial Revolution. The first major factor was advances in technology, especially in regards to material production and travel. Importantly, the steam driven locomotion and the development of rail travel in Britain, the United States, and Continental Europe generated access to raw material extraction and long distance trade. In addition, the mechanization of material production led to increases in mass production that undermined traditional production for subsistence consumption. In order to staff newly formed factories, a pool of labour was required. As such, the scale of urbanization required to staff the needs of material production was greater than the current urban workforce could provide. In a massive process of social dislocation, the Enclosure movement privatized traditional agricultural lands, which forced a massive population shift toward urban centres. Coupled with the rise of liberal ideology, framed in terms of individual freedom through market mechanisms, the old social order of feudalism was effectively at an end.\textsuperscript{131}

On the final point, the freedom to contract is closely associated with the construction of the rational human subject discussed above. The effect that the rise of liberalism had on changing the social

\textsuperscript{129} Roper, \textit{History of Democracy}, 197-200.
\textsuperscript{130} Ball et al., \textit{Political Ideologies}, 55.
dynamics of feudalism cannot be understated. Importantly, legislative changes fundamentally changed social relations to accommodate the demands of the newly industrial mode of production, and these changes were promoted through the language of individual freedoms. Importantly, the private sphere expanded from the intimate family to include economic exchanges in the form of the freedom to contract, as the private sphere came to delineate the sphere of autonomous freedom. However, this expansion required a dramatic shift for the role of the state, as a guarantor of the private sphere, both in terms of social and economic relations. These freedoms were institutionalized through the expansion of civil rights to the working population, and trumpeted as the extension of freedom to choose one's employment. In the minds of the promoters of the erosion of feudal arrangements, liberalism argued that “[trade should] have its own way, [and] people will seek out their own self-interest, prices will find their proper level, and all of these ideas had been increasingly justified from the sixteenth century onward by invoking Natural Law.” As such, the freedoms associated with liberalism and the emerging market economy became equated with notions of freedom in a general sense, as people were freed from traditional feudal notions of class and place in order to fulfil the need of a new mode of production. Importantly, these changes required a fundamental shift from labour for subsistence to labour as a commodity in the market which entailed new social relations reorganized society along class division. The new division was between the owners of the means of production and the wage labourers fuelling factory production. Specifically, Roper notes that the bourgeois and the emerging middle class advocated for the end of arbitrary governmental authority through the language of liberal ideology, in terms of demanding for the institutionalization of individual freedom and the rule of law.

The transition to industrial production was not without its problems, which gave rise to the

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133 Atiyah, Rise and Fall, 80.
134 Roper, History of Democracy, 180-181; See also Atiyah, Rise and Fall, 224-237
situation encapsulated by Polanyi's concept of the double movement. He writes “'labour power' cannot be shoved about, used indiscriminately, or even left unused, without affecting also the human individual who happens to be the bearer of this peculiar [fictitious] commodity.”

The human possessor of labour, thus, advocated against the negative effects of commodification, including issues such as lengthy work hours, terrible working conditions, and insufficient labour protections. Furthermore, the newly created labouring class also represented the need for social protections for people when the market could not generate the means to maintain adequate levels of prosperity. T.H. Marshall writes that after the expansion of political rights, namely in the form of the franchise, the next strand of rights that developed, were social rights. He writes that social rights, such as the Factory Acts (protection of children as factory workers), Poor Laws (wage adjustments), and Speenhamland system (minimum income provision), were not attached to notions of citizenship because “enforced protective measures curtailed the civil right to conclude a free contract of employment.”

In particular, the Speenhamland Law, which was in effect between the years 1795-1834, was an effective guaranteed minimum income, which protected the workforce from falling into destitution by providing a minimal level of social security. The need for social protections was primarily viewed as a failure on the part of individuals to successfully utilize their capacities as rational agents in the pursuit of their own self-interest. For example, the Speenhamland allowance in Great Britain (1795) was a bread allowance granted on the basis of need, designed to complement wage labour. However, as will be discussed below, laws that restricted the creation of a labour commodity, such as the Speenhamland allowance, laws that restricted the mobility of labour, the guild system of apprenticeship, and the enforcement of

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135 Polanyi, *Great Transformation*, 76.
136 Marshall, *Social Class*, 20-26; See also Polanyi, *Great Transformation*, 81-89 and Atiyah, *Rise and Fall*, 537-544
137 Polanyi, *Great Transformation*, 81-89. Important to note is Polanyi's discussion of this particular law. Speenhamland effectively removed the incentive to work as a labourer, as the level of subsistence provided by wages was equal or less to that of the Speenhamland allowance. Importantly, factory owners utilized the Speenhamland allowance to lower real wage levels as a means to maximize profits. As such, the repeal of Speenhamland effectively forced the labouring class to accept the terms and wage levels of employment, framed in terms of liberal freedom.
labour by state officials, were seen as artificial barriers to the logic of the market.\textsuperscript{139}

Following the success of the protection of ownership rights gained by the capitalist class, the next wave of democratization that swept through Western Europe came from within the working class. Following in the wake of successful bourgeois entrenchment of rights into law, the next set of people to advocate for greater protections were the factory workers. As industrial production took hold, the lived experience of factory working conditions produced an increasingly marginalized labouring class. This class became increasingly vocal in their demands over a voice in the political process and workplace protections. During the mid to late 18\textsuperscript{th} century, labour movements and working class political parties began to form, in order to exert pressure in favour of a more favourable and humane treatment.\textsuperscript{140}

Marshall points to developments in nineteenth century Britain as an example of this. He writes “when it [expansion of political participation rights] began, it consisted, not in the creation of new rights to enrich a status already enjoyed by all, but in the granting of old rights to new sections of the population.”\textsuperscript{141} An example of this is the Reform Bill of 1832, which changed the property qualifications for voting in Britain so as to expand the franchise to include a greater set of British subjects.\textsuperscript{142} In particular, labour groups increasingly pressure the political elites for a greater control over the decisions that impacted their lives, the most obvious of which is the expansion of the franchise by the 1920s.

However, as the economy became increasingly complex, education was seen as necessary to maintain an efficient and productive workforce, and the state provision of education can be seen as an early form of social rights. Furthermore, influential unions played a huge part in constructing social protections for members, which directly challenged notions of individuality that had become dominant

\textsuperscript{139} Polanyi, \textit{Great Transformation}, 81-107.
\textsuperscript{140} Ball et al., \textit{Political Ideologies}, 60-65; Roper, \textit{History of Democracy}, 193-194.
\textsuperscript{141} Marshall, \textit{Social Class}, 19.
\textsuperscript{142} Ball et al., \textit{Political Ideologies}, 55.
The rise of the democratic state, caving to the pressure of various reform movements, fundamentally transformed the purely negative guarantee of rights in terms of private property, and began to articulate positive rights, in terms of state guarantees, such as labour standards, minimum wage, employment insurance, and a more robust regulatory systems.\(^{143}\) This opened the floodgates to an increasingly robust welfare state. For example, the provincial government of Saskatchewan in 1947 implemented hospital insurance, which evolved to national health care by 1968 and was later transformed into a national plan through the enactment of the *Canada Health Act, 1984*\(^ {144}\). Trade unions and student movements influenced employment and education policy, including employment insurance, the extension of education, universal education, and robust employment protects concerning the hiring and firing of employees. Furthermore, in the post WWII era, the state became increasingly influential in the economy, which will be discussed in greater detail below.\(^ {145}\)

The rise of the proactive welfare state began as a response the crisis generated by the Great Depression during the 1930s, and was further complemented by the powers of taxation and government spending the state accumulated during WWII.\(^ {146}\) According to Adam Harmes, the post-war welfare state was built around four basic principles. First, the active use of government resources and influence to control the economy, through the application of Keynesian macroeconomic principles. Specifically, Harmes points to government control of interest rates, which in turn influenced the economic or financial decisions of the market to generate the desired outcomes, and the fixation on maintaining low unemployment. Second, Harmes points to the Bretton Woods international monetary system, which provided important capital controls, mainly through creating restrictions on the exit of capital from domestic markets. This, according to Keynes, would empower domestic governments to enact the

\(^{143}\) Habermas, *Structural Transformations*, 224-229;  
\(^{145}\) Harmes, *Return of the State*, 18-23.  
\(^{146}\) Ball et al., *Political Ideologies*, 63-64.
policies that were being demanded by the citizen body. The third pillar of the welfare state was the expansion of New Deal regulatory and social policies, which governed issues such as mergers, environmental regulations, and social protection programs. As Harmes notes, “probably the most important areas of welfare state regulations were those concerning the labour market.” Importantly, corporations were required to recognize the legal status of trade unions, which empowered the unions to have an increasingly influential voice over the conditions of production. And finally, the fourth pillar that Harmes points to of the post-war welfare state is the shift towards Fordism, or the vision of society as a consumer culture. Coupled with social movements such as the civil rights movement of the United States, which extended the franchise to black voters in America, the enfranchisement of women and ethnic minorities in much of Western Europe, Canada, and the United States, the picture that emerges is the liberal expansion of rights being granted to an increasingly comprehensive set of citizens.

With the institutionalization of social, political, and economic rights, the consolidation of liberal democratic states reached its most robust form prior to the neoliberal turn in the 1980s, which will be discussed in relation to the market in the following chapter. However, it is through the expansions of public authority in the provision of social goods, such as health care and education, and through the institutionalization of comprehensive labour codes and democratic voting rights, where the liberal democratic state could be seen as embodying its most robust, in relation to the concept of the holistic good. This was Cerny’s concept of the welfare state discussed in action. It is from this high water mark of liberal democracies when the role of the state was more than just a guarantor of economic exchange and security. The state was accepted as a legitimate provider of social programs. And it is

\[\text{147} \text{Harmes, } \text{Return of the State, } 19-20; \text{ See also, Ball et al., Political Ideologies, 64-66 and Harmes, Return of the State, 164.}\]
\[\text{148} \text{Harmes, Return of the State, 21.}\]
\[\text{149} \text{Harmes, Return of the State, 22.}\]
\[\text{150} \text{Cerny, “Competition State,” 251-274.}\]
here where the retraction of the robust liberal democratic state begins. As will be shown in the following chapter, events occurring in the international market economy fundamentally reorganized the state as an organ of the market, with a strong preference for limiting its role in the provision of social services. In Cerny's terms, the competition state came to eclipse the welfare state.

Liberal democracies have become a celebrated form of political organization, leading some authors such as Francis Fukuyama to claim that as a human race, we have reached the end of history. He makes this claim because under liberal democracies, rights have become enshrined in law and extended to a complete set of citizens, and through the entrenchment of these rights and the empowerment of the liberal individual to exercise their rationality through political participation and rational pursuits, liberal democracies represent the ideal political organization in that they fully respect and empower the liberal individual. In his profoundly influential book *The End of History and the Last Man*, Fukuyama writes that liberal democratic citizenship is “best exercised through 'mediating institutions’” such as political parties, civil society, or other forms of political activity. Furthermore, Fukuyama writes, “liberal democracy remains the only coherent political aspiration that spans different regions and cultures around the globe. In addition, liberal principles in economics... have spread, and have succeeded in producing unprecedented levels of material prosperity.”

Specifically, the principles of liberal democracies include the rule of law, political participation through the act of voting in free and fair elections, and the guarantee of rights. As has been show through the discussion in this section, the evolution of liberal democratic states was not linear, nor did it follow a universal trajectory. Furthermore, and related to the discussion of section 1.1, liberalism and democracy have become associated with the construction of the rational individual, and according to Fukuyama, the “liberal state is rational... because it reconciles these competing demands for [individual] recognition on the

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only mutually acceptable basis of the individual's identity as a human being."\textsuperscript{152} Thus, Fukuyama argues that liberal democracy is the only state form that respects and institutionalizes protections for what I am calling the holistic common good.

\textsuperscript{152} Fukuyama, \textit{End of History}, 201.
Chapter 2: The Construction of the International Market Economy.

As the previous chapter demonstrates, the liberal democratic state emerged and evolved according to the prescriptions of the holistic common good as it was conceptualized in early state-oriented liberal theory. In addition, liberalism constructed an important distinction between the public authority of the state and the private realm of rational agents. In terms of the liberal democratic tradition, the private/public distinction has been institutionalized through the expansion of rights enjoyed by citizens and through the evolution of what is defined as public and what remains in the private. The task of this chapter, then, is to demonstrate the role of the market economy as it has been theorized, institutionalized, and internationalized in the modern era. Furthermore, it will be shown that the current institutional arrangements under the new constitutionalism of disciplinary neoliberalism is clearly favouring the market conception of the common good, conceptualized as the “material common good”.

