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Climate Change, Consequentialism, and the Road Ahead

Dale Jamieson*

Abstract

In this paper I tell the story of the evolution of the climate change regime, locating its origins in "the dream of Rio," which supposed that the nations of the world would join in addressing the interlocking crises of environment and development. I describe the failure at Copenhagen and then go on to discuss the "reboot" of the climate negotiations advocated by Eric A. Posner and David Weisbach. I bring out some ambiguities in their notion of International Paretianism, which is supposed to effectively limit the influence of moral ideals in international affairs, and pose a dilemma. I go on to discuss the foundations of their views regarding climate justice, arguing that the most reasonable understandings of their favored theoretical views would not lead to some of their conclusions. Finally, I return to the climate regime, and make some observations about the road ahead, concluding that for the foreseeable future the most important climate change action will be within countries rather than among them.

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I. INTRODUCTION

Since the signing of the United Nations Framework Convention on Climate Change (UNFCCC) at the Rio Earth Summit in 1992, abating greenhouse gas (GHG) emissions has been regarded as an urgent global responsibility.¹ GHGs linger in the atmosphere for decades, centuries, and even longer.² When this is coupled with the fact that their impacts are mediated through various complex systems, the result is that climate change is practically irreversible on time scales that most of us care about.³ However, abatement matters because the nature and severity of the impacts are affected both by the absolute levels of GHG concentrations in the atmosphere and their rates of increase. Since abating greenhouse gas emissions imposes costs on emitters, the question of how to allocate these costs fairly has been at the center of climate ethics. Questions about the fairness of various abatement strategies are complicated by the fact that land use changes such as deforestation can also

¹ Abatement is usually called “mitigation” in the climate change literature. In chapter 6 of my forthcoming book, *Reason in a Dark Time: Ethics and Politics in a Greenhouse World* (manuscript on file with the author), I argue that “abatement” is a better term for any intentional reduction of anthropogenic GHG emissions.

² Piers Forster, et al, 2007: *Changes in Atmospheric Constituents and in Radiative Forcing*, in S. Solomon, et al, eds, *Climate Change 2007: The Physical Science Basis*, Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) 212–13, Table 2.14 (Cambridge 2007).

³ See Susan Solomon, et al, *Persistence of Climate Changes Due to a Range of Greenhouse Gases*, 107 *Proceedings Natl Acad Sci* 18354, 18354–59 (2010); and Susan Solomon, et al, *Irreversible Climate Change Due to Carbon Dioxide Emissions*, 106 *Proceedings Natl Acad Sci* 1704, 1704–09 (2009).

dramatically impact atmospheric concentrations of GHGs both by directly affecting emissions and by changing the biosphere's ability to sequester carbon. Unfortunately, these processes are difficult to characterize and measure.

As it has become increasingly clear that we are in the early stages of a climate change that is likely to continue for centuries even if we pursue aggressive abatement policies, questions about the fair distribution of the costs of adaptation have also begun to receive attention.⁴ Since the resources that can be brought to bear on adaptation are limited, questions about setting priorities are also becoming increasingly important. How do we decide what to save and what to give up when we cannot protect everything?

Adaptation is motivated by a concern to avoid damages. However, climate change damages have already occurred and will continue, though it is difficult to tell exactly what damages can be attributed to climate change and to assess their extent. Research in this area is ongoing and especially active regarding climate change impacts on human health. The World Health Organization estimates that climate change is already causing more than 150,000 deaths per year. This estimate is controversial but there is little doubt that climate change will cause millions of deaths or even orders of magnitude more.⁵ Compensating for loss of life raises special problems, but there is a range of other climate change damages (for example, property losses) that are straightforwardly compensable. This raises questions about whether compensation should be paid and, if so, who should pay whom and how the required compensation should be determined and delivered.⁶

⁴ The IPCC defines "adaptation" as "adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities." M.L. Parry, et al, eds, *Climate Change 2007: Impacts, Adaptation and Vulnerability*, Contribution of Working Group II to the Fourth Assessment Report of the IPCC 27, Box TS.3. (Cambridge 2007). For further discussion, see Paul Baer, et al, *Greenhouse Development Rights: A Framework for Climate Protection That Is "More Fair" Than Equal Per Capita Emissions Rights*, in Stephen M. Gardiner, et al, eds, *Climate Ethics: Essential Readings* 215–30 (Oxford 2010); Paul Baer, *Adaptation to Climate Change: Who Pays Whom?*, in Gardiner, et al, eds, *Climate Ethics* 247–62; Dale Jamieson, *Adaptation, Mitigation, and Justice*, in Gardiner, et al, eds, *Climate Ethics* 263–83; Dale Jamieson, *When Utilitarians Should Be Virtue Theorists*, in Gardiner, et al, eds, *Climate Ethics* 315–31. See also W. Neil Adger, et al, eds, *Fairness in Adaptation to Climate Change* (MIT 2006).

⁵ See Anthony J. McMichael, et al, *Global Climate Change* (Summary Version) in *The World Health Report 2002* 71–72 (World Health Organization 2002), online at http://www.who.int/whr/2002/en/whr02_en.pdf (visited Oct 13, 2012). For a taste of the controversies in this area, see Andrew C. Revkin, *Warming and Death*, NY Times (May 29, 2009), online at <http://dotearth.blogs.nytimes.com/2009/05/29/warming-and-death/> (visited Oct 13, 2012).

⁶ For discussion, see Catriona McKinnon, *Climate Change and Future Justice: Precaution, Compensation, and Triage* (Routledge 2012); Daniel A. Farber, *Basic Compensation for Victims of Climate Change*, 155 U Pa L Rev 1605 (2007). While compensation is discussed in the academic and NGO community, and increasingly by the leaders of some African countries, it is not central to the current diplomatic discourse.

There are also difficult and neglected questions of participatory justice and how it interacts with distributive concerns. Climate change will remake the world in which we live and bequeath to our descendants. Generally, the impacts will be greater on those who contribute little to the problem than on those who contribute a lot. The forty-two members of the Alliance of Small Island States (AOSIS) emit about 0.5 percent of global GHG emissions and, on a per capita basis, emit one-quarter as much carbon dioxide as the global average. Yet many of them will disappear under rising seas.⁷ Sub-Saharan Africans emit about one-twelfth as much carbon per capita as Europeans, who in turn emit about one-half as much carbon as North Americans, yet sub-Saharan Africans will suffer disproportionately from climate change and have less capacity to adapt than Americans or Europeans.⁸ While 194 nations are parties to the UNFCCC and their diplomats fly around the world in a seemingly endless series of talkathons, most of these nations have very little power over the forces that actually affect the global climate, and billions of their citizens have even less voice.⁹ Eighty percent of global carbon emissions come from only ten countries.¹⁰ Their leaders, along with the executives of the world's most powerful corporations, have disproportionate influence on the decisions that affect emissions and the resources available for adaptation.¹¹ While this disparity in the ability of various nations and their peoples to effectively participate in climate change negotiations is decried by some academics and NGOs, American academics and policymakers increasingly seem to want less inclusive regimes.¹²

⁷ Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS), *The Impact of Climate Change on the Development Prospects of the Least Developed Countries and Small Island Developing States* (2009), online at <http://www.unohrrls.org/UserFiles/File/LDC%20Documents/The%20Impact%20of%20CC%20on%20LDCs%20and%20SIDS%20for%20web.pdf> (visited Oct 13, 2012).

⁸ World Bank, *CO₂ emissions (metric tons per capita)*, online at <http://data.worldbank.org/indicator/EN.ATM.CO2E.PC/countries> (visited Nov 4, 2012) (providing data from which these figures were computed).

⁹ To get a feel for what it was like for developing world representatives in Copenhagen in 2009, see International Institute for Environment and Development, *The Climate Game and the World's Poor: Documentary Film from Inside the COP15 Climate-Change Summit* (July 7, 2010), online at <http://www.iied.org/climate-game-world-s-poor-documentary-film-inside-cop15-climate-change-summit> (visited Nov 8, 2012). For discussion, see J. Timmons Roberts and Bradley C. Parks, *A Climate of Injustice: Global Inequality, North-South Politics, and Climate Policy* 14–19 (MIT 2007).

¹⁰ See the interactive charts and maps at *Climate Change Trends: Carbon Emissions Giants* (NPR), online at <http://www.npr.org/2009/12/11/121240453/climate-change-trends-carbon-emissions-giants> (visited Oct 13, 2012).

¹¹ *Id.*

¹² Indeed, there is reason to be frustrated by the UNFCCC process as I suggest in Section V and discuss more fully in Jamieson, *Reason in a Dark Time* ch 6 (cited in note 1).

Finally, there are impacts on non-human nature. Climate change is occurring against a background in which human activities have already diminished populations and fragmented landscapes in ways that will reduce dispersal rates and block range shifts for many species. The 2007 Intergovernmental Panel on Climate Change (IPCC) report documented that climate change has already shifted the geographic ranges of plants, animals, and biomes around the world.¹³ The ability of many species to migrate, even if dispersal corridors are available, will be slow relative to the pace of future climate change. Moreover, since many species engage in mutualistic interactions, the dispersal dynamics of multiple species can affect the viability of any single species.¹⁴ These and other considerations have led conservation biologists to generally agree that climate change will raise extinction rates.¹⁵ The polar bear has already become the popular symbol of climate change-caused extinction.