The task of this chapter is to demonstrate that the philosophical arguments for the market economy, which are often categorized as liberalism understood in general, in fact diverge in important ways from state-oriented liberalism and the holistic common good that informs such theories. Importantly, both strands of liberalism rely on a particular construction of the liberal agent, namely the rational and self-interested individual. However, market-oriented liberalism places a greater degree of importance on the market as a mechanism for both the pursuit of rational self-interest, and the societal good that is assumed to follow by acting through the market mechanism. In particular, market theorists posited that market exchange is the appropriate mechanism to allow for individuals to pursue their self-interest, which consequently leads to societal improvement and international stability. Furthermore, the initial role the market was to play has remained part of its continued justification in the modern era. However, as will be demonstrated in section 2.3, the institutionalization of new
constitutional principles undermines the explanatory power of the private and public distinction. As such, the distinction is becoming increasingly unable to explain changes in the modern economic organization, leading scholars such as Cutler to emphasize the transnational character of economic governance. In moving forward, it will be shown that transnational character of economic law has a profound influence over the global economy and the liberal democratic state, resulting in a conflict between the theoretical cores of liberal democracies and the international economy by reaching into the domestic jurisdiction of liberal democracies and fundamentally transforming traditional notions of state sovereignty, legitimacy, and political accountability.

The evolution of the international economy can be usefully organized into three historical blocks through the utilization of the concept of “lex mercatoria.” Basically understood, lex mercatoria, or the law merchant, signifies the dynamic relationship between the state and the market from the 11th century onwards, and can be conceptualized as a transnational network of law, organizations, and relations that facilitate international trade.\(^{153}\) Importantly, the concept of lex mercatoria usefully identifies the evolution of long distance trade from the pre-state period to the current international market economy, as the laws, practices, expectations, and institutional arrangement of the law merchant phases changed in response to the development of centralized states, liberal ideology, technological advances, and the changing balance between the private and public spheres. Phase one generally falls between 11th and 16th centuries, phase two of the law merchant points to developments between 17th and 19th centuries, and the finally phase three begins in the 19th century and continues into the present day.\(^{154}\)

This chapter will organize into three sections. First, the theoretical core of the market economy will be discussed through the development of the concept of the “material common good”, in reference


to the role that economics was seen to play in the creation of material prosperity through competition from within market logic. Furthermore, early market proponents theorized that pursuing material prosperity through the market mechanism would induce a state of peace and stability. Importantly, peace and stability were thought of as a consequence of material prosperity, as opposed to distinct or equally valuable aims developed through the concept of the holistic common good. The second section will articulate the evolution of the international economy, with a particular focus on changes that lex mercatoria underwent during its first two phases. In particular, phase one of the law merchant will be shown to encapsulate two competing market orders, namely the local forms of economic exchange during the feudal era and the long distance trade associated with the emerging merchant class. The second phase will be shown to track with the solidification of the state form discussed in section 1.2, with the role of the economy undergoing a dramatic transformation as it became a conscious mechanism for the fulfilment of material prosperity for the increasingly centralized state. And finally, section three will address the final stage of the law merchant and the rise of neoliberalism and new constitutionalism forces, as neoliberal ideology influences the economic organization of the domestic and international economy.

Section 2.1- The Theoretical Core: Developing the “Material Common Good”.

The aim of this section is to the particular strand of liberal thinking that provides justification for market mechanisms as the appropriate path to human freedom. In achieving this end, the concept of the “material common good” will play an essential role. Basically understood, the concept of the material common good encapsulates the focus on the materiality of market exchange as a prerequisite for all other social goods as the hallmark of market-oriented liberal theory. As will be shown below, market theorists posit that the pursuit of individual self-interest, defined in terms of materiality, induces the consequence of personal prosperity for the individual, and the additional consequence of peace and
stability within the state and throughout the international system. As such, the market was and continues to be framed as both as a mechanism for peace, stability, and prosperity for not only the individual, but for the state and the international community of states as well. Importantly, this construction of the market as a vehicle for the pursuit of human interests fundamentally relies on what Cutler has called the four liberal myths, which will be discussed in greater detail below.

As noted above, early liberal thinkers within each strand share at least two theoretical assumptions. The first shared theoretical assumption is the belief in and reliance on the private/public distinction. Recall that the realm of the private sphere purported to recognize the inherent rationality of the individual human being or agent, whereas the realm of the public was seen as where the state could legitimately intervene on behalf of social stability and the common good.155 From the perspective of the market, the private sphere was the domain in which market exchanges took place, and was framed as a domain of individual freedom beyond the scope of legitimate government interference. Furthermore, the privatization of market relations, as demonstrated by Habermas, framed the market as something that was apolitical, neutral, and organic.156 Indeed, capitalism depended upon a distinct “organization of production [that] can be viewed as the outcome of a long process in which certain political powers were gradually transformed into economic powers and transferred...” to the private sphere.157 By conceptualizing the market as a natural and neutral set of relations, as something that resulted through natural human interactions, the market was effectively removed as a topic for political debate, at least in theory.158 In addition, “classical economics... conceived of a system whose imminent laws afforded the individual a sure foundation for calculating his economic activity rationally according to the

155 Atiyah, Rise and Fall, 585-592; Cutler, Private Authority, 54-56; Habermas, Structural Transformations, 36, 55-80; Ruggie, “Territoriality and Beyond,” 151.
156 Habermas, Structural Transformation, 55-80.
157 Habermas, Structural Transformation, 36.
standard of profit maximization…” which serves as a central tenet of the market economy.¹⁵⁹

The second shared assumption is the construction of the human agent as rational and as motivated by self-interest. Importantly, this rational self-interest led social contract theorists such as Locke, Rousseau, and Hobbes to the state as an escape from the state of nature, which set the stage for the development of human capacities as articulated by Kant. Through the creation of the state, human relations came to be constrained through predictable law backed by coercive force, which was seen as an improvement over the state of nature.¹⁶⁰ However, self-interest was not fully exorcised from the newly created citizen, and new channels or modes to legitimately fulfil self interested desire required a new outlet.

The liberal construction of the human agent represents a powerful illustration of how human nature was conceptualized during the early period of the market economy. In particular, the concept of “interest” became a lynchpin for market mythology. According the Albert O. Hirschman, the seventeenth and eighteenth centuries were set against the backdrop of two competing aspects of human nature, namely the passions and the interests.¹⁶¹ These concepts have their roots in Platonic understandings of the soul.¹⁶² The basic idea is that, if left unchecked, certain inescapable human impulses that were framed as either passions or interests led to less than favourable outcomes for the social whole unless they were regulated by a mediating force. In effect, actions guided by passions were taken as irrational and therefore less than the rational human ideal, and the raw pursuit of rational

¹⁵⁹ Habermas, Structural Transformation, 86. ¹⁶⁰ Recall section 1.1 for the full discussion of the movement towards the state, as theorized by Hobbes, Locke, Rousseau, Smith, Kant, and Mill. ¹⁶¹ Hirschman, Passions and Interests, 43 ¹⁶² Plato, Republic, trans G.M.A, Grube, (Indianapolis: Hacket Publishing Company, 1992), 110-121. In Book IV, Plato presents his conception of the human soul, which he divides into three parts. The first is the appetitive, which focuses on the raw and animalistic drives of human beings. The second part is the rational, which concerned itself with knowledge and reason. And finally, the third part of the soul is the spirited part. This part of the soul provided the driving force for human action. Through this discussion, one interpretation is that Plato argues the appropriate balance of these three parts of the soul was to be guided by reason, rather than by appetite or spirit alone. In particular, Plato believed that rule through reason led to just consequences, both from within the individual and for the community at large.
interest was perceived as detrimental to the social whole unless it was constrained by law or channelled through the market mechanism. As such, a major project for much of this time period was to uncover the appropriate mix of restraint, in order to channel the drives of human beings into outcomes that were optimal for the social whole and the individual.\(^{163}\) Important to note is that the state was not the final solution for constraining human nature and the improvement of humankind, as the goal of the liberal project was to not stop the pursuit of self-interest by way of coercion and law. Importantly, the goal of the liberal project is to limit or channel the harms that arise from the pursuit of self-interest by self-regulation through participation in the market economy.

For example, Adam Smith argued that the market was the appropriate vehicle for human beings to pursue their interests. According to Smith, the aims of human beings include procreation, protection of property, inheritance, and the development of human capacities. In this regard, Smith is typical of the liberal theorists discussed above.\(^{164}\) However, instead of turning to the state as the sufficient mechanism for the achievement of these ends, Smith argues that the achievement of these ends necessarily requires wealth. Furthermore, wealth was gained by participating in market exchange, whereby the role of the state is reduced to create and maintain the conditions for market competition.

While Smith shares many similarities of liberal thinkers in the construction of the human agent, there are some important points that are unique to his theoretical version of the liberal individual. As mentioned in Chapter 1, he argued that human nature assigned people a “propensity to truck, barter, and exchange one thing for another.”\(^{165}\) Importantly, Smith argues that rational agents are in a better position to know and pursue their own interests than political authorities. As such, the role that Smith grants to the state is to smooth over market exchanges by providing infrastructure, laws that govern exchange, protection

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from external dangers, and removing barriers to trade. By organizing society along these lines, Smith believed that a “free” market, devoid of unnecessary state interference, was the only appropriate mechanism for the achievement of human ends, by generating required wealth to pursue additional human interests.  

Thus, Smith represents “a powerful economic justification for the untrammelled pursuit of individual self-interest...” as human beings acting as informed by their nature through market mechanisms. Importantly, this justification silenced or undermined alternative conceptions of interests or paths to pursue the common good. And finally, Smith believed that by creating the conditions for human beings to act on their natural impulses, the raw pursuit of rational self-interest would create the unintended consequence of prosperity for the greater political community.

Importantly, the market construction of the common good was framed solely in reference to material prosperity, and the role assigned to the state was the creation and maintenance of favourable market conditions so that rational agents could pursue their aims. Resulting in the pursuit of self-interest would importantly lead to good for society at large, as if by an “invisible hand.” From within the organizing logic of the market-oriented liberalism, then, the common good can be usefully conceptualized as the “material common good.” In practice, the pursuit of individual self-interest through the market mechanism, framed in terms of the material common good, market theorists argued that three benefits would follow. First and foremost, by empowering the rational human agent with the ability to pursue material prosperity through market exchanges, social good is created in three broad benefits, namely for the individual, the state, and the international system. Advocates for the market economy argued that it was only through the free market that liberally constructed human agents could actually be free. By creating the conditions for competition and the pursuit of self-interest that did just

167 Hirschman, Passions and Interests, 110-111.
168 Smith, Wealth of Nations, 423; See also Hirschman, Passions and Interests, 10-17, 105.
enough to remove people from the state of nature, market-oriented liberals assigned the state the role of limiting the chaotic nature of the state of war. By removing the threat of sudden and violent death, and by providing guarantees to economic agreements, human beings were free to exercise their freedom to pursue the material prosperity, which was seen as a prerequisite for further human development or additional ends.\textsuperscript{169}

The second benefit of market exchanged was linked to political authority, which came to be institutionalized through the Westphalian state. From the perspective of political authority, the material prosperity that the market generated for individuals led to the material prosperity of the nation. Here, Smith's argument concerning the “hidden hand” of the market becomes important. By pursuing self-interested aims, Smith argued that by way of unintended consequences, the whole of society was improved. In more practical terms, higher levels of individual prosperity generated a greater tax pool that state officials could leverage for political aims.\textsuperscript{170} In essence, individuals freely competing within the market led to a greater degree of prosperity for the greater political community by providing resources and goods for the country. Furthermore, Hirschman writes that many seventeenth century thinkers “believed the expansion of commerce and industry would eliminate arbitrary and authoritarian decision making by the sovereign...” because they saw the market as an early check on the exercise of government power, even before the modern introduction of the rule of law.\textsuperscript{171} In the versions of the state that conceptualized the relationship between the sovereign and the people in very close terms, such is the case with democratic states; Hirschman writes that the prosperity that the market would generate for the political community would also be prosperity for the sovereign.\textsuperscript{172} This point is well encapsulated in a distinction implicitly made by James Steuart, a writer from the eighteenth century. As


\textsuperscript{170} Smith, \textit{Wealth of Nations}, 423.

\textsuperscript{171} Hirschman, \textit{Passions and Interests}, 87.

\textsuperscript{172} Hirschman, \textit{Passions and Interests}, 98.
presented by Hirschman, Steuart argues that the distinction was “between 'arbitrary' abuses of power that stem from the vices and passions of the rulers... and the 'fine tuning' carried out by a hypothetical statesmen exclusively motivated by the common good... modern economic expansion puts an end to the former type of intervention, but then creates a special need for the latter kind in the economy is to move along a reasonably smooth trajectory.”173

And finally, market proponents argued that the development of international trade organized under free market principles led to international peace and stability, as the costs of disrupting the conditions for material prosperity were greater than the gains of raw self-interested pursuits.174 Through the market mechanisms and market expansion, European powers deployed market rationality throughout the world in the era of imperialism and colonialism. However, the clearest analysis of the international economic system as a peace and stability creating mechanism is The Great Transformation by Polanyi. As will be discussed in greater detail below, Polanyi points to international integration in terms of finance and currency functioning as stability mechanisms, the failure of which led to the disastrous events of the World Wars.175 In the modern era, neoliberal logic aims to institutionalize free market principles that constrains state action in reference to the market through the language of international law, and countries are forced to adopt international standards as a requirement to participate in the international economy, at the risk of exclusion.176 A further consequence, according to Polanyi, is that “the control of the economic system by the market is of overwhelming consequence to the whole organization of society: it means no less than the running of society as an adjunct to the market.”177

In taking stock of this discussion, we are able to make the following claims. First, early market

173 Hirschman, Passions and Interests, 86.
174 Kant, Political Writings, 93-115
175 Polanyi, Great Transformation, 10-20.
177 Polanyi, Great Transformation, 60.
proponents such as Smith, Steuart, Locke, and to some extent Kant, argued that it was only by pursuing interests through the market mechanism that the conditions for greater human prosperity would emerge. As such, material prosperity, and the conditions for attaining this material prosperity are understood as the primary means to additional human goods. Furthermore, by linking the state or international stability to individual prosperity, the market was assumed to fulfil a peace and stability creating mechanism. As a consequence, the theoretical core of market thinking is aimed towards the “material common good” that emerges unintentionally through the pursuit of individual aims and interests.

Cutler provides an important critique of the construction of the market, in particular on the basis of four liberal myths that underpin liberal ideology. According to Cutler, the first liberal myth is that “the private ordering of economic relations is consistent with natural or normal economic processes.”

This assumption posits as an objective fact that human beings are rational actors motivated by self-interest and an inherent natural urge towards economic exchange. The second underlying liberal myth is that the private sphere is presumed to be an apolitical realm of private exchange, whereas that which is public provides the content of the politics. Importantly, the liberal distinction between private and public spheres are assigned to the market and state mechanisms, respectively. In essence, the construction of the market as a sphere that is private and as a place where human beings are free to pursue their interests relies on the construction of the private sphere as a neutral place of freedom within liberal theory. Furthermore, the distinction creates a theoretical separation between actions that are perceived as private exchanges, as actions that emerge from the natural disposition of human beings, and actions that are political, and this require public intervention or regulation. The third

178 Cutler, Private Authority, 54.
179 Smith, Wealth of Nations, 13; This point has important bearing on the external consistency of liberalism generally. Cutler points out, and correctly in my own view, that the liberal agent as rational and self interested is a “myth”, and one that requires more support than is provided for in the theorist's own work. However, as this thesis is primarily a critique of the internal cohesion of liberalism under new constitutionalism, I regretfully set aside this valid and interesting avenue of enquiry.
180 Wood, “Political and Economic,” 86-95. See also Habermas, Structural Transformations, 55-90.
181 A. Claire Cutler, “Artifice, Ideology, and Paradox: The Public/Private Distinction in International Law,” in Review of
myth complements the supposed neutrality of private affairs, in that the private sphere and the exchanges that occur within are understood to be “consensual and non-coercive.”\textsuperscript{182} And finally, Cutler writes that the fourth myth assumes the efficiency of the market comprised of private exchange over the state apparatus.\textsuperscript{183} Taken together, these myths comprise the liberal mythology of the division between private and public spheres, and the subsequent association of the public sphere with the state and the market as the private sphere of human activity.

In sum, the market economy was understood to promote its vision of the common good in two ways. In a positive sense, it served as a mechanism to channel individual self-interest by allowing rational people a way to pursue his/her material well being. In a negative sense, the economy served as a check against the presumed exercise of “irrational” state power by linking the material prosperity of a state's population and government to the economy. To this day, the capitalist economy is portrayed as something that is neutral, natural, and outside of the purview of political regulation, and this will become apparent in the following sections. However, the liberal mythology discussed above has given rise to a plethora of criticisms surrounding the characterization of the market as neutral and necessary. In particular, the contestation over what actions get characterized as political or economic is at the heart of new constitutionalism scholarship.

In moving forward, the thing to keep in mind are the two conceptualizations of the common good that inform different aspects of liberal theory. The first was constructed through the emergence of the state, and encapsulates a variety of human interests such as security, prosperity, environment, stability, and community. The second, constructed through the logic of the market, narrows this broad and holistic conception into a specific materialistic construct. As such, in moving forward we are able to critically analyze the claims to the promotion of public good from the internal perspectives, which

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\textsuperscript{182} Cutler, \textit{Private Authority}, 56.

\textsuperscript{183} Cutler, \textit{Private Authority}, 56.
will enable us to critically reflect on the balance of power between the market and the state in the current global economic configuration.

**Section 2.2- The Evolution of *Lex Mercatoria*.**

In moving forward from the theoretical core of the market, the purpose of the next two sections is to track the institutional arrangements of international economic relations through a discussion of the historical evolution of *lex mercatoria*. Specifically, having established a dominant justification for the market, in terms of the material common good and the consequent peace and stability induced domestically and internationally through market discipline, sections 2.2 and 2.3 will discussed the evolution of the market economy through the concept of *lex mercatoria*. It is the specific task of this section to discuss phase one and two of the law merchant.

The first phase of *lex mercatoria* operated between the eleventh and sixteenth centuries. To a large extent, the first phase of the law merchant predates the emergence of the state-based international system, as early forms of long distance trade co-existed with feudal social and political arrangements.\(^{184}\) In essence, there were two distinct forms of economic exchange operating simultaneously during the first phase, namely the local and the long distance. For local trade P. S. Atiyah notes that “[customs] and laws had grown up on the basis that it was the duty of those wielding authority... to see that prices and wages were just, and to stamp out the usurer. There were repeated attempts to impose price controls, especially on staple items such as bread and ale, as well as to regulate wages.”\(^{185}\) Multiple aspects of local economic exchanges were governed by local custom and through notions of justice that characterized moral consciousness of the feudal system, including price controls, quality standards for locally produced goods, and just wages.\(^{186}\) In effect, “nobody doubted- neither rich nor poor, Church or

\(^{184}\) The full discussion of social and political arrangements under the feudal era can be found in section 1.2.

\(^{185}\) Atiyah, *Rise and Fall*, 62.

\(^{186}\) Atiyah, *Rise and Fall*, 60-75; Cutler, *Private Authority*, 109-140.
laity- that everybody was entitled to a subsistence.” Essentially, economic exchange at the local level was governed by the social fabric of the community writ large and, and local authorities governed around customary notions of justice and fairness that were community oriented. For long distance trade, however, the story is quite different. As noted above, urbanization was an important component in the demise of feudalism, and with an increase in urban populations, cities began to emerge along intersecting trading routes. As such, Cutler writes that “[it] was in the Italian cities and northern port cities that the law merchant had its origins.”

Traders faced two difficulties. As noted above, a lack of central political authority entailed a high degree of insecurity and uncertainty regarding market transactions. Along with the increase in trade came a real and perceived need to guard against uncertainty among the emerging merchant class, who sought to remove the uncertainties associated with long term trade in a variety of ways. Whereas local trade was subject to local law, which included religiously informed notions of the just prices, quality control mechanisms, and guild control, what set the law merchant apart in its first phase was the ability of the international merchant class to carve out an autonomous legal space to regulate and respond to disputes. Cutler writes that “[merchants] came to be accorded a special status in medieval society, as the law merchant emerged as a distinct and autonomous body of law regulating the activities of...” long distance traders. For their own dispute resolution, and in what would become one of the jus cogens norms of international law and a foundational principle for modern contract law, the law merchant came to rely on the principle of pacta sunt sevanda, or agreements must be kept. However, this is not to say that political authority operated in isolation of long distance trade. According to Cutler, dispute resolution during the first phase of the law merchant received its authority from a

187 Atiyah, *Rise and Fall*, 64.
188 Cutler, *Private Authority*, 113.
191 Cutler, *Private Authority*, 118.
combination of the hard law devolution of authority granted by royal decree and the soft law authority comprised of market exclusion, reputation costs, and peer review. This, coupled with the organic or informal nature of the rules of contract that were developed by the merchant class, regulated long distance trade of this period. What will become strikingly familiar in the final phase of the law merchant, is the “[during] the medieval phase, merchants developed in very efficacious system of private adjudication and enforcement.”

Merchant courts were characterized by informal and case sensitive practices, and were adjudicated by fellow merchants.

Importantly, the law merchant class was granted immunities from many of the local laws and regulations that conditioned local trade. The exemption of the law merchant from local laws can be framed in both a positive and negative sense. The law merchant was served in a positive sense because the lack of artificial barriers to the flow of goods meant that the private economic actor was able to pursue their own material prosperity without interference from the local authorities. However, local authorities in the feudal era recognized the potential for increased revenue by facilitating trade fairs, as trade fairs and long distance trade generated revenue in the form of taxes and customs duties. Here, we see a clear connection between the motivating theory of the market developed above and the actual practices that characterized long distance trade in the first phase of lex mercatoria. And the law merchant gained power over the state in the negative sense, in that the fluidity of the merchant class meant that they could discipline local authorities that attempted to impose their authority beyond the self governing rules of the merchant class. This discipline, recall, was market exclusion, and therefore the diminishing of material prosperity.

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192 Cutler, Private Authority, 133; See also Cutler, “Artifice, Ideology, and Paradox,” 277-278.
193 Cutler, Private Authority, 136.
194 Ruggie, “Territoriality and Beyond,” 154-155.
195 Worth noting on this point is that local authorities, laws, and customs during feudal era did not provide adequate protection for the merchant class, as long distance trade and the merchant class did not “fit” traditional social and economic relations. In modern parlance, the legal personality available to the merchant class did not provide for the particular protections that long-distance trade required. This led to the development of dispute resolution within the merchant class that could effectively respond to the needs of long distance trade.
As the first phase of the law merchant came to a close, and the second phase began, autonomous dispute resolution and exemption from local law, the defining features of the first phase law merchant, were attacked in the process of state-building. While the first phase of the law merchant was characterized by an autonomous legal order that conditioned long distance trade, the second phase of the law merchant saw this autonomy challenged by the process of state centralization between the seventeenth and nineteenth centuries. Importantly, political authorities ceased to view the market as something that operated at arms length from the political community. Importantly, the market came to be utilized as a mechanism for the material prosperity of the state, as autonomous long distance trade for the benefit of the merchant class was replaced by mercantilist economics focusing on trade for the benefit of the state. According to Ball et al, mercantile theory posited, “one country could improve its economic strength only at the expense of others.”

It was during the second period of the law merchant that “[political] authorities developed a new understanding of the importance of regulating international commerce for achieving national welfare goals and political economy.” As was discussed above, material prosperity and political stability became intertwined, and in the period of state-building may be characterized as the public state asserting authority to take control over its own material prosperity. Some of the institutional autonomy that characterized the law merchant, such as private arbitration of international trade disputes, became internalized into nascent judicial systems within the state. However, it should be noted that even though some aspects of the law merchant were stripped away and internalized within the states, market theorists in the laissez-faire tradition posited that legal restrictions on the flow of goods undermined the value of the free market, and even as states asserted jurisdiction over the market, theorists were lamenting the imposition of artificial constraints on the organic market, such as the feudal just price controls and imposed quality standards on locally

196 Ball et al., Political Ideology, 52.
197 Cutler, Private Authority, 142-143.
198 Polanyi Great Transformation, 57-58.
produced goods. As discussed above Smith and his contemporaries characterized the market as a natural and organic phenomenon. In order for the theoretical good that market forces were thought to provide through the unintended consequences of the pursuit of self-interest, the state was supposed to demonstrate restraint in the regulation of the economy, in order to keep the market as organic and natural as possible. These thinkers eventually won the day, in that state intervention, such as just prices, quality controls and other “unnatural” market interference, was increasingly relaxed.

The first two phases of the law merchant can also be differentiated through the study of dispute resolution. In the first phase, disputes were taken up in merchant courts. However, the second phase saw the removal of judicial authority from the hands of the merchant class, and the internalization of the dispute resolution mechanisms into the state apparatus. Therefore, the rules of the merchant class were subsumed or internalized into the nation state, whereas before, they existed as something separate. Therefore, the picture that emerges in the second phase of the law merchant is international economic relations being subjected to a variety of domestic regulations and a loss of judicial autonomy exercised by the merchant class through the localization and state-building project. However, as is the case in the current investor-state regime, the third phase of the law merchant has seen a dramatic rise of private and transnational dispute settlement mechanisms,

Section 2.3- The Final Stage of Lex Mercatoria and the Neoliberal Turn.

The previous section established the historical evolution of the international market economy through the first two stages of lex mercatoria. In both phases, the operative goal of both emerging state authorities and the nascent international market economy was to improve the material prosperity and security of both individuals and emerging centralized political communities. Importantly, the final stage

200 Cutler, Private Authority, 144-156.
201 Cutler, Private Authority, 143-161.
202 Cutler, Private Authority, 158-175.
of the law merchant, especially since the proliferation of neoliberal policy prescriptions, removed control of the market economy from the domestic sphere in an attempt to standardize the international economy under a new constitution. Furthermore, the process of new constitutionalism emerged as a response to the perceived failings of the welfare state, discussed in section 1.3 above. In order to track this evolution, this section will build on the analysis of the evolution of the private and public realms that was presented above, and track the erosion of this distinction in terms of the role of government and the market through the effects of transnational law of new constitutionalism.

The current phase of *lex mercatoria* has its beginnings in the nineteenth century. What characterizes this phase of the law merchant is the distinct move towards the internationalization of the laws governing the increasingly internationalized market economy. Here, Polanyi's concept of the double movement will provide an important analytic tool for tracking the tension between the private and the public spheres. According to Polanyi, the international economy expanded dramatically during the nineteenth century. However, as the notion of the market economy serving as an international peace mechanism became institutionalized in adherence to the public/private distinction discussed above, Polanyi noted a counter-movement, in that there “was a reaction against a dislocation which attacked the fabric of society, and which would have destroyed the very organization of production that the market had called into being.” As was discussed in section 1.3 above, various counter-movements, in the form of trade unions, labour unions, and social movements emerged in protest against the assumed neutrality of market and production arrangements, the response of which led to robust transformations that informed our current conceptions of liberal democratic states.