Given the depth and difficulty of these issues, it seems reasonable to think that part of why it is difficult to build an effective international climate regime is because of moral disagreements and differing perceptions of justice. Yet many commentators, especially those broadly in the tradition of “realism” in international relations theory, tend to minimize such concerns in favor of such notions as economic efficiency or self-interest. In this Article I claim that ethics matters, but the foundations of any particular ethical theory are relatively unimportant to the decisions we face. Morality matters, but history, context, and circumstance matter more than abstract principle.

In Section II, I fill in some of the details regarding the evolution of the climate change regime that are relevant to understanding its current status. In Section III, I discuss Eric A. Posner and David Weisbach’s International Paretianism (IP), a principle that they seem to believe effectively limits the influence of moral ideals in international affairs.¹⁶ I go on in Section IV to discuss the foundations of Posner and Weisbach’s views regarding climate

¹³ See Camille Parmesan and Gary Yohe, A Globally Coherent Fingerprint of Climate Change Impacts Across Natural Systems, 421 *Nature* 37, 37–41 (2003); Patrick Gonzalez, et al, Global Patterns in the Vulnerability of Ecosystems to Vegetation Shifts Due to Climate Change, 19 *Global Ecol and Biogeography* 755, 755 (2010); Cynthia Rosenzweig, et al, Attributing Physical and Biological Impacts to Anthropogenic Climate Change, 453 *Nature* 353, 353–54 (2008).

¹⁴ See, for example, Iliana B. Baums, *A Restoration Genetics Guide for Coral Reef Conservation*, 17 *Molecular Ecol* 2796, 2796–2806 (2008) (noting the genetic challenges of local adaptation in plant restoration efforts).

¹⁵ Chris D. Thomas, et al, *Extinction Risk from Climate Change*, 427 *Nature* 145, 145–47 (2008) (predicting that 15 percent to 37 percent of the study sample species will be “committed to extinction” due to climate change over the next half century). As a consequence, responses such as “assisted migration” are increasingly under discussion. See generally Mark W. Schwartz, et al, *Managed Relocation: Integrating the Scientific, Regulatory, and Ethical Challenges*, 62 *BioSci* 732 (Aug 2012).

¹⁶ See Eric A. Posner and David Weisbach, *Climate Change Justice* (Princeton 2010).

justice, arguing that the most reasonable versions of their favored theoretical views would not lead to some of the conclusions that they embrace. Finally, in Section V, I return to the climate regime and make some observations about the road ahead.

II. THE DREAM OF RIO

On December 6, 1988, the UN General Assembly passed Resolution 43/53 on the “Conservation of climate as part of the common heritage of mankind.”¹⁷ This resolution formally recognized the IPCC, set a timeline for its first report, and provided a framework for moving to a convention.¹⁸

A. The Run-up to Rio

The stage had been set by a series of events that contributed both to a sense of urgency about environmental challenges and the feeling that this was a moment in which decisive, even transformative, action was possible. In 1968, we were able to see the Earth from space for the first time, and many people around the world were moved by its lack of borders and apparent vulnerability. In 1972 in Stockholm, the UN held its first conference on the environment, which led to the creation of the United Nations Environment Programme (UNEP). The same year, Nixon went to China, and in the following year, the Paris Accords were signed, ending American involvement in Vietnam. Détente with the Soviet Union was growing. In 1977, World Bank President Robert McNamara, who had been the US secretary of defense during most of the Vietnam War, announced the creation of a commission that would make recommendations regarding North-South relations. The resulting Brandt Commission issued reports in 1980 and 1983 with proposals focusing on food, agricultural development, aid, energy, trade, and international monetary and financial reform. The report also discussed the global environment, the arms race, and population growth. In 1983, the UN General Assembly created the World Commission on Environment and Development, which popularized the phrase “sustainable development” in its 1987 report. The resulting book, *Our Common Future*, was influential around the world.¹⁹

¹⁷ Protection of Global Climate for Present and Future Generations of Mankind, General Assembly Res No 43/53, UN Doc A/RES/43/53 (1988).

¹⁸ For the origins of the IPCC, see Shardul Agrawala, Context and Early Origins of the Intergovernmental Panel on Climate Change, 39 *Climatic Change* 605–20 (1998); and Bert Bolin, *A History of the Science and Politics of Climate Change: The Role of the Intergovernmental Panel on Climate Change* (Cambridge 2007).

¹⁹ United Nations World Commission on Environment and Development, *Our Common Future* (Oxford 1987); see also Jamieson, *Reason in a Dark Time* (cited in note 1).

In Europe especially, environmental consciousness was rapidly growing, partly in response to concerns about acid rain and fears generated by the 1986 Chernobyl nuclear disaster.²⁰ Green political parties were forming all over. Since most European countries have some system of proportional representation, these parties were gaining parliamentary seats. The European Union (EU) was becoming progressively stronger and acting increasingly independently of individual states. The Greens made their influence felt at both the EU and national levels. In 1984 they entered the European Parliament and since then have been continuously represented.²¹ Greens were also becoming increasingly influential in Eastern Europe and the Soviet Union through the emerging social movements that challenged the power of the state and the Communist Party. Gorbachev's rise to power in the Soviet Union in 1985 seemed to create new political possibilities for addressing global environmental problems. In his bold and wide-ranging 1988 speech to the UN, Gorbachev indicated that the reformed Soviet Union would play an aggressive role in protecting the global environment.²² It seemed there was a real possibility that the East and West would join in trying to heal the North-South division and address the linked problems of global environmental destruction, poverty, and underdevelopment.

In 1987 the Montreal Protocol was signed, becoming the first in a series of international agreements leading to the phasing out of ozone-depleting chemicals.²³ While the possibility that human action could deplete stratospheric ozone had been discussed and debated since the early 1970s, the 1985 discovery of the Antarctic ozone hole, which no model had predicted, shocked people around the world.²⁴ This discovery showed how subtle changes in the atmosphere can produce surprising, unintended consequences that can threaten the prospects for life on Earth. The next year UNEP and the World Meteorological Organization (WMO) joined to produce an international scientific assessment of the threat posed by chlorofluorocarbons (CFCs) and other compounds while expeditions led by Susan Solomon showed that CFCs

²⁰ R. Daniel Kelemen and David Vogel, *Trading Places: The Role of the United States and the European Union in International Environmental Politics*, 43 *Comp Pol Studies* 427, 442–44 (2010).

²¹ See The Greens: European Free Alliance, *History*, online at <http://www.greens-efa.eu/about-us/50-history.html> (visited Oct 14, 2012).

²² Mikhail Gorbachev, *A Road to the Future: Complete Text of the December 7, 1988 United Nations Address* (Ocean Tree Books 1988).

²³ Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) (Sept 16, 1987), 1522 *UN Treaty Ser* 29 (1989).

²⁴ For accounts of the history of this period see Lydia Dotto and Harold Schiff, *The Ozone War* (Doubleday 1978); Richard Elliot Benedick, *Ozone Diplomacy: New Directions in Safeguarding the Planet* (Harvard 1991); Edward A. Parson, *Protecting the Ozone Layer: Science and Strategy* (Oxford 2003).

were indeed implicated in causing the Antarctic ozone hole.²⁵ The adoption of the Montreal Protocol, which embodied a system of targets and timetables, was a great achievement that occurred very quickly by the standards of international diplomacy. This led to a sense of optimism that, with the help of the scientific community, the nations of the world could successfully address the problem of climate change.

In 1988 climate change moved from an issue of public concern to a global project. Much of the US spent the summer in the grip of extreme heat and serious drought. Fires raged in Yellowstone National Park, agricultural production declined dramatically, and water levels in the Mississippi River system dropped precariously, resulting in channel closings and ship groundings.²⁶ On the Eastern seaboard, demand for electricity hit an all-time high and air conditioners were even in short supply. On June 23, 1988, a sweltering day in Washington, DC, climate modeler James Hansen testified before a US Senate Committee that it was 99 percent probable that global warming had begun. Hansen's testimony was front-page news in *The New York Times* and was extensively covered in other media as well. One week after Hansen's testimony, a WMO-sponsored conference in Toronto called for a 20 percent reduction in GHG emissions by 2005. On July 28, Senator Tim Wirth of Colorado, along with eighteen co-sponsors from both political parties, introduced the National Energy Policy Act of 1988 calling for a 20 percent reduction in US carbon dioxide emissions from 1988 levels by the year 2000.²⁷ In a September speech to the Royal Society, British Prime Minister Margaret Thatcher expressed concern about climate change, ozone depletion, and acid rain, noting that the five warmest years in a century were all in the 1980s, and reminded her audience of the vulnerability of the Maldives to sea level rise.²⁸ 1988 was an election year in the United States and the Democratic Party promised in its platform to "address

²⁵ The theoretical paper is Susan Solomon, et al, *On the Depletion of Antarctic Ozone*, 321 *Nature* 755–58 (1986). The observational paper is S. Solomon, et al, *Visible Spectroscopy at McMurdo Station, Antarctica: Observations of OC10*, 92 *J Geophysical Rsrch* 8329, 8329–38 (1987). A narrative account is available at *NOAA Celebrates 200 Years* (NOAA 2007), online at <http://celebrating200years.noaa.gov/breakthroughs/ozone/welcome.html> (visited Nov 2, 2012).

²⁶ See, generally, Michael H. Glantz, ed, *Societal Responses to Regional Climate Change: Forecasting by Analogy* (Westview Press 1988); President's Interagency Drought Policy Committee, *The Drought of 1988: Final Report* (Cornell 1988).

²⁷ S 2667 100th Cong, 2d Sess (Jul 28, 1988), in 134 *Cong Rec S* 19391 (Aug 1, 1988).

²⁸ Margaret Thatcher, *Speech to the Royal Society* (Sept 27, 1988), transcript available online at <http://www.margaretthatcher.org/speeches/displaydocument.asp?docid=107346> (visited Oct 14, 2012).

. . . the ‘greenhouse effect.’”²⁹ George H.W. Bush, the Republican candidate, promised to counter the greenhouse effect with “the White House Effect” and declared that he would be the “environmental president.”³⁰ What seemed like a bidding war over emissions reductions continued in November in Hamburg, Germany, when the World Congress on Climate and Development called for a 30 percent reduction in emissions by 2000. The year ended with *Time Magazine* forgoing its usual “man of the year” in favor of the “planet of the year,” with the “Endangered Earth” depicted as wrapped in plastic and bound in rope.³¹

Resolution 43/53 left the IPCC only about eighteen months to produce its first report. Initially its work was supported and cheered on by virtually every country in the world. In January 1989 newly appointed US Secretary of State James Baker spoke at the first meeting of Working Group III, declaring that the time had come for political action.³² In February 1990 President George H.W. Bush told the IPCC that “[t]he United States is strongly committed to the IPCC process of international cooperation on global climate change.”³³ However, in August 1990 at the IPCC meeting in Sundsvall, Sweden, which had been called to approve the texts of the three working group reports along with a synthesis statement, competing political interests and ideologies were on display. Greenpeace International was present, and so were climate change denial NGOs such as the Global Climate Coalition and the Global Climate Council, as well as various fossil fuel interest groups. Under pressure for revisions from the US, Saudi Arabia, the Soviet Union and some developing countries, the meeting nearly collapsed.³⁴ Finally, however, a text was accepted and after one more round of ministerial review it was submitted to the UN General Assembly in October 1990.³⁵

²⁹ *Democratic Party Platforms: Democratic Party Platform of 1988* (July 18, 1988), in Gerhard Peters and John T. Woolley, eds, *The American Presidency Project*, online at <http://www.presidency.ucsb.edu/ws/index.php?pid=29609> (visited Oct 14, 2012).

³⁰ See Steve Chapman, *The GOP's Environmental Disaster: It Wasn't Always Against Protecting the Planet*, *Chicago Tribune* 23 (Sep 27, 2012); *Some White House Effect*, *NY Times* 22 (Apr 21, 1990).

³¹ Michael D. Lemonick, *Planet of the Year: Global Warming Feeling the Heat*, 133.1 *Time Magazine* 36 (Jan 2, 1989).

³² Bolin, *A History of the Science and Politics of Climate Change* at 53–54 (cited in note 18).

³³ *Id.* at 58.

³⁴ Gorbachev's grip on power had been steadily weakening and by the end of 1991 the president of the Soviet Union was no longer a president and there was no longer a Soviet Union.

³⁵ United Nations Framework Convention on Climate Change (UNFCCC) (1992), 1771 UN Treaty Ser 107 (1994).

B. The Framework Convention on Climate Change

In response, the General Assembly created the Intergovernmental Negotiating Committee (INC), whose charge was to prepare a proposal for a framework convention on climate change that would be acted on at the UN Conference on Environment and Development, which was to convene in Rio de Janeiro in June 1992. Remarkably, with only eighteen months to act, the INC was able to agree on a text. The UNFCCC was opened for signature in Rio on May 9, 1992, and entered into force on March 21, 1994.³⁶

Despite the conflicts, the UNFCCC has won nearly universal acceptance; there are 194 parties to the convention while the UN has 192 member states.³⁷ The parties to the UNFCCC committed themselves to the following:

The ultimate objective of this Convention . . . is to achieve . . . stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.³⁸

They would achieve this objective by assuming “common but differentiated responsibilities.”³⁹ The developed countries would lead the way by reducing their own emissions and transferring technology and financial assistance to developing countries. Instead of the mandatory targets and timetables favored by the EU, AOSIS, and most developing countries but opposed by the US and the oil-producing states, the UNFCCC incorporated highly ambiguous language regarding the responsibilities of developed countries to reduce their emissions. In Article 4.2.a of the convention, each developed country committed itself to:

[A]dopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions . . . recognizing that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases . . . would contribute to such modification . . .⁴⁰

In 4.2.c this commitment is referred to as developed countries having “the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases.” The ambiguity of the

³⁶ Id.

³⁷ See UNFCCC, annex I–II (cited in note 35).

³⁸ Id at Art 2.

³⁹ UNFCCC at Art 3.1 (cited in note 35).

⁴⁰ Id at Art 4.2.a.

language is indicated by the fact that shortly after the United States signed the convention in Rio, a Bush policy advisor wrote to a US congressman that “there is nothing in any of the language which constitutes a commitment to any specific level of emissions at any time,” while the chief British negotiator was quoted as saying about the same provision that it is “indistinguishable” from an absolute guarantee.⁴¹

The UNFCCC is a framework convention. What mattered was the way forward and from the beginning, there were two distinct visions about how it ought to go. The Europeans and environmentalists were willing to accept the UNFCCC because they saw this as the first step in a process in which the parties would take mutually reinforcing positive actions.⁴² Developed countries, which were responsible for 75 percent of CO₂ emissions from 1860–1990 despite having only 20 percent of the world population,⁴³ would demonstrate the seriousness of their commitment by voluntarily stabilizing their emissions at 1990 levels by 2000. They would also transfer technology and other resources in order to enable developing countries to produce greenhouse gas inventories, take climate change into account in their planning processes, educate their citizens about climate change, and promote sustainable management.⁴⁴ These initial steps would begin to bend the curve on CO₂ emissions and build confidence among the parties. During the next period, all countries would share the burdens of emissions reductions according to the principle of “common but differentiated responsibilities.”

The problem with this approach is that it assumed goodwill and a common purpose on all sides. However, not everyone wanted global action on climate change. Most of the oil-producing states were opposed and so were many influential actors in the US who were motivated by ideology, self-interest, or the calculus of political advantage. The policies of some nations were unstable (for example, Canada and Australia), while other important actors were not committed to either scenario but instead poised to follow a pragmatic or opportunistic policy. The logic of the optimistic scenario was such that it was extremely vulnerable to those who were opposed to taking action. If the naysayers could prevent developed countries from acting in a way that inspired

⁴¹ Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 Yale J Intl L 451, 516–17 (1993).

⁴² Jamieson, *Reason in a Dark Time* (cited in note 1).

⁴³ Larry Parker and John Blodgett, *Greenhouse Gas Emissions: Perspectives on the Top 20 Emitters and Developed Versus Developing Nations* (Congressional Research Service Report 2008), online at <http://earthalliance.net/NLE/CRSreports/08Feb/RL32721.pdf> (visited Nov 4, 2012) (providing data for this estimation and calculation).

⁴⁴ UNFCCC at Art 4.1 (cited in note 35).

confidence and trust on the part of developing countries (for example, by casting doubt on the fairness of the bargain or the willingness of developing countries ever to do their part), then they would be able to prevent the virtuous circle of mutually reinforcing positive actions from ever taking hold. Even if the transition to a carbon-free economy could not be prevented but only delayed, this would still result in enormous economic benefits for some of the interest groups involved.⁴⁵

In January 2009, a new American administration took office. It was committed both to engaging constructively in the international negotiations to establish a post-Kyoto climate regime and to reducing emissions domestically through various policy interventions including the establishment of a cap-and-trade system.⁴⁶ However, the lesson that it took from the Clinton administration's failure with the Kyoto Protocol was the importance of linking international and domestic policy. The Obama administration was not going to make international commitments that it could not ratify or keep.