One of the central features of the international economy during the early portion of the third phase of the law merchant was the gold standard, which valued national currencies against the amount

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of gold held in a country's treasury. This internationally accepted institution, according to Harmes, was a shift away from national control over domestic monetary policy in favour of capital mobility and fixed exchange rates.\textsuperscript{205} Polanyi further links the system of fixed exchange rates to the gold standard to the concept of \textit{haute finance}, which Polanyi defines as a set of international rules and regulations that were promoted by global elites for the promotion of international economic relations. This system not only created a climate of predictability and stability that served the interest of capital, but Polanyi observed that the close link developed between prime economic conditions and international peace and stability meant that the free market, while it was functioning well, served as a peace-making institution.\textsuperscript{206} However, the peace making institution of \textit{haute finance}, which relied on the gold standard and the opening up of domestic markets to the international economy, could not prevent the two world wars.

Polanyi argues that \textit{haute finance} emerged as “the main link between the political and the economic organization of the world. It supplied the instruments for an international peace system, which was worked with the help of the Powers, but which the Powers themselves could neither have established or maintained... \textit{haute finance} functioned as a permanent agency of the most elastic kind.”\textsuperscript{207} Furthermore, Polanyi argues, “peace organization rested upon economic organization... [and] the balance of power was made to serve.”\textsuperscript{208} With the collapse of the gold standard came the collapse of the \textit{haute finance} peace mechanism, as the institutional arrangement of currency value was unable to provide the degree of stability and prosperity required for stable market exchanges. And once the \textit{haute finance} system deteriorated, the world quickly fell into war motivated by nationalist tendencies; the “utopian endeavour of economic liberalism to set up a self-regulating market...” became the catalyst for

\textsuperscript{205} Harmes, \textit{Return of the State}, 154; Polanyi, \textit{Great Transformation}, 26-27.
\textsuperscript{206} Polanyi, \textit{Great Transformation}, 1-20.
\textsuperscript{207} Polanyi, \textit{Great Transformation}, 10.
\textsuperscript{208} Polanyi, \textit{Great Transformation}, 18-19.
As Polanyi conceives it, the international economy in the final phase of the law merchant was seen as an additional restriction on the use of force, in much the same way that Hirschman discusses above within the domestic sphere.

Of interest is that the haute finance institution represented a serious tension between the nationalist hangovers of the second phase law merchant and emerging internationalization third phase. The nation states of the nineteenth century were realizing the value in international conformity, yet the nationalistic tensions undermined the efficacy of the haute finance mechanism. Importantly, Polanyi's concept of the double movement, when applied to interactions between states, points to the social reactions of the state when faced with internal negative social dislocations as a result of the failure of international market mechanisms. Worth noting is that one of the essential tendencies of the third phase law merchant, especially post-1980, has been to codify stability and lock out protectionist tendencies through the constitutionalization of the neoliberal principles in international law.

During the interwar period, the movement away from a business mentality towards a more publicly sensitive state and economy emerged. Importantly, the balance between the market and the state shifted in favour of a more expansive state apparatus, which can be exemplified by the introduction of Keynesian economics. In the post-War era, Harmes writes that the rise of the welfare state, which can be characterized by social welfare programs, employment insurance, health care, education and a number of other state provided services began to emerge. Furthermore, many democratic states enacted labour legislation, which created and protected the space for powerful trade unions to emerge and engage with business leaders on behalf of union members. In response to the horrors brought about by the two world wars, the international community once again sought an international arrangement to prevent future warfare. Two major developments in international relations

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209 Polanyi, Great Transformation, 31.
210 Harmes, Return of the State, 18-29.
were the result. First and foremost, the United Nations was created as an international institution for the regulation of actions at the level of the international arena. Importantly, while the system was built upon the principles of political sovereignty and territorial integrity, the United Nations system also opened the door for the challenging the concept of sovereignty through the advancement of the *Universal Declaration of Human Rights*, and the subsequent discourses of human security, human rights, and multiple conventions that sought to regulate the conduct of states.  

The second development is more closely tied to the market economy. With the creation of the Bretton Woods regime, following the second World War, in what can be interpreted as a second phase law merchant move, governments internationalized their power to have a greater degree of control over their domestic financial policy, restrict the flow of capital flight, and reintroduce a new, standardized, international currency value system which pegged currencies to the US dollar, it appears as though the period following the WWII can be seen as a period of stability through government, instead of through the market.  

It was this compromise between nationalistic tendencies and the desire for international stability through trade that Ruggie identifies as “embedded liberalism.” Furthermore, two organizations emerged with the explicit aim to maintain the market stability, namely the International Monetary Fund and the World Bank. In brief, these two institutions were meant to provide capital support for countries that were unable to meet their loan commitments and their development goals. Specifically, the IMF was originally instituted to provide short term loans in order to maintain balance of payment commitments, whereas the World Bank, originally named the International Bank for Reconstruction and Development, provided loans to war torn European countries for the process of rebuilding infrastructure. Later, the World Bank evolved to support loans for economic development

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211  The United Nations system received a greater depth of treatment in the later portion of section 1.2
212  Harmes, *Return of the State*, 23-26; 169-175.
213  Ruggie, “Territoriality and Beyond,” 393-398
However, the Bretton Woods system proved to be insufficient protection against nationalist tendencies. According to Harmes, stagflation, the combination of high unemployment and high inflation rates undermined Keynesian economic policies. Usually associated with the economist Milton Friedman, the era of conservative economics emerged as a response to stagflation that characterized the late 1960s and early 1970s. In response to the social pressure of high unemployment, President Nixon removed the fixing of the US currency to the value of gold, which effectively ended the Bretton Woods era. Historically, neoliberalism emerged out of the context of a global recession during the 1970s, and it is often associated with two heads of state, Margaret Thatcher of Great Britain and Ronald Reagan of the United States. During this period, Bockman writes that capitalism entered “a series of worldwide crises- the oil crisis, fiscal crisis, stagflation, debt crisis, and legitimacy crisis due to the widespread popularity of socialism.” In order to overcome these crises, the appeal to fiscal responsibility and the reduction of social services became the dominant strategy.

What came to replace the welfare state was the disembedding of public provision of social services and the privileging the market, as characterized by neoliberal ideological principles. Here, we see a clear shift in favour of market-oriented liberalism that has become the focus of new constitutionalism scholarship. This move towards the market oriented organization of the international market economy continued into the 1980s with the introduction of neoliberal policies. Basically understood, neoliberalism is a political ideology that advocates for a particular organization between the state and the market, an ideological orientation that emphasizes the market's ability to generate the

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216 Harmes, Return of the State, 27-34; Gill, Power and Resistance, 26-27.
219 Ruggie, “International Regimes,” 386.
common good over that of the state. At the heart of neoliberal thinking is the belief that the state is ill-equipped to provide for the provision of services that could be privatized, because it lacked the ability to gain and react to market signals. Furthermore, what became a foundational assumption for neoliberalism is the belief that the profit motive provided the necessary and sufficient incentives for generating the best outcomes. As such, neoliberalism advocates for the reduction of taxes, the lowering of trade barriers and protectionist policies, and the reduction of state expenditure in the form of social goods like health care and education. Gill writes that neoliberalism provides a “discourse of governance that stresses the efficiency, welfare, and freedom of the market and the actualization of the self through the process of consumption.” The motivating core of neoliberalism, at least its public goal, is to promote the well-being of the individual and the social through the raw application of the capitalist logic. Proponents of the neoliberal paradigm minimize the state's ability to provide for the common good and privilege a free market's ability to promote the material prosperity of society which results in the state's role being reduced or restricted in fundamental ways.

One of the early testing grounds for neoliberal policy comes from the United States, where New York City was pushed to the brink of bankruptcy in favour of “responsible” financial management, which led to the social and transportation infrastructure taking the brunt of the neoliberal assault. Furthermore, Reagan and Thatcher conducted union busting activities, in order to undermine advances in worker rights and wage negotiation in favour of financial responsibility. This kept in line with the general aim of neoliberal policies, which was to achieve financial stability at the level of the state through the privatization of public goods and the reduction and removal of welfare state provisions. Once the success of neoliberal policies took hold in the domestic arena, they began to be represented in

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223 Harvey, “Creative Destruction,” 32.
the international arena as well. A major example of this is the transformation of the “U.S.-dominated IMF.”224 The IMF was established in order to provide development funds for countries in need of capital. However, once populated by economists trained in neoliberal thinking, the IMF began a loaning trend that forced structural adjustment programs. Basically understood, these programs place conditionality on IMF loans, the conditions being neoliberal economic restructuring. In order to qualify for a loan from the IMF, nations were forced to cut back on social spending, remove trade barriers, and privatize nationally owned enterprises. All of this was expected to induce economic growth and create financial stability through an increased openness to the international market.225

This is not to say that developing countries are the only states that have become subject to neoliberal logic. The proliferation of international free agreements such as the North American Free Trade Agreement (NAFTA), and regional governance such as the European Union, can be understood through neoliberal economics. Characteristic of these agreements is the removal of “artificial barriers” to trade, the aim of which is to promote the free flow of goods and services between countries.226 Furthermore, membership is often conditioned on responsible (read neoliberal) financial policies. What has often been labelled as “the Washington Consensus”, therefore, has become global in scope and has become institutionalized in a variety of international organizations and agreements.227

Through subsequent phases of the law merchant, material prosperity and the public good were presumed to follow from the organic nature of the capitalist endeavour. However, it is important to acknowledge that those who benefited materially from the expansion of the market and the public that is appealed to for the relaxing of state barriers to promote further market growth are different groups. Habermas and Wood have both shown that the public, as it is conceived of today, has evolved out of a

224 Harvey, “Creative Destruction, 32
227 Cutler, Private Authority, 182; Held, Global Covenant, 24-33.
historical trajectory that incrementally added subsets of citizens through the expansion of democratic franchise, civil rights, human rights, and numerous other holistic conceptions of humanity. Furthermore, labour movements and trade unions have been exceptionally influential in carving out protections for the average worker against the wishes of the raw accumulation of free market capital expansion.

The broad picture of the current *lex mercatoria* phase, as outlined above, can be summarized in the following manner. Through the reduction of state expenditures on social welfare provision and through the increased privatization of former government services and assets as a global phenomena, the welfare state has been transformed into what Cerny characterizes as a competition state. Essentially, the market has become entrenched as the dominant mechanism for the provision of social welfare through the institutionalization of neoliberal principles on a global scale. Importantly, this institutionalization occurs through the discipline of international and transnational law, which has the effect of fundamentally re-structuring alternative conceptions of the common good in favour of the material common good.

At this juncture, I have established that there are at least two strands of liberalism, one that informs the liberal democratic tradition, and one that informs the market economy. As discussed in section 1.1, the holistic common good which informs the liberal democratic tradition promotes aspects of the human experience such as protection from harm, predictability in law, material prosperity, and the development of human capacities. Importantly, the liberal democratic state has developed legal protections and institutional capacities that entrench core elements of the holistic common good in the state apparatus. Furthermore, no judgement is made as to which of these aspects is primary, as each component contributes equally to the constitution of the holistic common good. In addition, the welfare

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229 Cerny, “Competition State,” 255-274;
state which followed the two World Wars can be understood as a robust attempt by political authorities to respond to the demands entailed by the holistic common good. Namely, social rights such as education, the provision of welfare, participation in the political decision making process, and the promotion of material prosperity have been adopted by liberal democratic states. And finally, liberal democratic states create an open space concerning the idiosyncratic institutionalization of the holistic common good, as it is understood from within particular countries, by allowing room for discussion and debate through democratic processes. In contrast, the strand of liberalism that informs the market is a significantly narrower theoretical paradigm. As demonstrated through the construction of the material common good, economic liberalism prioritizes material prosperity as a necessary prerequisite for additional human goods by allowing people to gain sufficient resources to improve their capacities. Here, democratic processes are effectively barred from the “natural” requirements of market exchange by characterizing the market process as a private interaction between rational agents.

In the contemporary period, the tension between the two liberal strands, as framed through Polanyi's concept of the double movement in the shift from the welfare state to the competition state, has increasingly privileged market-based interpretations of liberalism. Furthermore, new constitutionalism scholars have pointed to the increasing entrenchment of market oriented neoliberalism in international law. An important consequence that emerges from the increasingly constitutional discipline that is exercised over liberal democratic states is that new constitutionalism has fundamentally undermined the ability for liberal democratic states to fulfil their theoretical, ideological, legal, and institutional obligations that disrupt the naturalized common sense of market prescriptions. In making this point, the following chapter discusses an important component of the neoliberal discipline of new constitutionalism that clearly challenges liberal democratic obligations: the investor-state regime.
Chapter 3- New Constitutionalism and the Investor-State Regime.