C. The Copenhagen Climate Change Conference

The American administration went to Copenhagen in December 2009 with several disadvantages. First, the Americans had done little to convince the rest of the world that the US was serious about climate change besides electing a new president who spoke a different language about climate change and international cooperation. Second, there was little time for the new administration to engage meaningfully with the international process prior to Copenhagen. Third, the negotiations that did occur appear to have been badly managed. Discussions went forward on two tracks, one that did not include the US regarding post-2012 emissions reductions under the Kyoto Protocol, and a second track that did include the US that discussed long-term cooperative action under the UNFCCC.⁴⁷

Moreover, the climate change denial campaign escalated once again. Less than three weeks before the opening of the Copenhagen meeting, emails were

⁴⁵ The delaying game is often self-consciously played by actors with large economic interests at stake (for example, automakers opposing mandatory seat belts, phase-out of leaded gasoline, etc.). See Dale Jamieson, *The Question of the Environment*, in Stefano Rodota and Paolo Zatti, eds, *Trattato di Biodiritto - Ambito e Fonti del Biodiritto* 37, 37-50 (Giuffr  2010). Political actors often benefit from opposing a policy or regulation, then becoming its champion once it is enacted (for example, Republicans have tried this tactic with Social Security). And of course some developing countries (for example, India) have been relieved that the developed countries have been such laggards since it relaxes the pressure on them to act.

⁴⁶ See Eric Pooley, *The Climate War* 122, 128, 277-81 (Hyperion 2010).

⁴⁷ *Background on the UNFCCC: The International Response to Climate Change* (UNFCCC), online at http://unfccc.int/essential_background/items/6031.php (visited Oct 14, 2012).

hacked from the Climate Research Unit at the University of East Anglia in the UK and posted on a climate change denial website. *The New York Times* quoted prominent climate change deniers including Patrick Michaels who said “this is not a smoking gun; this is a mushroom cloud.”⁴⁸ The story was picked up by all the major media and was quickly dubbed “Climategate.” Prominent climate scientists were charged with fabricating research results, misrepresenting data, and trying to destroy the careers of scientists who disagreed with them.⁴⁹ Death threats spiked against climate scientists.⁵⁰ Even some advocates for aggressive action on climate change expressed disappointment and endorsed some of the charges that were being made.⁵¹ Finally, months later, after nine separate investigations, the scientists were exonerated.⁵² No one who was involved in stealing the emails, making them public, or threatening the scientists has been brought to justice. Some in the media acknowledged that this was a “highly orchestrated, manufactured scandal,” but the damage had already been done.⁵³ Climategate was not the wound that killed Copenhagen but it was one of a thousand cuts.⁵⁴

The divisions that have haunted climate change negotiations from the beginning hardened and fractured even further in Copenhagen. The United States was at odds with the EU, and the North was in conflict with the South.⁵⁵

⁴⁸ Andrew C. Revkin, *Hacked E-Mail Is New Fodder for Climate Dispute*, NY Times A1 (Nov 21, 2009),

⁴⁹ For a detailed description of the events of Climategate, see, for example, Fred Pearce, *The Climate Files: The Battle for the Truth About Global Warming* (Guardian Books 2010); Michael E. Mann, *The Hockey Stick and the Climate Wars: Dispatches from the Front Lines* (Columbia 2012).

⁵⁰ Pearce, *The Climate Files* at 179–91 (cited in note 49); Leo Hickman, *US Climate Scientists Receive Hate Mail Barrage in Wake of UEA Scandal*, The Guardian (July 5, 2012), online at <http://www.guardian.co.uk/environment/2010/jul/05/hate-mail-climategate> (visited Oct 18, 2012).

⁵¹ George Monbiot, *Pretending the Climate Email Leak Isn't a Crisis Won't Make It Go Away*, The Guardian 16 (Nov 25, 2010).

⁵² Pearce, *The Climate Files* at 219–22 (cited in note 49); Justin Gillis, *Climate Scientist Cleared of Altering Data*, NY Times A14 (July 2, 2010).

⁵³ Sharon Begley, *Newspapers Retract “Climategate” Claims, but Damage Still Done* (The Daily Beast Jun 25, 2010), online at <http://www.newsweek.com/blogs/the-gaggle/2010/06/25/newspapers-retract-climategate-claims-but-damage-still-done.html> (visited Oct 14, 2012). See also Curtis Brainard, *Wanted: Climate Front-Pager*, Colum Journalism Rev (July 7, 2010), online at http://www.cjr.org/the_observatory/wanted_climate_frontpager.php (visited Oct 14, 2012).

⁵⁴ A.A. Leiserowitz, et al, *Climategate, Public Opinion, and the Loss of Trust*, Yale Project on Climate Change Communication (Yale School of Forestry & Environmental Studies Working Paper 2010), online at http://environment.yale.edu/climate/files/Climategate_Opinion_and_Loss_of_Trust_1.pdf (visited Oct 14, 2012). For a full account, see Pearce, *The Climate Files* (cited in note 49).

⁵⁵ See generally, Radoslav S. Dimitrov, *Inside UN Climate Change Negotiations: The Copenhagen Conference*, 27 Rev Poly Rsrch 795 (2010).

AOSIS led by Tuvalu demanded rigorous, legally binding commitments that almost no one was willing to make.⁵⁶ Rifts occurred between large developing countries such as China and Brazil, and others in the G-77.⁵⁷ Countries such as Cuba, Venezuela, Nicaragua, Bolivia, and Sudan became increasingly rejectionist.⁵⁸ The two negotiating tracks were never successfully brought together. Many developing countries demanded that any agreement had to be within the purview of the Kyoto Protocol, a condition that could not be satisfied by any US government since the Kyoto Protocol was politically dead in the US and beyond resurrection.⁵⁹ New disputes broke out over how to verify national claims about emission reductions and about the transparency and inclusiveness of the negotiating process.⁶⁰

President Obama remained non-committal about whether he would go to Copenhagen until November 25, when the White House issued a statement confirming his attendance and stating the US position. The US would reduce emissions 17 percent by 2020 from a 2005 baseline and also affirm as “goals” and “provisional targets” reductions of 30 percent by 2025, 42 percent by 2030, and 83 percent by 2050.⁶¹

The President arrived on the morning of the final day of the conference, going immediately into negotiations with a select group of world leaders and then emerging for a plenary address. His speech seemed mainly addressed to Americans rather than to the conference delegates who remained skeptical about America’s good faith. Obama began by acknowledging American responsibility but in a way that seemed grudgingly tautological: “As the world’s largest economy and the world’s second largest emitter, America bears our share of responsibility in addressing climate change.”⁶² He went on to boast of a record that many find altogether lacking if not downright pathetic, mentioning “our leadership within international climate negotiations” and claiming that “bold

⁵⁶ Id at 805–07.

⁵⁷ The G-77 is an intergovernmental group founded in 1964 to promote its members’ collective economic interests and create an enhanced joint negotiating capacity in the United Nations. It now consists of 132 states (including Palestine), and coordinates its policies with China.

⁵⁸ Dimitrov, 27 Rev Poly Rsrch at 810–13 (cited in note 55).

⁵⁹ Id at 803–04, 810–13.

⁶⁰ Id at 810–13.

⁶¹ The White House Office of the Press Secretary, *President to Attend Copenhagen Climate Talks* (Nov 25, 2009), online at <http://www.whitehouse.gov/the-press-office/president-attend-copenhagen-climate-talks> (visited Oct 14, 2012).

⁶² Barack Obama, *Speech at United Nations Climate Change Conference in Copenhagen* (Dec 18, 2009), transcript available online at http://www.huffingtonpost.com/2009/12/18/obama-in-copenhagen-speech_n_396836.html (visited Oct 14, 2012).

action” had been taken at home.⁶³ All this, he said, was “ambitious” and he went on to restate the commitment to the emissions reductions that had been made in the White House statement.⁶⁴ The speech was not well received. A 17 percent emissions reduction by 2020 from a 2005 baseline is equivalent to a 4 percent reduction from the 1990 baseline, by far the weakest offer of any developed country (except for Canada, which offered a 3 percent reduction).⁶⁵ By contrast, the EU was offering a 20 percent to 30 percent reduction.⁶⁶

After his speech, Obama went back to negotiations and shortly before midnight the Copenhagen Accord was unveiled. Draft texts of hundreds of pages negotiated over two years were replaced with a new declaration of two and a half pages that went through several drafts, each thinner and vaguer than the one before. References to emission cuts in developed countries of 50 percent by 2050 and 80 percent were dropped, reportedly at the insistence of China.⁶⁷ The final text was an agreement negotiated behind closed doors by the US, China, Brazil, South Africa, and India, and supported by about twenty other parties including Ethiopia and the European Union.⁶⁸

After a press conference, Obama flew back to the US while the accord received a tumultuous reception from angry delegates. Rather than adopting or rejecting the accord, the convention finally agreed to “take note” of it.⁶⁹ Most environmental organizations denounced the accord except for those based in the US. The executive director of Greenpeace UK declared that “the city of Copenhagen is a crime scene tonight, with the guilty men and women fleeing to the airport.”⁷⁰

After twenty years of climate diplomacy, the plain fact is that the main forces that have successfully dampened greenhouse gas emissions have been, in

⁶³ Id.

⁶⁴ Id.

⁶⁵ *Factbox—Climate Negotiating Positions of Top Five Emitters* (Reuters Sept 25, 2009), online at <http://www.reuters.com/article/2009/09/25/idUSLP518662> (visited Oct 14, 2012).

⁶⁶ Id.

⁶⁷ Mark Lynas, *How Do I Know China Wrecked the Copenhagen Deal? I Was in the Room*, *The Guardian* (Dec 22, 2009), online at <http://www.guardian.co.uk/environment/2009/dec/22/copenhagen-climate-change-mark-lynas> (visited Oct 14, 2012). For more on the process, see Radoslav S. Dimitrov, *Inside Copenhagen: The State of Climate Governance*, 10 *Global Envir Pol* 18, 20–23 (2010).

⁶⁸ Andrew C. Revkin and John M. Broder, *UN Climate Talks “Take Note” of Accord Backed by US*, *NY Times* (Dec 19, 2009), online at <http://www.nytimes.com/2009/12/20/science/earth/20climate.html?pagewanted=all> (visited Oct 14, 2012).

⁶⁹ Id.

⁷⁰ *Copenhagen Deal Reaction in Quotes* (BBC Dec 19, 2009), online at <http://news.bbc.co.uk/2/hi/science/nature/8421910.stm> (visited Oct 14, 2012). For a humorous, but just as chilling account, see *Dr. Seuss at Copenhagen* (The Now Show Dec 19, 2009), online at http://www.youtube.com/watch?v=3_RIKxz_ymQ (visited Oct 14, 2012).

order of increasing importance: global recession, the collapse of communism, and China's one child policy.⁷¹

III. INTERNATIONAL PARETIANISM

From the beginning, some American international relations scholars saw the Rio approach as misguided.⁷² Even before the signing of the Kyoto Protocol, they objected to the idea of a comprehensive global treaty with binding national targets.⁷³ They saw it as a moralistic approach that was doomed to failure. What was needed was realpolitik and the cold calculus of national interest. To some extent their predictions of failure were (self) fulfilled.

It is true that the Rio dream was founded on a moral vision. It was intended to bring some justice to an unjust world. Mutual respect among nations was supposed to spawn the cooperation that would lead to addressing the twin problems of environment and development. While this vision might seem utopian in retrospect, it is difficult to imagine a "realistic" approach to climate change that does not take justice seriously. It is a fact that climate change negotiations do not occur in an ethics-free zone. When entertaining fantasies of technocratic solutions it is good to be reminded that Lumumba Stanislaus-Kaw Di-Aping, the chief negotiator for the G-77, compared the Copenhagen Accord to the Holocaust.⁷⁴ He was not the only moralist in attendance nor were all the moralists from developing countries.

A. A Realist Approach to Moralism

Posner and Weisbach are sensitive to the views of both the realists and the dreamers. They formulate a principle, International Paretianism (IP), that they think governs state behavior with respect to climate negotiations. They characterize IP as "a rough attempt to solve the tension between realism and

⁷¹ Climate change data reveals that after the collapse of communism, emissions radically declined in the old USSR and they have only declined in the rest of the world during recessions. See also "One-Child" Policy Aids Climate Change Battle: China (Terra Daily Mar 11, 2008), online at http://www.terradaily.com/reports/One-child_policy_aids_climate_change_battle_China_999.html (visited Oct 14, 2012) (perhaps overstating, but supporting the fact that China's one child policy has reduced emissions).

⁷² See, for example, David G. Victor, whose book, *The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming* (Princeton 2001), was devoted to an event that never actually occurred.

⁷³ Throughout most of the 1980s Thomas Schelling advocated "pledge and review," a version of which had been used to implement the Marshall Plan. The Copenhagen Accord is of course a "pledge and review" system. See Thomas C. Schelling, *Some Economics of Global Warming*, 82 *Am Econ Rev* 1, 12-13 (1992).

⁷⁴ See *Ambassador for G77 Gives Martin Luther King Speech of the 21st Century at COP15* (YouTube Dec 11, 2009), online at http://www.youtube.com/watch?v=s0_wvZw0fOU (visited Oct 14, 2012).

idealism”⁷⁵ and formulate it in this way: “[A]ll states must believe themselves to be better off by their lights as a result of a climate treaty.”⁷⁶

Putting aside the question of what it is for states to have propositional attitudes such as beliefs, it is clear that this is a weak subjective principle. For IP to be satisfied, a climate treaty does not have to actually make states better off by their own lights nor do they even have to be generally perceived to be better off by their own lights. States could be wrong about thinking that a climate treaty makes them better off and IP would still be satisfied. Moreover, in this formulation IP does not restrict what states may regard as making themselves better off. A state could have an eccentric or weird idea of what makes it better off (for example, a large military, large numbers of hedge fund managers, or a vast number of religious scholars). Or a state could be highly moralistic, believing that its own welfare is a function of everyone’s welfare. For example, a state might actually believe what John F. Kennedy said at the Berlin Wall in June 1963, that “[f]reedom is indivisible, and when one man is enslaved, all are not free.”⁷⁷ IP would be satisfied so long as states believed that a climate treaty would produce favorable results for them whatever these favorable results might consist in. In this formulation, IP is so weak that it comes close to saying nothing more than that if there is to be a climate treaty then states must desire what they take to be the results of such a treaty.

However, Posner and Weisbach are not consistent in their interpretation of IP. In other passages they seem to take IP to be an objective principle about economic welfare.⁷⁸ They talk about a climate treaty “redistributing wealth” and claim that “a climate treaty that produces net costs . . . violates the condition of International Paretianism.”⁷⁹ But it does not follow from the original formulation of IP that a treaty that produces net economic costs violates IP. If nations construct their interests in terms other than wealth (for example, the triumphal march of democracy, capitalism, socialism, or whatever), then IP may be satisfied even if a treaty produces net economic costs. Indeed, Posner and Weisbach go on to say that behaving altruistically can be part of a nation’s interest and so an agreement with some degree of altruism can in principle

⁷⁵ Posner and Weisbach, *Climate Change Justice* at 181 (cited in note 16).

⁷⁶ *Id.* at 6.

⁷⁷ John F. Kennedy, *Speech in Berlin* (June 26, 1963), online at <http://news.bbc.co.uk/2/hi/europe/3022166.stm> (visited Oct 14, 2012).

⁷⁸ In their contribution to this issue they renounce this interpretation.

⁷⁹ Posner and Weisbach, *Climate Change Justice* at 93 (cited in note 16).

satisfy IP.⁸⁰ In practice, however, they think that IP “probably requires that all states that participate in a climate treaty are economically better off.”⁸¹

B. A Dilemma for IP

Posner and Weisbach think that IP is a “pragmatic starting point for negotiations,” but it is difficult to see why.⁸² A weak reading of IP does not significantly restrict the domain of possible climate treaties. A strong reading of IP in which welfare is conceived as objective economic welfare would be empirically false. Nations often seem to take actions that are against their economic interests. They fight wars against drugs and terrorism, and in favor of human rights or democracy in remote parts of the world. Of course, it can be said that there are subtle arguments that show that such actions are in the economic interests of a state; that in supposing otherwise, we are not correctly pricing the economic importance of intimidating demonstrations of state power deterrence, or whatever. Consider a small example. Over the past thirty-four years the state of California has spent \$4 billion executing thirteen prisoners for capital crimes.⁸³ Even in this case someone could say that the executions pass some cost-benefit analysis (what a grisly thought!). However, at some point it becomes clear that such claims are vacuous. States can act contrary to their interests perhaps even by signing up to a climate treaty (isn’t that what some of the critics thought the US did in Kyoto?). To suppose otherwise is to treat IP as an axiom rather than as an empirical claim open to falsification, and it is difficult to see how such an axiom can function as a “pragmatic starting point.”

In their contribution to this issue Posner and Weisbach agree that IP should not be treated as an axiom. What they want is for IP to function as a feasibility constraint. They think we should focus not only on what is ethically acceptable but also on what is politically feasible, and they think that proposed climate treaties that are extremely redistributive are not feasible.⁸⁴ However, the real work in supporting this claim is done not by IP but by Posner’s and Weisbach’s empirical beliefs about the economics of various possible climate

⁸⁰ Id at 177–78.

⁸¹ Id at 179

⁸² Id at 181.

⁸³ *More Evidence Against the Death Penalty*, NY Times A30 (Apr 13, 2012).

⁸⁴ See Eric A. Posner and David Weisbach, *International Paretianism: A Defense*, 13 Chi J Intl L 347, 349 (2013). I am with them on this point. Philosophers often distinguish “ideal” from “non-ideal” theory and then largely ignore the latter. John Rawls introduced this distinction (which he tended to conflate with the full/partial compliance distinction) in his magisterial, *A Theory of Justice* (Harvard 1971), a work that is almost entirely devoted to ideal theory. When writing about the problems of partial compliance Rawls acknowledged that “[t]hese are the things that we are faced with in everyday life.” Rawls, *A Theory of Justice* at 9.

treaties, what different countries believe about the economics, and how economic considerations are traded off against other values in various countries. All of this is very dark, and Posner and Weisbach mobilize little empirical support for their substantive claims. There is serious disagreement about the economics of climate change which turns in part on various normative commitments (for example, about pure time preference), and certain empirical assumptions for which there is little evidence (for example, the growth rate over the next few centuries).⁸⁵ Moreover, nations have different attitudes toward the importance of economic considerations and how to trade them off against other values. No doubt there are practical limits on how economically redistributive a treaty can be and still gain universal acceptance, but IP in its various formulations does little to illuminate them. The question that repays investigation is not whether there is some set of feasibility constraints on the space of universally acceptable climate treaties, but rather, what are the considerations that can motivate diverse agents to cooperate in addressing the problems we face here and now. As we saw in the previous section, it is difficult to understand the behavior of the European Union in the climate negotiations without recognizing that green ideas are more widely and intensely shared in many European countries than in the United States. Similarly, it is difficult to understand American behavior without recognizing the suspicion of treaties and international organizations that is characteristic of many Americans. It is considerations such as these that help us to understand what is possible in the climate negotiations.