From the discussion of the two previous chapters, it should be clear that foundational theories that motivate and support both liberal democratic states and the market economy share many assumptions that cut across liberal thinking, such as the construction of the human agent as rational and self-interested. However, there are also profound differences. In particular, liberal theorists who were concerned with the state sought to utilize the state to bring about the development of human capacities, the promotion of security and safety, to create and maintain legitimate laws, and to promote material prosperity. In contrast, liberal market theorists advocate for a limited role for the state, namely to create and maintain the conditions for the market economy. In particular, market-oriented liberalism assumes that by pursuing material self-interest through the market mechanisms, a greater societal good would unintentionally emerge through the “hidden hand” of the market.\textsuperscript{230} Currently, market-oriented liberalism is exemplified by neoliberal ideology and policy prescriptions, which has led to an increasingly privileged role for the market economy in governing human affairs.

In bringing the tensions that are borne between competing theories that drive the market economy and the liberal democratic state under new constitutionalism, this chapter focuses on a particular component of the international economy, namely international investment law and the investor-state regime. As was demonstrated above, the holistic common good that provides the theoretical support for the liberal democratic tradition, and the material common good that provides the theoretical support for the market economy, diverge in important ways, in terms of how to appropriately empower liberal human beings to achieve their ends. For liberal democracies, liberal subjects have been empowered through the constitutionalization of rights, the franchise, and through state provided social programs. On the market, and especially since the 1980s under the neoliberal turn, the dominating argument is that human beings are only truly free when economic

\textsuperscript{230} Smith, \textit{Wealth of Nations}, 423. See section 2.1 for full discussion of concerning the theoretical role of the market.
barriers are removed and they are free to pursue their material interests in a free market economy.

Coupled with the tensions that have emerged within the liberal tradition, international law mirroring the liberal tradition has emerged in a variety of fields, specifically in the form of human rights law, the laws of war, and international economic law. In particular, laws that govern the increasingly globalized international economy have been transformed through the pervasive uptake of neoliberal policy prescriptions, which has led scholars such as Gill, Cutler, and Schneiderman to posit the emergence of a “new constitutional” order. Recall that new constitutionalism refers to the effect that international economic law has on the domestic sovereignty of states. Specifically, new constitutionalism scholars point to the neoliberal character of international economic law, and its disciplinary power in curbing or restricting domestic political authorities in favour free market principles. This disciplinary power is effectively challenging both traditional notions of sovereignty, which has served as a lynchpin for the international state system and for international law, and for the democratic principles entrenched in liberal democratic states.231 As will be discussed in greater detail below, international investment law has developed as a response to the uncertainty and risk associated with investing in another country. In particular, capital exporting countries and private investors sought to insulate their investments from expropriation and other actions that undermined the potential value associated with foreign investments.232

Various strategies for protecting international investments have been implemented throughout the development of the international system. For example, prior to the development of formal dispute settlement mechanisms, investors had to rely on their home state government to apply diplomatic pressure on an expropriating state, the weight and effectiveness of which was tied to the political


relationship and power dynamics between the two states. In the era of European expansion, states such as France, Germany, and Belgium created charter companies, with the delegated authority to act as a governing institution while simultaneously pursuing economic goods. In the post-World War Two era, a particular form of international agreement emerged as a prototype that was to become the bedrock of international investment law, namely international investment treaties. Since the first agreement was signed in 1959 between Germany and Pakistan, over 3000 bilateral and some 300 agreements with substantive investment protections, compose a fragmented system of generally standardized international investment law. In particular, one of the rights that prove to be exceptionally problematic to the liberal democratic state is the right of private investors to bring sovereign governments to arbitration if rights guaranteed to the investor through the relevant treaty are breached. Taken together, the expansion of international investment agreements (IIAs) and increasingly standardized language within IIAs has led scholars and practitioners alike to characterize the patchwork nature of international investment treaties as the “investor-state regime.”

In order to demonstrate the fundamental tension the new constitutionalism effects of the investor-state regime creates for liberal democracies, this chapter will be organized into three sections. The first section generally discusses the investor-state regime, in terms of international investment agreements, rights that are gained by private investors that can be exercised against states that are hosting investments, and two of the dominant investment dispute settlement mechanisms that govern international investment disputes. These mechanisms are the Model Rules for arbitration created by the

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233 Van Harten, “Private Authority and Governance,” 603.
236 Worth noting at this juncture is an attempt was made to create a unified and coherent multilateral agreement on investment during the 1990s. France, who was hosting OECD negotiations on the topic of an MAI, withdrew from negotiations over concerns on the impact that an MAI would have on domestic industries, a feeling that was shared by many of the participating countries. See Puig, “Emergence and Dynamism,” 575-578 and Van Harten, “Private Authority and Governance,” 614-615.
United Nations Commission on International Trade Law (UNCITRAL), which can be incorporated into any IIA, and the permanent arbitration facilities and rules of the International Centre for the Settlement of Investment Disputes (ICSID). Section two discusses some of the relevant criticisms that have been launched against the investor-state regime, as well as recent responses to said criticisms in changes to ICSID and UNCITRAL. And finally, in section three I argue that the responses and changes fail to resolve the tension between the holistic common good and the material common good, and that the investor-state regime is still informed by the material common good at the expense of liberal democratic sensitivity.

**Section 3.1- International Investment Law and the Investor-State Regime.**

The current field of international investment is characterized as a patchwork blanket of international investment agreements that facilitate and protect the rights and interests of investors. In particular, the 2014 *World Investment Report* reports that there are approximately 2900 bilateral investment treaties, and over 300 international agreements that provide substantial investment protections.\(^{237}\) While it is important to note that each international agreement is unique, there is a core set of protections that set a global standard for international investment protections. Furthermore, it can be generally said of both ICSID and UNCITRAL that panels are usually composed of three international jurists. Each party to the dispute appoints one member, with the third being chosen by consent or through appointment. International arbitrators are chosen from a pool of international jurists and experts in international trade and investment law.\(^{238}\) This section will present both the broad standards of protections afforded to international investment that are generally built into investment agreements, and two of the major investment dispute settlement mechanisms that are available to investment

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To begin, one of the greatest uncertainties faced by investors is the fear of expropriation of investment on the part of the state that is hosting the investment (host state). However, it is important to make a distinction between expropriations that are undertaken in a legitimate manner and those that violate the rights of investors. In order for an expropriation to legitimately occur, three conditions must be satisfied. First, the expropriation must be undertaken for a public purpose. Second, prompt and adequate compensation must be paid in return for the expropriated property. And finally, expropriation cannot be undertaken in a discriminatory manner.\footnote{Malanczuk, \textit{Akehurst's Introduction}, 235; McElhinney, “Responding to Withdrawal,” 605; Miles, \textit{Origins of International Law}, 48; Schneiderman, \textit{Constitutionalizing Economic Globalization}, 33-46} Actions that fail to meet these criteria are considered breaches of both generally accepted principles of international law and IIAs. However, Schneiderman points to an additional category of expropriation, namely indirect expropriation. Indirect expropriation, which can also be called actions that are tantamount to expropriation or creeping expropriation, protects investors from “measures that cumulatively amount to expropriation... [or] measures that so impact on an investment interest that they are equivalent to expropriation.”\footnote{Schneiderman, \textit{Constitutionalizing Economic Globalization}, 41; See also Miles, \textit{Origins of International Law}, 154-211.} For example, implementing environmental regulations or regulations that promote public health goals which increase the cost of doing business can initiate an investment claim.\footnote{Jurgen Kurtz, “Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication,” in \textit{ICSID Review} 27:1 (2012): 65-71; Miles, \textit{Origins of International Law}, 154-211; Ernst-Ulrich Petersmann, “How to Reconcile Health Law and Economic Law With Human Rights? Administration of Justice in Tobacco Control Disputes,” in \textit{Asian Journal of WTO and International Health Law and Policy} 10:1 (2015): 29-34; Puig, “Emergence and Dynamism,” 566-569.} To illustrate, Canada introduced Bill C-29 in 1995, which entered into force in 1997, and sought to regulate the import and export of MMT, which is a gasoline additive.\footnote{Ethyl Corporation v. The Government of Canada, 1998. Award on Jurisdiction. 2-3. http://www.italaw.com/cases/documents/410. Accessed July 13, 2015; Schneiderman, \textit{Constitutionalizing Global Capitalism}, 130.} This action triggered arbitration proceedings under Chapter 11 of the North American Free Trade Agreement (NAFTA), governed by the UNCITRAL
Model Rules. Essentially, Ethyl argued that the regulation of MMT violated their investment rights, specifically protection from expropriation under NAFTA Article 1110 and national treatment (Article 1102). These breaches led Ethyl to claim over $250 million in damages.\textsuperscript{243} Although the case was settled for $13 million, \textit{Ethyl v. Canada} clearly represents an instance where health regulations come in conflict with investor rights, as the product MMT posed a potentially hazardous danger to public health.\textsuperscript{244} As such, protections against indirect expropriation are meant to protect international investors from state actions that undermine the value of an investment, although many scholars argue that arbitration panels have significant room for interpreting or assessing what constitutes a legitimate policy goal or a breach of an IIA.

The second right enjoyed by international investors comes through “most-favoured nation” clauses (MFN). Generally understood, MFN clauses mandate “that foreign investors are entitled to treatment no less favourable than that available to foreign investors of any third country.”\textsuperscript{245} MFN clauses are often read in association with “national treatment” clauses that stipulate that “investors are entitled to ‘treatment no less favourable’ than that available to nationals within the host state.”\textsuperscript{246} Taken together, these two rights are meant to limit a government's ability to favour their own nationals by requiring that government measures do not discriminate on the basis of nationality.\textsuperscript{247} In addition, “stability” clauses are designed to insulate international investors from changes in the policy and legal landscape through locking in current standards. In essence, stability clauses restrict the legislative and policy space of host governments that can impact on the value of an investment.\textsuperscript{248}

\textsuperscript{243} \textit{Ethyl v. Canada}, Award on Jurisdiction, 2-7; Schneiderman, \textit{Constitutionalizing Global Capitalism}, 130-134.
\textsuperscript{244} Schneiderman, \textit{Constituting Economic Globalization}, 133. Worth noting is that while Ethyl claims that the scientific investigation that Canada relied on the inform the ban on MMT did not support the actions taken by Canada, Schneiderman notes that mere days after the settlement, a report linking low levels of MMT to neurological damage was released.
\textsuperscript{245} Schneiderman, \textit{Constituting Economic Globalization}, 31.
\textsuperscript{246} Schneiderman, \textit{Constituting Economic Globalization}, 31.
However, the right that has given rise to the moniker the “investor-state regime” is direct access to dispute settlement mechanism. As opposed to early foreign investment, which forced investors to rely on the graces of their home state to advocate for their interests, the current regime enables private investors to initiate legal proceedings directly against host states if they feel that the host state has violated their rights.\textsuperscript{249} Important to this arrangement is the notion of consent to be held liable for damages.\textsuperscript{250} Basically understood, the act of signing an investment agreement provides blanket consent on the part of host states to open themselves up to arbitration proceedings if the investors feel that their rights have been infringed.\textsuperscript{251} Two points follow from this discussion. First, while private investors gain rights and the ability to protect them through legal mechanisms, host states do not gain additional rights under these agreements that can be exercised against investors. Furthermore, since the dispute settlement mechanism usually broadens the host state's obligations, host states cannot initiate proceedings against private investors under international investment agreements, although host state domestic law still applies to investors in the host state.

Before turning a discussion of the two major platforms available to investment dispute resolution, one final point of IIAs is worth noting. Schneiderman writes that “unlike ordinary legislative measures, the investment rules regime ensures certainty in the long run by making onerous any withdrawal from investment disciplines.”\textsuperscript{252} In general, IIAs can be terminated only after ten years have elapsed. Additionally, in the event of withdrawal, IIAs protect investments made under the dissolved agreements for a period of up to twenty years following the dissolution of the investment agreement. These components of IIAs are particularly important constitution-like features of the investor-state regime. The length of time that states remain subject to the conditions of investment

\begin{footnotes}
\textsuperscript{250} ICSID, “Background Information,”, 1.
\textsuperscript{252} Schneiderman, \textit{Constituting Economic Globalization}, 37.
\end{footnotes}
agreements, coupled with MFN, national treatment, and stability clauses essentially freeze the policy and legal framework of the host state for the duration of the treaty, regardless of changes in the general economy, political will, or pertinent developments in scientific knowledge about the safety of investments.  

The final point to discuss entails the mechanisms available for the resolution of international investment disputes. The rise of the investor-state regime can be characterized as a distinct shift away from the settlement of investment disputes in domestic courts and towards settling investment disputes in de-localized international settings. In particular, the shift away from domestic courts, it has been argued, is seen as a “depoliticization” of dispute resolution, with the fear being that domestic courts would rule on disputes in favour of the host state. To remove the fear of domestic privileging, international arbitration tribunals were seen as a neutral ground for investment disputes, by removing the power to decide on disputes from the locale of the respondent by essentially bypassing domestic judiciaries. According to the 2014 World Investment Report, two major organizations account for most investor-state dispute settlements: ICSID, which settles more that 60% of all known cases, and UNCITRAL, which settles around 30% of known disputes. As such, each will be discussed in turn.