IV. WELFARISM AS A FOUNDATION

The general philosophical outlook that motivates Posner and Weisbach is what they call “welfarism,” which they contrast with what they call “deontological approaches,” which “focus on the rightness or wrongness of particular acts independent of their consequences . . . [while t]he welfarist approach approves of acts that increase the welfare of relevant people (and perhaps animals).”⁸⁶ They go on to say that welfare can consist of a “subjective sense of well-being, satisfaction of desires or preferences, or satisfaction of certain objective parameters.”⁸⁷

⁸⁵ See Jamieson, *Reason in a Dark Time* (cited in note 1).

⁸⁶ Posner and Weisbach, *Climate Change Justice* at 8 (cited in note 16).

⁸⁷ *Id.* at 171.

A. Welfarism, Consequentialism, and Utilitarianism

Posner and Weisbach's notion of welfarism is a confusing hybrid of a deontic theory (consequentialism) and an axiological theory.⁸⁸ The passage quoted above embodies a false contrast between a deontic view about what makes acts right and an axiological view about what is morally valuable. A proper deontic contrast is between consequentialism and non-consequentialist views such as deontology; a correct axiological contrast is between views such as welfarism and non-welfarist views that count other kinds of goods as morally valuable instead or in addition. Matters are further confused by Posner and Weisbach's willingness to count a non-welfarist axiology ("satisfaction of certain objective parameters") as an instance of welfarism.

Consequentialism is the view that acts are right, wrong, or indifferent solely in virtue of their consequences.⁸⁹ Since consequentialism is consistent with a broad range of theories of value, and since part of what Posner and Weisbach mean by "welfarism" is consequentialism, it is not surprising that their understanding of welfare is quite broad.

However, there are limits on what theories of value can reasonably be called welfarist. For example, Hastings Rashdall, one of the ideal utilitarians who flourished in the first half of the twentieth century, held that virtue and veracity are among the goods that we ought to promote.⁹⁰ There is no guarantee that bringing about such goods will contribute to welfare in any reasonable sense of the term. Promoting veracity and virtue may result in misery and early death. Rather than thinking of philosophers such as Rashdall as welfarists, it is more reasonable to think of them as non-welfarist consequentialists.⁹¹

⁸⁸ One stream of the literature tends to conflate the axiological theory of welfarism with the deontic principle of consequentialism (see, for example, Matthew D. Adler, *Well-Being and Fair Distribution: Beyond Cost-Benefit Analysis* 32–56 (Oxford 2012), and Roger Crisp, *Well-Being*, in Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy* (The Metaphysics Research Lab 2008)). Even understood as an axiological theory welfarism seems to embody two distinct dimensions: one that specifies that the value of states of affairs is a function of "personal utilities," and a second which restricts the nature of these utilities. See Amartya Sen, *Utilitarianism and Welfarism*, 76 *J Phil* 463, 463–89 (1979). Unfortunately, as Simon Keller notes, "[i]n the philosophical literature, direct discussion of welfarism is rare, and those who do discuss it offer differing stories about what welfarism is, exactly, and about which views in moral philosophy are consistent with it." Simon Keller, *Welfarism*, 4 *Phil Compass* 82, 83 (2009).

⁸⁹ For further discussions see Dale Jamieson, *Ethics and the Environment: An Introduction* 76–85 (Cambridge 2008).

⁹⁰ For discussion, see Anthony Skelton, *Ideal Utilitarianism: Rashdall and Moore*, in Thomas Hurka, ed., *Undervivative Duty* 45, 45–65 (Oxford 2011).

⁹¹ This is also how Keller regards them. While it is more difficult to think of non-consequentialists who have been welfarists, Keller suggests that versions of welfarist deontology and virtue theory may count as such. Keller, 4 *Phil Compass* at 88–89 (cited in note 88).

In addition to being consistent with a broad range of axiological theories, consequentialism is also consistent with a broad range of deontic principles including both maximizing and satisficing principles.⁹² Posner and Weisbach seem to endorse this when they write that “[m]any different forms of aggregation are consistent with welfarism” and state that utilitarianism is only one such version.⁹³ Yet they also say that “[w]elfarists seek policies that maximize people’s well-being,” thus effectively identifying welfarism with utilitarianism.⁹⁴

While pointing out these inconsistencies may seem like philosophical nit-picking (which is worth doing for its own sake anyway), some of Posner and Weisbach’s conclusions regarding climate justice rely on specific views in ethical theory that are obscured by their use of the term “welfarism.” It is not a general commitment to welfarism or consequentialism that leads Posner and Weisbach to minimize the roles of distributive justice, corrective justice, and equality in climate justice, but rather their de facto commitment to a crude version of utilitarianism that reduces value to money. While they do not explicitly endorse such a view or even consistently presuppose it, it is difficult to make sense of some of their arguments without attributing some such view to them.⁹⁵

B. Putting the Justice into Climate Justice

The role that is played by Posner and Weisbach’s utilitarianism can be seen in their rejection of proposals to create an international system of emissions trading, based on an initial equal per capita allocation of permits among countries.⁹⁶ Both Peter Singer and I have advocated such a system but neither of

⁹² For discussion see Dale Jamieson and Robert Elliott, *Progressive Consequentialism*, 23 *Phil Perspectives* 241 (2009).

⁹³ Posner and Weisbach, *Climate Change Justice* at 217 n 7 (cited in note 16).

⁹⁴ *Id.* at 171.

⁹⁵ However, it should be noted that many of their claims do not presuppose such a commitment and are widely shared by theorists who have diverse normative views. For example, many climate ethicists (myself included) agree that a climate treaty should not be a vehicle for the general redistribution of wealth according to some broad principle of distributive justice. There is also substantial literature pointing out that there are difficulties in applying standard principles of corrective justice to actions that may cause climate change. See, for example, Jamieson, *When Utilitarians Should Be Virtue Theorists*, in Gardiner, et al, eds, *Climate Ethics* 315, 315–31 (cited in note 4); Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 *Envir L* 1 (2011). Finally, reconciling cosmopolitan concerns with the existing state system is a major challenge, as Posner and Weisbach point out, and is acknowledged by many political theorists.

⁹⁶ Posner and Weisbach, *Climate Change Justice* 119–43 (cited in note 16).

us has felt any tension between these views and broadly consequentialist (and welfarist in the proper sense) convictions.⁹⁷

Posner and Weisbach consider two bases for the view that emissions permissions should be allocated on an equal per capita basis: one founded on welfarism and another founded on fairness.

Posner and Weisbach assume that a welfarist argument for an equal per capita allocation must rest on two factors: distribution and efficiency. While they are not completely clear about why a welfarist would argue on the basis of distribution, it appears that the reason concerns diminishing marginal utility. Generally, a unit of a resource produces more utility when allocated to someone who has less of the resource than to someone who has more.⁹⁸ Posner and Weisbach point out that a system of equal per capita allocation is at best “only indirectly connected to the underlying normative goal” of increasing global welfare and that it “would be much better to redistribute all resources than to redistribute shares of the atmosphere’s capacity to absorb greenhouse gases.”⁹⁹ They go on to claim that equal per capita allocations would be inefficient because “[g]overnments would be rewarded for pursuing fertility policies that maximize the size of the population”¹⁰⁰ and that such a system “punishes states that do well, while rewarding states that do poorly. . . . From an efficiency perspective, the best use of the surplus [generated by any climate treaty that satisfies IP] would be to reward the states that had taken steps in advance of the treaty to abate the greenhouse gases.”¹⁰¹ While granting that “there are

⁹⁷ See Dale Jamieson, *Climate Change and Global Environmental Justice*, in Paul N. Edwards and Clark A. Miller, eds, *Changing the Atmosphere: Expert Knowledge and Environmental Governance* 287, 287–307 (MIT 2001); and Peter Singer, *One Atmosphere*, in Gardiner, et al, eds, *Climate Ethics* 181, 181–99 (cited in note 5). Singer and I were developing a view that was already in circulation, notably in Anil Agarwal and Sunita Narain, *Global Warming in an Unequal World: A Case of Environmental Colonialism* (Centre for Science and Environment 1991), online at http://cseindia.org/agenda2011/pdf/global_warming%20agarwal%20and%20narain.pdf (visited Oct 14, 2012). See also Darrel Moellendorf, *Common Atmospheric Ownership and Equal Emissions Entitlements*, in Denis Arnold, ed, *The Ethics of Global Climate Change* 104 (Cambridge 2011).