Beginning with ICSID, its founding document, “the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention)... entered into force on October 14, 1966.” Although its role in international investment has evolved in important ways over time, the overarching motivation for creating ICSID was to neutralize investment


255 UNCTAD, World Investment Report, 125.

256 ICSID, “Background Information,” 1
disputes by resolving them in an apolitical international setting. The ICSID Convention established both permanent arbitration facilities and a standardized procedure for the settlement of international investment disputes. However, it is important to note that ICSID does not rule over arbitration proceedings, but merely provides the venue and rules of procedure. ICSID may be used in one of two ways. First, ICSID is available for the settlement of disputes if both the host state and the home state of the investor are parties to the ICSID Convention. Second, ICSID provides Additional Facilities that are available to disputants where only one state is party to the ICSID Convention, but both disputing parties agree to utilize ICSID's Additional Facilities as a means to resolve the dispute.

The second major body that governs international investment arbitration emerged from the United Nations Commission on International Trade Law. Specifically, in 1976, UNCITRAL issued its “Model Rules” for the settlement of international investment disputes. However, in contrast to ICSID, which houses permanent facilities for dispute settlement, Tuck writes that the “UNCITRAL Rules are intended to be acceptable in countries with different legal, social, and economic systems and are widely used in both ad hoc arbitrations and administered arbitrations.” As such, international agreements may adopt and adapt the Model Rules, regardless of nationality or allegiance, in order to operate from a foundational procedural framework to facilitate investment and dispute resolution. And finally, states are able to modify or complement the Model Rules at their own discretion, which allows for a greater degree of flexibility in investment disputes.

As outlined above, IIAs and the investor-state regime have come to provide international investors with a substantial set of rights and protections that may be exercised over states hosting

257 For a thorough discussion concerning the evolution of ICSID, see Puig, “Emergence and Dynamism.”
261 Tuck, “ICSID and UNCITRAL,” 889.
foreign investment. Furthermore, ICSID and UNCITRAL dominate the settlement of disputes between investors and host states. From the discussion of the broad outline of the investor-state regime, the following section will present criticism that the investor-state regime has faced, as well as changes made to ICSID, UNCITRAL, and IIAs in response to the perceived flaws of the investor-state regime.

Section 3.2- Criticism and Compromise: Recent Reforms of the Investor-State Regime.

The proliferation of IIAs and the expansion in investment disputes has given rise to a plethora of criticisms, both in terms of specific outcomes that result from arbitration decisions, and the structure of the investor-state regime itself. Importantly, the tensions that have emerged between the investor-state regime and liberal democratic states can be usefully linked to the concepts of holistic common good and material common good developed above, and their respective institutionalization. As will be shown below, many of the criticisms launched against the investor-state regime follow from the liberal democratic principles that have been constitutionalized and internalized through the historical development of liberal democracy. Worth noting, however, is that many important changes and developments to the regime have emerged, both in terms of new investment agreements and the ICSID and UNCITRAL arbitration rules that seek to relieve the tension between the two theoretical stances. As such, this section will discuss two broad points. First, some of the major criticisms that have been launched against the investor-state regime will be presented. Second, two broad strategies will be discussed that have emerged to respond to these criticisms, which include changes made to new IIAs on the part of states and changes to ICSID and UNCITRAL arbitration rules.

Many of the tensions that arise in relation to the investor-state regime can be sorted into three broadly interrelated issues. First, multiple criticisms have been launched against the role and composition of arbitration panels. As mentioned above, international arbitrators are chosen by the parties to the dispute or by appointment. First, arbitrators are hired by the respective parties on an ad
hoc basis, and usually are specialized practitioners of international trade, commerce, and investment law. However, one of the major criticisms of international arbitration is the public dimension of disputes. Strictly speaking, arbitration panels are limited in jurisdiction to view disputes from within the language of the IIA governing that the dispute. In particular, investment disputes that involve matters of public interest may thus be regarded as raising issues that are outside the jurisdiction of the arbitration panel and the IIA. As such, competing obligations or considerations under alternative international agreements, domestic constitutions, or political instability that are not enshrined in the applicable IIA are essentially silenced through the construction of the IIA and arbitration rules. This criticism is a clear example of new constitutionalism at work, as IIAs and investment tribunals are able to override competing obligations and thus favour the interests of the investor.

The case of *Aguas del Tunari, S.A., v. Republic of Bolivia* serves to illustrate this point. Aguas del Tunari (AdT) is a subsidiary company owned by the American company Bechtel, that won a contract to operate, maintain, and improve the water and sewage system of the Bolivian city of Cochabamba in return for a guaranteed sixteen percent return on investment. In order to achieve this level of return, AdT needed to raise the price of water to its consumers, which took effect on December 1st, 1999. However, the price hikes provoked societal backlash, as many of the poorest residents of Cochabamba saw water bills that represented 25% of their monthly income. As social unrest increased, AdT decided to abandon their investment five months after taking over the provision of water and sewage services, and initiate arbitral proceedings claiming $50 million in damages. Although

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international pressure against Bechtel led to the settlement of the dispute for a symbolic 30 cents, *Aguas v Bolivia* serves as a clear example of the tension between investment agreements and domestic conditions.266 Further, it reinforces the Polanyian concept of the double movement, as what led to the retreat of AdT from Bolivia was the treatment of citizens as customers in relation a fundamental requirement for human life, namely water.267

A secondary criticism of international investment arbitration points to a certain degree of inconsistency from within arbitration decisions. In essence, critics point to how cases that arise from within a factually similar set of circumstances can come to dissimilar arbitral awards. A clear example of this phenomena emerged out of two contradictory decisions rendered by two arbitration panels on the same factual circumstances in the case of *Lauder* and *CME*.268 Basically understood, the debacle that *Lauder* and *CME v. Czech Republic* represent is that two tribunals, operating under UNCITRAL Rules, came to opposite conclusions of the same factual circumstance. The disputes were sparked when the Czech Republic tried to impose domestic content requirements on the television provider CME, which was owned by Ralph Lauder. The *CME v Czech* Tribunal awarded $353 million in damages plus interests in favour of CME, whereas the *Lauder v. Czech* Tribunal dismissed the case ten days before.269 Thus the broad interpretive space that is available to investment tribunals emerges as a result of broadly worded investment protections can result in serious inconsistencies within the investor-state regime case law. Coupled with a lack of precedent value that is assigned to prior decisions, many critics argue that this demonstrates an apparent need for an appeal mechanism to deal with contradictory decisions, in order to move the investor-state regime towards greater coherence.270

A third criticism of the investor-state regime touches the heart of the tension between the two strands of liberalism, in that critics point to the lack of recognition that investment disputes often entail a profoundly public component. Liberal democratic governments are often characterized as transparent, and as a consequence, accountable to their constituents.\textsuperscript{271} Prior to the changes made to UNICITRAL and ICSID to be discussed below, investment dispute proceedings were both closed to interested parties that were not in direct dispute (except through consensus on the part of the disputing parties), and the awards were confidential. International investment arbitration was modelled after commercial arbitration, which is fashioned to arbitrate disputes between two private actors. As such, proceedings were generally kept confidential. However, critics of this model point to the fact that the investor-state regime is a very different order in that it involves the state, which is in essence a public apparatus, making disputes involving a state \textit{de facto} public disputes.\textsuperscript{272} Taken with principles of democratic participation and accountability, a lack of transparency concerning the actions of a government led critics to point to an accountability gap and democratic deficit for citizens to exercise their democratic rights.\textsuperscript{273} Taken together, the lack of predictability, accountability and transparency have fuelled expansive criticisms of the investor state regime.

And finally, stability clauses, the lack of decision coherence, and broadly defined investor rights have led many scholars to note a “regulatory chill” on the public policy space of liberal democratic states. This regulatory chill is exemplified by the Canadian experiment with plain packaging of tobacco products legislation. The proposed regulations prompted tobacco company Philip Morris and others to threaten investment litigation under NAFTA's Chapter 11 as a challenge to this health policy

\textsuperscript{271}Ball et al., \textit{Political Ideologies}, 31.
\textsuperscript{272}Puig, “Emergence and Dynamism,” 567; Tuck, “ICSID and UNCITRAL,” 912; Van Harten, ““Private Authority and Governance,” 607-615.
legislation, which resulted in Canada's eventual abandonment of the policy. As a consequence, without an effective mechanism to balance between competing objectives and obligations or a clearly worded exception within an IIA for particular policy fields, the investor-state regime has silenced numerous attempts on the part of liberal democracies to implement seemingly legitimate policy objectives.

In addition, the constitution like features of IIAs affords a climate of predictability and stability for investors through the length of time that IIAs are in effect, and MFN, national treatment, and stability clauses. However, this rigidity is effectively at odds with the flexibility and control that emerges through the democratic process when a country is faced with exceptional circumstances. A country that exemplifies this particular situation is Argentina. In the early 2000s, Argentina was faced with a severe economic recession and a devalued national currency. As a result of the actions taken by the Argentina state, approximately thirty investment disputes were triggered. One case in particular resulted in the case of CMS Gas Transmission v. Argentina case, which resolved under an ICSID Tribunal in 2005 and resulted in an economically crippled Argentina saddled with an additional US$132.2 million dollars.

By way of context, the ICSID Tribunal noted that in 1989, Argentina had initiated a wave of privatization of public industry and infrastructure with the intention to attract foreign investment. According to Schneiderman, “Michigan-based CMS Gas participated in the wave of privatization of Argentinean public enterprise in 1995 by purchasing almost 30 percent of the public company Transportada de Gas del Norte.” CMS Gas went on to invest “more than US$ billion in the

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274 Schneiderman, *Constitutionalizing Economic Governance*, 120-129. Worth noting is that plain packaging legislation has sparked investment disputes proceedings in Australia and Uruguay, leading Australia to revoke its support for the investor-state regime. See Kurtz, “Australia's Rejection of ISA,” 65-71.


renovation and expansion of the gas pipeline network.”

However, this investment was compromised due to the actions taken by the Argentine government as a response to the market collapse of the Argentine economy in 2001. Specifically, Argentina unpegged the peso from the US dollar, imposed capital flight protection mechanisms, and the temporarily imposed gas tariffs (intended to be a short term corrective measure at the time of negotiations between Argentina and the gas sector). Schneiderman notes that the Argentina government expected all market participants to bear their share of the burden necessary to recover from economic hardship. However, CMS “instead filed a claim for damages under a US-Argentina BIT, insisting that the government had guaranteed a rate of return on its investment via the TGN license regardless of financial hardship...” and sought over US$230 million in damages. This was due, according to CMS Gas, because of the devaluation of the market share of TGN had fallen from US$261.1 to US$21.2 million, which led to the inability on the part of CMS Gas to pay its own debts. Argentina's defence focused on the actions taken as necessary for the maintenance of stability in the Argentine state, which are principles that are established in both customary international law and the US-Argentina BIT. However, the Tribunal ruled that Argentina had sowed the seeds of its own economic hardship, and therefore the claim to necessity was undermined in lieu of this fact. In the end, the award favoured CMS Gas. This ruling, and others that resulted in Argentina's response to economic instability, subsequently led to Argentina's rejection of the investor-state regime.

In turning from these criticisms, it is important to discuss some of the reforms that have emerged from within both a state's participation in the investor-state regime, and from within ICSID and UNCITRAL. From the perspective of states, at least two broad strategies have emerged in response

279 CMS v. Argentina, Final Award, 21.
280 CMS v. Argentina, Final Award, 18- 21.
281 Schneiderman, Constitutionalizing Economic Governance, 99.
282 Puig, “Emergence and Dynamism,” 580-582.
283 McEliney, “Responding to Withdrawal,” 602.
to investor-state dispute experiences. First, many Latin American countries, such as Bolivia, Ecuador, and Argentina, have exited the ICSID Convention as a means to solving investment disputes. Outside of Latin America, Australia has also revoked its support for the settlement of investment disputes through binding delocalized arbitration as a result of its experience in implementing plain packaging legislation in April, 2011.\textsuperscript{284} As will be discussed in greater detail below, it is unclear as to the effectiveness of this strategy, as many IIAs remain in force up to twenty years after their dissolution. Alternatively, states such as Canada and the United States have made incremental changes to their new investment agreements, in order to “carve out” a broader domestic policy space. In particular, these carve outs are often compared to the GATT's general exceptions Article XX, which allows for a greater degree of policy autonomy in the fields of health and environmental regulations.\textsuperscript{285} For example, the Canadian model IIA was modified in 2004 to include General Exceptions under Articles 9, 10, and 11. In general, these Articles aim to protect against investment disputes by providing general exceptions for health, safety, and environmental measures (Article 11) or necessary political actions aimed to protect human, animal, or plant life and health (Article 10.1(a)).\textsuperscript{286} As for the United States, changes in their 2012 Model BIT include acknowledgement of their commitments to labour and environmental standards under Articles 12 and 13, which has created more policy space in these areas for implementing new regulations.\textsuperscript{287}

However, liberal democratic states are not the sole source of change within the investor-state regime. In particular, ICSID made important changes to its Arbitration Rules that were adopted in 2006. As noted above, one of the characteristic features of investment arbitration was the closed and

\textsuperscript{284} Kurtz, “Australia's Rejection of ISA,” 65. Worth noting is that Australia has taken alternative approaches to dispute resolution in subsequent Free Trade Agreements, such as returning the settlement of disputes to Australia's local courts.


\textsuperscript{286} Canada, 2004 Model FIPA, 12-15.

\textsuperscript{287} United States, 2012 Model BIT, 17-19.
confidential nature of the proceedings between the disputing parties. In responding to criticisms that
centred on the public nature of state participation and the public nature of investment disputes, ICISD
adopted Revised Rules 32 (the ability of the tribunal to open up proceedings to the public at its own
discretion), 37 (the ability for the tribunal to accept *amicus curiae* briefs), and 48, which allows the
Tribunal to publish the legal reasoning behind their decision. Taken together, these changes were clear
attempts of the part of ICSID to make arbitration proceedings both more transparent and legitimate.288
As for UNCITRAL, one of the most notable changes to its Model Rules include recent changes in 2010
and the adoption of the Rules on Transparency, which entered into force “on 1 April 2014, [and] comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-State arbitration.”289 In terms of the Model Rules, Articles 11-13 implement stricter
disclosure on the part of potential arbitrators and their relationship to any of the disputing parties.290
Furthermore, beginning with the *Glamis Gold Ltd. v. United States* arbitration tribunal, which was one
of the first arbitration panels to allow for the participation of *amicus curiae* briefs through a reading of
Article 15(1) of the Model Rules, arbitration that operates under the Model Rules have increasingly
allowed for the participation of *amicus curiae* participants.291

Through the above discussion, the investor-state regime has responded to a number of important
criticisms. Many of the criticisms may be usefully framed as stemming from the failure of the investor-
state regime to respect democratic principles, institutions, and obligations that have become

288 Antonietti “ICSID Amendments,” 429-442 Brown, “International Investment Agreements,” 2-4; Tuck, “ICSID and
UNCITRAL,” 886-901.


particular, Article 11 requires a potential arbitrator to disclose any relationship that could undermine the neutrality of the
proceedings, Article 12 allows for arbitrators to be challenged if their impartiality is justifiably questionable, and Article
13 sets a strict time line and procedure for challenging arbitrators. (10-11).

291 Clara Reiner and Christoph Schreuer. “Human Rights and International Investment Arbitration.” in Human Rights in
International Investment Law and Arbitration eds Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich

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institutionalized over the historical evolution of liberal democratic states. In an effort to internalize some of these liberal democratic principles, UNCITRAL and ICSID have moved towards greater transparency and widened the scope of participation in the form of *amicus curiae* briefs. On the part of liberal democratic states, a variety of options have been employed, ranging from rejection of the investor-state regime entirely, to incremental adjustments to new IIAs. However, many of the tensions remain, which is the topic of the next section.

**Section 3.3- Assessment of Reforms.**

As presented in the previous section, there have been a variety of criticisms against the investor-state regime, in terms of lack of transparency, accountability, predictability, and legitimacy. As a result of these criticisms, many states have taken up reforms of IIAs or denunciations of the regime in order to return to a more acceptable position from which to fulfil their domestic obligations, as understood through the liberal democratic tradition and the holistic common good developed above. Furthermore, there has been an increase in recognition on the part of ICSID and UNCITRAL regarding the deficits of their part in the investor-state regime, which has led to substantial changes to the process of investment arbitration. Some of these changes are more effective than others in resolving the tension resulting in the new constitutionalism of international investment. However, I argue here that these changes have ultimately failed to resolve the fundamental tension between liberal democratic states and the investor-state regime.

On the strategy of state's renouncing the investor-state dispute settlement mechanism, there are two issues worth discussing. First, the investor-state regime, although fragmented in nature through the reliance on bilateral, regional, and multilateral agreements that fail to reach a global scale, is characterized by a generally accepted global standard. As such, the effects of failing to participate through a globally accepted standard of investment protections may result in harms that are greater than
the participation. Although this observation is merely hypothetical, countries such as Bolivia, Ecuador, and Australia should be studied carefully in the coming years to observe the effects of the denunciation before judgements can be made concerning the viability of exit. Furthermore, recall that the duration of investment protections extends for a period of time following the dissolution of investment agreements. As such, investments that have occurred while a relevant IIA was in effect are still potentially subversive issues that a renouncing country is faced with until all agreements have lapsed. Therefore, the effects of new constitutionalism under international investment agreements, while eroded, remain in effect.

On the strategy of incremental changes to new IIAs, a similar set of problems emerges in terms of the shelf-life of past IIAs. While it is the case that general exceptions have the potential to create space for desired policies, older IIAs and investors that operated in similar fields that host states seek to regulate still pose the threat of arbitration, which effectively neutralizes the potential of new agreements. Furthermore, many critics of the investor-state regime have pointed to the ability of private investors to “forum-shop” for IIAs that can be most effectively used for the protection of investments. For example, Australia's dispute with Philip Morris Asia required Philip Morris to reorganize its ownership structure to take advantage of a Hong Kong- Australia BIT, a practice that is not uncommon in international investment arbitration. Another problem with changing the language of new agreements centres on the issue of interpretation and the irregularity of decisions do not guarantee that general exception clauses will protect host state regulatory space. But again, this point must be monitored for decisions that emerge under new IIAs for confirmation or refutation. In effect, time will tell how arbitration panels respond to general exception clauses.

In turning to the changes to both ICSID and UNCITRAL rules and procedures, one point that

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293 Kurtz, “Australia's Rejection,” 65-72;
can be framed as an improvement to the regime are the changes to arbitrator disclosure as a means of creating a higher degree of neutrality, and as a consequence, legitimacy for the investor-state regime. However, on the grounds of transparency and accountability, much is still desired. For ICSID, it is unclear how transparency concerning the publication of the legal rationale for a dispute settlement in any way affects the accountability that an impacted public can exercise over an arbitration tribunal. While it may lead to public outcry and a variety of consequences for the host state, the fact that arbitration tribunals still act as active components of new constitutionalism through the ability to judge state action and impose legal decisions of sovereign states is problematic from the perspective of state-oriented liberalism. If understood through the lens of the democratic tradition, political accountability, and the protection of rights under domestic constitution, important democratic deficits remain. This is especially the case when disputes arise relating to issues of public interest, health, or rights, such as Aguas del Tunari v. Bolivia, CMS Gas Company v. Argentina, and Ethyl v. Canada, as discussed above.

A criticism of the last point could be that by allowing amicus curiae participation, the arbitration tribunals are informed as to the public nature of the dispute, and make their decision accordingly. However, there are two obvious counter points to this claim. The first is the nature of the arbitration community. As noted above, the pool of international investment arbitrators is saturated by a specific kind of practitioner. Specifically, most arbitrators are practising trade and investment lawyers, specializing in economic or commercial private law. What is distinctly lacking from this over saturation of one kind of training are public international lawyers who are trained to note and respect issues of public international law, such as human rights or environmental law. As a result of lack of training and expertise, the culture and training of international investment lawyers may be fundamentally ill equipped to resolve disputes that bear on public issues.\footnote{Watt, “Contested Legitimacy,” 223-235.}

Second, and related to the point made above, while it is true that amicus curiae are an
increasingly visible component of investment arbitration, the ability to participate is concretely restricted by the discretion of the arbitration panel. Specially, the wording of the participation of *amicus curiae* from within the ICSID Convention is to aid in establishing facts and implications of the case. However, there remains an important limiting factor on the *amicus curiae*, in that participation is allowed so long as it does not over burden the efficiency of the investment dispute, to be decided by the arbitration panel. Here, there is a profound conflict between arbitration, with the specific aim of efficiency, and law and a focus on justice. On the last point, even after the most recent changes of ICSID Arbitration Rules and UNCITRAL Model Rules, the applicable law that arbitration panels utilize is still primarily from with the relevant IIA. As such, even if arbitrators are sympathetic to the points raised by *amicus curiae* briefs, there is a distinct lack of applicable law that is available to the arbitration panel to accommodate the concerns raised. And finally, there is a distinct difference between allowing third party participation, and actually responding and incorporating the views raised. On this point, changes to ICSID and UNCITRAL do not compel arbitration panels of incorporate the views of *amicus curiae* participants in final decisions. Therefore, a lack of compulsion, or at least the ability to incorporate additional views, unless noted and acknowledge in final decisions (which has almost never happened), renders *amicus curiae* participation effectively meaningless.

Clearly, the most recent reforms of the investor-state regime have failed to address the fundamental tensions between liberal democratic states and the international market economy. This is the case because reforms have failed to acknowledge the conflict between the theoretical stances that have served in the development of both institutions. In essence, the conflict between state and market is a conflict between two distinct theoretical strands within liberal theory, and the failure to address this theoretical conflict has led to a clear democratic deficit, even with the most recent reforms of the investor-state regime.
Conclusions.

From the analysis above, I have demonstrated that two distinct yet interconnected theoretical strands exist within liberal ideology. Essentially, both strands take as their starting point the rational and self-interest agent, and both strands aim to construct a political and economic system that creates the conditions for the improvement of the human condition. However, these two strands within liberal ideology diverge on the role of the state and the market as a mechanism for generating freedom for the liberal human being. Specifically, market-oriented liberalism argues that by individually pursuing material prosperity through the market mechanisms will indirectly lead to additional other human and societal goods. In contrast, state-oriented liberalism importantly prioritizes the state, and places the role of the market on equal footing with the institution of liberal democratic principles.

I have linked the concept of the holistic common good to state-oriented liberalism, which has informed the evolution of liberal democracies. Importantly, state-oriented liberalism not only acknowledges the importance of material prosperity and the security of private property, but has institutionalized a variety of political participation, social welfare provision, and social protection mechanisms and institutions. Thus, state-oriented liberalism aims to not only protect the liberal human agent from the pursuit of the competing interests in the political community, but also to empower the liberal human agent to exercise their assumed rationality in the exercise of political decision making and in the pursuit of self interest. On the side of market-oriented liberalism, it is posited that market based exchange is the appropriate means for the development of human potential. From Adam Smith to the neoliberal turn in the 1980s, economically oriented liberal theorists argue that the human rationality is exercised in the ideal through economic exchange, and delegate to the state the role of ensuring protections of market based interactions.295 Furthermore, economic liberalism posits that the development of additional human capabilities and capacities can only emerge after a set level of

295 See section 2.1 and 2.3 on this point.
material prosperity has been attained.\textsuperscript{296}

In the above discussion, the tension between these two liberal strands was framed in reference to the concept of new constitutionalism. Recall that new constitutionalism scholarship points to the global phenomenon of market-oriented liberalism (neoliberalism), which has become entrenched in international relations, institutions, and law since the 1980s. Importantly, new constitutionalism scholars argue that the new constitution has fundamentally reorganized state-society relations to align with neoliberal economic policy. Importantly, this reorganization is challenging historically established principles of the state-based international system by challenging the internal sovereignty of states by reorienting states towards the prioritization of market based exchange over domestic preferences.\textsuperscript{297}

The disciplinary effects of new constitutionalism are felt in the fields of international trade, production, private ownership, financial transactions, and banking. However, I take the position that the investor-state regime represents a robust component of new constitutionalism, and one where the tension between the two strands of liberalism can be clearly recognized. As discussed in Chapter 3, international investment law has developed a substantial set of protections for private investors. Alongside investor rights, a system of international dispute settlement has empowered investors with the ability to bring claims against sovereign states through international arbitration. Importantly, the system of arbitration effectively removes disputes from domestic judicial systems. Comprised of international lawyers that specialize in trade, investment, and economic law, arbitration panels are formed on an\textit{ad hoc} basis to rule on investment disputes. Arbitration panels are restricted in the law that can be applied to investment disputes, namely the IIA between the state hosting the investment and the home state of the investor. Critics of the investor-state regime point to the inherently public nature of many investment disputes. This point can be broken into two parts. First, liberal democratic states

\textsuperscript{296} Hirschman, \textit{Passions and Interests}, 10-17, 105; Smith, \textit{Wealth of Nations}, 423.

\textsuperscript{297} Refer to Introduction, as well as sections 1.3 and 2.3 for discussions of new constitutionalism scholarship.
are institutions that are public in nature, in that liberal democracies have both a set of duties and obligations owed to their populations, and democratic processes to hold governments to account in the exercise of state functions. Secondly, many investment disputes impact on issues of public concern, such as affordable access to water, environmental regulation, and health regulation. Furthermore, the length of time that IIAs are in force substantially contribute to the constitution-like effects of the investor-state regime, and the lack of precedent value that is attributed to past arbitration decisions essentially renders the investor-state regime unpredictable. As such, the constitutional effect of IIAs and the investor-state regime potentially undermine the ability for liberal democracies to fulfil their domestic obligations in favour of investment protections.

Recent changes to the investor-state regime can be usefully sorted into two broad camps. From the perspective of states, countries such as Canada and the United States have made changes to their model investment agreements to protect domestic policy space in the issue areas mentioned above. From the perspective of investment arbitration, recent changes in the rules and procedures of both UNICITRAL Model Rules and ICSID have attempted to address legitimacy and transparency concerns by allowing the submission of *amicus curiae* briefs, by granting arbitration tribunals the ability to publish the legal rationale for decisions, and through stricter disclosure requirements on the part of arbitrators. However, in assessing these changes, I conclude that the tension between the two liberal strands has not been resolved, which naturally leads to the question: What can be done? Are there changes that can be made to the investor-state regime that would resolve the tensions felt between liberal democratic principles and new constitutionalism?