⁹⁸ There are lots of counter-examples here, including our old friend, Robert Nozick’s “utility monster,” who gets “enormously greater sums of utility from any sacrifice of others than these others lose.” Robert Nozick, *Anarchy, State and Utopia* 41 (Basic Books 1974). The problem of the utility monster is amusingly explained in *Nozick’s Utility Monster* (Dec 2011), online at <http://www.myishacherry.org/2011/12/25/nozicks-utility-monster/> (visited Oct 14, 2012).

⁹⁹ Posner and Weisbach, *Climate Change Justice* at 129 (cited in note 16).

¹⁰⁰ Id at 131.

¹⁰¹ Id at 132–33.

complexities here,” they go on to say that “[t]hese states would probably be the European states that accepted binding reductions under the Kyoto Protocol.”¹⁰²

While these arguments have some force, quite a lot can be said in response to them, though I cannot do full justice to the details here. In my 2001 presentation of the equal per capita allocation proposal, I anticipated the objection regarding perverse incentives for fertility rates and suggested that the per capita allocation be indexed to a particular year. Singer took up this suggestion in his presentation.¹⁰³ While there have been objections to such indexing as a solution, the problem has not been ignored. Second, while it is important from an efficiency perspective to consider the incentive effects of various institutional arrangements, it is far from clear that the most efficiency-conducive allocation of a climate treaty surplus would be to reward those who have acted well in the past. It is an entirely open empirical question as to whether allocating resources in this way would do the most to incentivize efficiency-producing behavior in the future.

The most important point is keyed by Posner and Weisbach’s observation that a system of equal per capita allocation is at best “only indirectly connected to the underlying normative goal.” They are right about this. Utilitarianism is highly context-sensitive, and the level at which its guiding principle should be applied is always a question worth asking. As I have said elsewhere, utilitarianism is a universal emulator: it implies that people should lie, cheat, steal, even appropriate Aristotle, when that is what brings about the best outcomes.¹⁰⁴ Something like this thought has been central to utilitarian thinking since at least Jeremy Bentham and has figured in the development of many different versions of indirect consequentialism, including rule consequentialism, virtue consequentialism, global consequentialism, and so on. It has also led particular utilitarians to endorse actions and policies that perhaps would not be countenanced in a utilitarian utopia.¹⁰⁵ Most utilitarians consider the indirectness of the relations between principles and policies to be a feature, a consequence of applying their views to the world in which we live rather than as an objection to their theory.

¹⁰² Id at 133.

¹⁰³ See note 97.

¹⁰⁴ Jamieson, *When Utilitarians Should Be Virtue Theorists*, in Gardiner, et al, eds, *Climate Ethics* 315, 315–31 (cited in note 4).

¹⁰⁵ The supposed act-utilitarian Bentham spent much of his life working on constitutional codes, John Stuart Mill was a strong advocate of rights to liberty, and many contemporary consequentialists have defended the importance of “associative” duties such as those that spring from friendship. Real utilitarians tend not to spend much time in the airy domain of unreal theory.

For these reasons (and others), it is important not to exaggerate the practical and middle-level differences between consequentialism and other moral theories. Consequentialists can appeal to such notions of fairness as part of the good (a view I haven't discussed), and insofar as these notions are important to people and motivate their behavior it would be a mistake for consequentialists to ignore them. What consequentialists cannot say is that such notions figure at the foundations of morality as independent deontic considerations. This is where the clash of moral theories really occurs. However, since Posner, Weisbach, and I agree that the best climate policy is one that is both ethically acceptable and politically feasible, it should not be surprising that the best climate policy might be one that incorporates values that do not occur at the very foundations of the best moral theory.

Whatever the best moral theory, it is clear that perceptions of fairness matter to people.¹⁰⁶ There is a large body of empirical evidence that shows that we will inflict costs on ourselves in order to punish those who violate norms.¹⁰⁷ It should thus not be surprising that concerns about fairness loom very large in the climate change debate, perhaps especially outside the US.¹⁰⁸ In light of such considerations, both Singer and I appeal to fairness as well as welfare in arguing for an equal per capita allocation.¹⁰⁹ We do not see ourselves as having to choose between these considerations. We can care about fairness because we care about welfare.

However, Posner and Weisbach do not think that arguments from fairness work any better than welfarist arguments in supporting equal per capita allocations. To a great extent the difference between us turns on what we think fairness implies with respect to the atmosphere.

Many climate ethicists think that people have equal rights to use the atmosphere as a sink for greenhouse gases and that the extent of these rights is determined in part by some threshold such that the consequences would be close to universally unacceptable if it were exceeded.¹¹⁰ They believe this because they can find no morally relevant reason for supposing that some people have

¹⁰⁶ For an early treatment see Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, *Fairness and the Assumptions of Economics*, 59 J Bus 285 (1986).

¹⁰⁷ A classic paper in this tradition is Ernst Fehr and Simon Gächter, *Altruistic Punishment in Humans*, 415 Nature 137 (2002).

¹⁰⁸ Henry Shue, *The Unavoidability of Justice*, in Andrew Hurrell and Benedict Kingsbury, eds, *The International Politics of the Environment: Actors, Interests, and Institutions* 373, 373–97 (Oxford 1992).

¹⁰⁹ See note 97.

¹¹⁰ A 2°C increase in Earth's mean surface temperature is widely viewed as the threshold that should be avoided. The 2°C threshold was first adopted by the Council of the European Union in 1996 and by the G8 in 2009, and has since found its way into various international documents.

rights to use the atmosphere that are not available to others. However this view is filled in, it leads naturally to the conclusion that many of those currently alive in rich industrial countries are exploiting the atmosphere beyond their entitlements.¹¹¹

Posner and Weisbach disagree with this conception of rights to the atmosphere. They think that emitters who on equal per capita allocation would not receive emissions permissions equal to their current emissions “should be compensated for the lost investment that they made in the reasonable expectation that their rights would continue as in the past.”¹¹²

I can imagine why someone might hold such a view with respect to a renewable resource. If a resource is not threatened by exhaustion and I have built my economy and way of life around exploiting this resource to a greater extent than other people, I can understand why someone might think that this entitles me to continue my exploitation at the same level. However, if the resource is exhaustible and I have already exploited it to a greater extent than others then I can see no reason why the fact that I have overexploited this resource in the past should give me a right to continue overexploiting it in the future. Suppose that mother gives us ten cookies and I eat four of the first five and then claim that this entitles me to eat four of the last five cookies as well. You might think that I am a good candidate for law school but you are unlikely to be persuaded by my argument.

Many scholars think that in order to avoid climatic disruption humans must cumulatively emit less than a trillion tonnes of carbon.¹¹³ On this view there are about 440 billion tonnes that can still be emitted.¹¹⁴ It is difficult to see why anyone would think that some countries (or people) are entitled to emit a disproportionate share of the last 440 billion tonnes on the grounds that they emitted a disproportionate share of the first 560 billion tons.

The only other argument that I can imagine in support of Posner and Weisbach’s claim would be one that holds that the present allocation of emissions is economically efficient, at least compared to an equal per capita allocation, and that this consideration has sufficient moral weight to trump other considerations. This view is not only implausible in its own right but the concern

¹¹¹ There are various ways of filling in this argument including appeals to Lockean notions of property and ideas of unjust enrichment. For further discussion see Daniel A. Farber, *Climate Justice*, 110 Mich L Rev 985 (2012); and Paul Harris, *World Ethics and Climate Change: From International to Global Justice* (Edinburgh 2010).

¹¹² Posner and Weisbach, *Climate Change Justice* at 136 (cited in note 16).

¹¹³ The primary scientific source of this view is Myles R. Allen, et al, *Warming Caused by Cumulative Carbon Emissions Towards the Trillionth Tonne*, 458 Nature 1163 (2009).

¹¹⁴ See id at 1163.

with initial allocation is not in the spirit of those who highly value efficient outcomes. They often defend unequal initial allocations by drawing on the Coase Theorem to show that efficient outcomes are distribution-insensitive under certain ideal conditions.¹¹⁵ Indeed, the only moral theorists I know who would endorse the argument that I am imagining would be a certain kind of utilitarian with a quite reductive theory of value. These are scarce on the ground, at least in philosophy departments.¹¹⁶

In this section I have claimed that Posner and Weisbach do not clearly develop and defend their foundational moral views and that in any case much of what is in dispute in the domain of climate justice does not turn on such foundational questions. Welfarist consequentialists as well as deontologists can defend trading schemes that allocate emissions permissions on an equal per capita basis.¹¹⁷

V. CONCLUSION: SLOUCHING TOWARD THE FUTURE

Posner and Weisbach see the fundamental challenge of climate justice as one of achieving an optimal climate treaty and then deciding how to allocate the surplus.¹¹⁸ Some international relations theorists see the challenge in similar but less economic terms, as one of producing the benefits of international cooperation while respecting national interests.¹¹⁹ However, we are now in a situation in which there appear to be few benefits to allocate and many costs to avoid.