As noted above, one criticism of the investor-state regime is a lack of an appeal mechanism, other than cases where there is a gross overreach on the part of the arbitration tribunal in terms of jurisdiction. As such, many scholars advocate for an mechanism for appealing decisions made by

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298 Return to section 3.2 and 3.3 for discussion and criticism of investor-state regime.
arbitration tribunals. For example, Van Harten writes that “[one] option would be to establish an international adjudicative body with jurisdiction over all generalized investor-state arbitrations... Only a unified body would be in the position to ensure reasonably consistent evolution of the law.”\textsuperscript{299} In addition to Van Harten, ICSID officials in the lead up to the 2006 reforms, contemplated the creation of an appeals mechanism for ICSID cases. However, the appeals mechanisms was dropped from the official changes in the 2006 ICSID reforms.\textsuperscript{300} On the point of implementing an appeals mechanism, one barrier for this as a potential solution is that it presupposes a preexisting consistency within the investor-state regime, which critics point to as lacking. Arbitration panels are under no obligation to inform their decisions in reference to similar cases, as the decisions of \textit{Lauder v. Czech Republic} and \textit{CME v. Czech Republic} clearly demonstrate. As such, the first step in improving the existing investor-state regime would be to directly address this lack of consistency throughout the individual investment agreements and dispute settlement mechanisms of the investor-state regime.

Introducing a commitment to precedent in the investor-state regime could be accomplished in one of three ways. As model IIAs have evolved to include general exceptions, it appears possible that new IIAs could be written to require arbitrators to frame decisions in reference to precedent. However, this point is faced with the life span of preexisting IIAs, a fact that limits the effectiveness of implementing precedent and makes incremental changes at the level of IIAs challenging. The second strategy that could be adopted in making the investor-state regime would be to revisit the idea of a multilateral investment agreement, with the overarching authority in the form of a global investment agreement or World Investment Court to decide on investment agreements. However, as indicated by the failure of the MAI, this strategy is faced with substantial opposition in terms of achieving international consensus concerning multilateral rules, regulations, and procedures.\textsuperscript{301} And finally,

\textsuperscript{299} Van Harten, “Private Authority,” 618.
\textsuperscript{300} Antonietti, “2006 ICSID Amendments,” 429.
\textsuperscript{301} Refer to note \{x\} of Chapter 3 for a brief history of the attempt to reach a multilateral agreement on investment. As well,
investment-state arbitration rules and procedures could be reformed to include an explicit commitment to resolving disputes in reference to precedent. Of the three strategies, I think that this option has to greatest chance of success, as ICSID and UNCITRAL have come to dominate investor-state dispute resolution.\textsuperscript{302} However, one of the possible criticisms of this approach is that while IIAs share a set of similarities, not all IIAs are alike. As such, one of the barriers to creating a coherent set of case law and investment protections is to acknowledge the differences between IIAs.

However, even if the investor-state regime became more coherent by committing to precedent and implementing a mechanism for appeal, the underlying tension between the motivating logic of the investor-state regime and the theory that motivates liberal democratic principles would remain. This is the case because accountability over arbitrators and, arguably more important, the representation and acknowledgement of the public nature of investment disputes, would still be a matter left unaddressed. The underlying tension that has been demonstrated throughout the preceding discussion is a conflict between market-oriented liberalism and state-based liberalism, and making market-oriented liberalism more coherent ignores this underlying tension.

One possibility in resolving the tension is to accept that Polanyian double movement as an essential component of our current political organization, and to refrain from framing the tension between the two strands of liberalism as a problem. An argument could be made to support this notion, as societal backlash has led to important advances for state-based liberalism in the form of democratic participation, social protections, and social programs. One could make the argument that the history of the evolution of social, civil and political rights supports this point.\textsuperscript{303} In the taking the case of \textit{Aguas del Tunari v. Bolivia}, it could be argued that the social upheaval that arose out of the investment

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\textsuperscript{302} For discussion of UNCITRAL and ICSID reforms, refer to section 3.2.
\textsuperscript{303} Marshall, \textit{Social Class}, 20-26; See also Polanyi, \textit{Great Transformation}, 81-89 and Atiyah, \textit{Rise and Fall}, 537-544
\end{flushright}
agreement acted as an important check on economic liberalism. On the material side, it is plausible to argue that economic liberalism has led to important advances in technology and prosperity, and has produced an interconnected world economy that participates in the general improvement of global society. While it is the case that the benefits of these improvements have not been evenly distributed across the world, this does not entail that distributive justice is impossible. As such, one could argue that improvement has been found through the movement between state orientation and market orientation, and has led to both the proliferation of liberal democratic principles and massive improvements in the material prosperity and technological advances.\(^{304}\)

If it is accepted that the tension between the two strands of liberalism identified in this work is a positive force for human improvement, then one possible route for regulating the tension, emerges from the work of Paul Schiff Berman. Basically understood, Berman advocates for the adoption of strategies to manage the conflict between competing legal orders, so as to mitigate the negative effects of multiple domestic and international legal orders asserting jurisdiction over shared factual circumstances. He writes that “a pluralist framework recognizes that normative conflict is unavoidable and so, instead of trying to erase conflict, seeks to manage it through procedural mechanisms, institutions, and practices that might at least draw the participants to the conflict into a shared social space.”\(^{305}\) Thus, Berman argues that legal pluralism essentially respects the differences of competing legal orders that conflict with the domestic sovereignty of states, while providing mechanisms for managing conflicting legal orders.\(^{306}\)

From my own perspective, the trend towards constitutionalism appears to undermine Berman's strategy. In particular, new constitutionalism seeks to assert dominance over domestic legal orders in favour of homogenized economic standards and disciplines. Therefore, if constitutionalizing

\(^{304}\) Recall section 1.3 for the development of liberal democratic states.


\(^{306}\) Berman, “Global Legal Pluralism,” 1192-1295.
international relations is the trend, then I posit here that the debate between state- and market-oriented liberalism, and the double movement between the institutional priority given to the state or the market, is irreconcilable through theoretical debate. This is the case because the organizational structure that follows from the theoretical assumptions made by each strand necessarily assigns a role for the market and a role for the state. As such, each theoretical strand gives rise to two distinct organizational logics, both aiming to empower the liberal subject in divergent ways. Taken in isolation, each strand aims to construct a coherent system that empowers the liberal subject in the manner that is advocated for from within each distinct strand, and the tension emerges out of the both systems of liberal empowerment attempting to operate simultaneously. Thus, the tension does not arise from within one of the liberal strands, but arises between them when state-oriented liberalism infringes on market-oriented theory, and vice versa.

I put forward that in order for international investment law to resolve the tension between the material common good and the holistic common good, a decision must be made between the theories. As indicated in section 1.2, international law is structured in a hierarchy that begins with *jus cogens* principles. As such, creating a hierarchy of law within international investment law, in which there is an explicit role or rank associated with liberal democratic principles and market based principles would resolve the tension within the investor-state regime. However, this committed decision is faced by substantial barriers which are internal to the tension within liberalism, as well as alternative perspectives of international law. As articulated above, law requires a certain degree of consistency, societal acceptance and predictability in order to be regarded as a legitimate legal order. As such,

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308 On the later point, my conclusion sets aside the issue of criticisms of elevating liberal principles as *jus cogens* norms as a topic beyond the scope of this argument.

309 Refer to sections 1.1, 1.2, and 2.2 for the discussion of the role and construction of law as coherent, predictable, and legitimate.
organizing international law in reference to either the material common good or the holistic common
good would require a fundamental transformation of international law and international society.

This conclusion leads us to the phoenix and the goose. When taken to the extreme, if we take the market-oriented liberalism as phoenix by hierarchically privileging market conceptions over more holistic competitors, then organizing international investment law in reference to the concept of the material common good would reorganize international society along the following lines. First, any conflicts that would emerge between liberal democratic principles and the rights guaranteed through IIAs would be resolved in favour of the private investor. Coupled with a coherent body of case law and a commitment to precedent, these three changes to the investor-state regime that would create a predicable and stable legal order and resolve the tension between economic liberalism and liberal democratic principles. Specifically this would be accomplished by privileging in law the claim that empowering the liberal subject by creating and maintaining stable market access is the appropriate way to guarantee the freedom of the liberal subject.

In choosing market-oriented liberalism over liberal democratic principles, important consequences would emerge. Democratically elected governments would be required to accommodate market requirements, and the role of government, as prescribed by economic liberalism, would be to provide the conditions to create optimal market conditions. Democratic participation would be restricted in reference to market requirements, and the tension between the two strands of liberalism would fade away so long as this privileging of market based liberalism is internalized as the legitimate cornerstone of international law and society. In essence, the market-oriented liberal claim that by enabling rational individuals to pursue material prosperity leads to greater societal prosperity would inform international society.

However, it is worth noting the challenges that are faced with this path. As the case of Aguas
*del Turnai v Argentina* indicates, attempts to frame investment disputes solely in contractual terms provokes expansive social unrest, a point that is further reinforced in Polanyi, who notes that treating humans as adjuncts to the market or as fictitious commodities instigates fierce societal backlash. As such, organizing international society along market prescriptions has produced historical situations, ranging from the collapse of *haute finance* to democratically informed criticisms of private authority in the investor-state regime. These responses indicate that privileging the material common good would produce resistance along the lines of Polanyi's double movement, and thus undermine the stability and internal cohesion of international investment law from without. Therefore, the commitment to the material common good at the level of theory and at the level of law can potentially be undermined by social dissatisfaction at the level of lived experience, as the history of state-oriented liberalism can attest.

If we take the state-oriented liberalism as the phoenix, that is as the dominant principle of international society, then international society would be reorganized along the following lines. Market interactions would be subject to conditions decided on by legitimately elected government officials, and economic efficiency would be constrained by the legitimately articulated conditions of the relevant political body. Within the investor-state regime, this would require economic law being read in conjunction with human rights law, humanitarian law, environmental law, and additional public international law branches, so as to appropriately balance between material and non-material considerations. Essentially, this would collapse the distinction between international investment law and other bodies of law, and produce a movement towards a new, new constitution. Economic efficiency would be framed in reference to the standards of international law holistically conceived, and each branch would be read together in the settlement of international disputes. This would allow for the settlement of disputes to adequately represent the complex nature of the interests at stake, as  

well as change composition of the arbitration tribunal to draw on the varied expertise of international lawyers specializing in fields other than economic law.

At a bare minimum, this would require two significant changes to the investor-state regime. The first change would be to open up investment disputes to additional bodies of international law, such as environmental law and human rights law. However, the culture, training, and expertise of the arbitration community would have to evolve in order to respond to the expanded scope of applicable law. This would change the dynamic of investment arbitration, as arbitration panels would require members with expertise in the relevant applicable legal field. Recognizing that investment disputes are dynamic in nature, the ad hoc constitution of arbitration is a feature that should be retained, although an acceptable procedural guideline should be developed to facilitate cooperation between disputing parties.

As is the case with privileging market-oriented liberalism as the hierarchically superior principle of international law, one of the major worries is the disruptive pressure of the market within the Polanyian double movement. Market-based liberalism would surely seek to push back against the liberal democratic orientation in a reordered constitution. A contestation of this reordering would have to reach a critical mass of support outside of the legal order that is more characteristic of the social dimension of Polanyi's double movement. Furthermore, as has always been with the case of the holistic common good, materiality, property rights, and economic freedoms inform state-oriented liberalism, they merely framed in reference to liberal democratic considerations. As such, the success of privileging state-oriented liberalism importantly relies on the output legitimacy of the investor-state regime concerning disputes that involve public interests or that bear on liberal democratic principles. Thus, the success of organizing the investor-state regime to include liberal democratic considerations is contingent of the success of balancing competing interests that arise in disputes.

In conclusion, I have uncovered an important tension within liberal theory, namely between
market and state-oriented strands of liberalism. This tension has been discussed in reference to the concept of new constitutionalism, which points to the entrenchment of neoliberal principles into international law and the tension this provokes for the state-oriented liberalism of liberal democratic states. Furthermore, I argue that the tension cannot be resolved by incremental changes that fail to resolve the underlying theoretical tension. To resolve the tension, I argue that the investor-state regime must reorganizing along liberal democratic considerations, holistically understood. If the current trend towards constitutionalism remains robust, I conclude that the integration of holistic common good principles that inform liberal democracies into the material orientation of new constitutionalism is the only strategy for resolving the tension (albeit artificially) between the holistic common good and the material common good. In essence, this would entail a new, new constitution.

One point remains to be made. As was recognized from the outset of this thesis, the investor-state regime is merely an influential component of the broader new constitution. While this analysis empirically uncovers the tension between the investor-state regime, as influenced by market-oriented liberalism and liberal democracy, it is essential to recognize that the tension between the two strands of liberal theory includes additional branches of international law that bear new constitutional characteristics. However, by collapsing the distinction between investment law and alternative branches of international law, and through the recognition of the public dimension of investment disputes in investor-state arbitration, my proposed changes have the potential to fundamentally transform the nature of transnational law, and with it, resolve the tension between the material common good and the holistic common good.
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