The problem of how to allocate future greenhouse gas emissions was once perhaps the most salient question about climate justice, but its importance has receded as it has become increasingly likely that tolerable emissions limits will be breached before any such system can be put in place. Other issues concerning adaptation and compensation are now of more immediate concern. I see the main challenge of climate change as involving all of the following:

- slowing or reducing the build-up of GHG concentrations in the atmosphere;

¹¹⁵ See Ronald H. Coase, *The Problem of Social Cost*, 3 J L & Econ 1, 67–68 (1960).

¹¹⁶ Luc Bovens has defended a very limited form of “grandfathering” on somewhat different grounds. Luc Bovens, *A Lockean Defense of Grandfathering Emission Rights*, in Arnold, ed, *The Ethics of Global Climate Change* 124, 124–44 (cited in note 97).

¹¹⁷ What I have said here is only meant to parry the objections of Posner and Weisbach. More would have to be said to mount a full defense, including a discussion of the relevance (or not) of various analogies from morality and law regarding rights to indoor air, minerals from the sea, and so on.

¹¹⁸ Posner and Weisbach, *Climate Change Justice* at 178–87 (cited in note 16).

¹¹⁹ See, for example, David G. Victor, *Global Warming Gridlock: Creating More Effective Strategies for Protecting the Planet* (Cambridge 2011).

- adapting to climate change in a world characterized by radical inequality, mutual suspicion, and diverse values;
- living with an awareness that there is some chance that increasing GHG concentrations in the atmosphere could be catastrophic;
- all this while protecting what we value, which includes features of non-human nature as well as economic welfare.

There is no general or abstract solution to this problem. What we should do next is path-dependent. The economics of climate change (for example) are extremely policy-sensitive. Innovations that internalize externalities or create cooperative arrangements among countries and other actors can contribute to economic welfare, which in turn would ramify into the future. If key nations had behaved in the way envisioned by the Rio dream, would these nations or the world be better or worse off than they are today? This is a good question that I don't know how to answer. It is made even more difficult by the considerations adduced earlier regarding the value-ladenness of economic calculations and the difficulty of valuing non-market impacts of climate change that will unfold over centuries.

Some would say that whatever the truth about climate economics, the Rio dream was bound to fail because key nations were not going to cooperate given the world as it is. But how do we know this? Could anything else have worked better? Some theorists today talk about the importance of broadening the negotiations beyond climate so that every party to the negotiation will find something from which to benefit.¹²⁰ But the Rio dream did involve broad negotiations on topics including forestry and biological resources as well as climate and the infrastructure of development. Telling the story as one that was doomed to failure may simply transform the contingent political success of some interest groups (for example, the US Chamber of Commerce, Exxon, the right wing of the Republican party) into necessary truths about international relations. My hunch is that the Rio dream could have succeeded but I have no way of proving it.

What is clear is that our world would be quite different if the Clinton administration had acted to reduce US emissions rather than sitting on its hands after its failure to enact a BTU tax. Perhaps in order to do this, the Clinton administration would have had to succeed on health care reform and then used its accrued political capital on climate change. Or perhaps it would have been enough had Clinton not had to admit to an "improper physical relationship"

¹²⁰ See Matthew Ranson and Robert N. Stavins, *Post-Durban Climate Policy Architecture Based on Linkage of Cap-and-Trade Systems*, 13 *Chi J of Intl Law* 403 (2013) (examining the role of linkages among independent trading permit systems in decreasing abatement costs and overcoming institutional challenges to climate agreement).

with an intern after denying that he had “sexual relations with that woman.” In any case, the world is where it is and it matters how it got here. The bruises that the world wears as a result matter, too. History is important.

The dream of the 1992 Rio Earth Summit came to an end in Copenhagen in 2009.¹²¹ That the dream is over does not mean that everyone is awake. The UN will continue to hold successful meetings since UN meetings never fail. Diplomats will continue to diplomatize, talking heads will keep talking, and all of this will seem Very Important to Very Important People. However, all of this to-ing and fro-ing will be in the service of a zombie negotiation. While bodies and mouths continue to move, it is increasingly obvious that the action is elsewhere. The international climate negotiations are now part of a broader effort at global regulation involving trade, immigration, human rights, currency, capital flows, and other issues. Efforts to control the forces that give rise to these problems will continue. “Clubs” that take climate change seriously will eventually form. There will be discussions, decisions, and perhaps even agreements, some of which may actually be kept. Someday, perhaps, these efforts will result in an international regime that is responsive to the anthropogenic destabilization of the climate system. But don’t hold your breath.

In the interim, climate politics and policy will continue to be practiced. Motivation, not feasibility, will be the most important challenge (we are not ambitious enough for feasibility to be a major obstacle). The ongoing problem is how to get anybody to do anything together in a sustained way that will be effective. Rather than based on a global deal, for the foreseeable future climate policy will largely reflect the motley collection of policies and practices adopted by particular countries. It will be driven by national and regional efforts rather than by large schemes and big dreams. In every country there are political divisions about how to respond to climate change, and domestic politics will become increasingly important in determining the global response. This will all seem rather drunk and disorderly. What countries do (and fail to do) will reflect their internal politics, values, fears, ambitions, and national priorities. There will be climate-relevant action, but it will be different in different countries and it will be pursued under different descriptions and with different objectives. Some countries will adopt emissions trading, others carbon taxes, and still others technology forcing policies. Some countries will alter their energy mix, others their transportation systems, and others their buildings. Some countries will do a lot and others will do a little. An election may change a leader into a laggard or a

¹²¹ I more or less predicted this in Dale Jamieson, *The Post-Kyoto Climate: A Gloomy Forecast*, 20 *Georgetown J Intl Envir L* 537 (2008).

laggard into a leader.¹²² Urban sustainability and resilience will become increasingly important everywhere. In some countries there will be a great deal of sub-national variation, while other countries will have nationalized and even to some extent internationalized their policies. These policies, in different proportions depending on the country, will reflect a mix of self-interest and ethical ideals. These notions of self-interest and ethical ideals will be constructed in different ways in different countries. Any international agreement will be a matter of an overlapping consensus. No comprehensive doctrine has a chance in this fragmented world.¹²³

While the global environmental movement has not succeeded in motivating the countries of the world to adopt an effective global climate regime, it has succeeded in insinuating itself into the political fabric of virtually every country, even those such as the US that are the most recalcitrant on climate change. In the sober light of these new realities, old stereotypes about northern environmentalism in conflict with southern development priorities should be discarded or refigured. In elections held in 2010, the Green Party candidate for president of Brazil received nearly 20 percent of the vote, while the Green Party in Great Britain captured only about 1 percent of the vote.¹²⁴ Of course, much can be said to show why these numbers do not really mean what they seem to mean. Nevertheless, it is clear that seismic changes are underway in the configuration of global environmentalism. The site of the global struggle to stabilize climate is now primarily within countries rather than among them.¹²⁵

US policy in the next several years will be driven by the effectiveness and resiliency of state laws and policies such as those in place in California, and regional institutions such as the East Coast's Regional Greenhouse Gas Initiative (RGGI). In addition, attempts to regulate carbon dioxide under the Clean Air Act and the vast amount of litigation slowly working its way through the courts will also be extremely influential, perhaps mainly for its political effects.¹²⁶ Ongoing attempts to reframe climate change are also important. Thus far, none of these attempts to reframe climate change as an issue about energy, green jobs,

¹²² Keep your eye on the next Australian federal election, which will be held no later than fall 2013. It may well lead to the abolition of Australia's carefully constructed carbon control regime, which was only put in place in 2012.

¹²³ For the distinction between overlapping consensus and comprehensive doctrines see John Rawls, *Political Liberalism*, (Columbia expanded ed 2005).

¹²⁴ *Brazil's Green Party to Remain Neutral in Run-Off Vote* (BBC Oct 17, 2010), online at <http://www.bbc.co.uk/news/world-latin-america-11562247> (visited Oct 14, 2012); *Election 2010*, BBC, online at <http://news.bbc.co.uk/2/shared/election2010/results/> (visited Oct 14, 2012).

¹²⁵ See Jamieson, *Reason in a Dark Time* (cited in note 1).

¹²⁶ You can track these developments at *Center for Climate Change Law* (Columbia Law School), online at <http://www.law.columbia.edu/centers/climatechange> (visited Nov 2, 2012).

or concern for our children has had much traction.¹²⁷ A narrative may come along in the future that will move people and organize our thoughts and feelings about climate change in a way that will be effective. Perhaps geoengineering will catch the popular imagination. In the meantime we live in the wreckage of the old story.¹²⁸

So we will have to live with climate change. We will have to find meaning and joy in a world that increasingly fails to resemble the one in which we came to consciousness. The biota will change, diversity will diminish, weather will be less stable, skies will be different, and it will become increasingly difficult to relate to the old stories and tales. We will have to live in the knowledge that this is not like “an asteroid from space,” but the result of patterns of human action in which we persist.¹²⁹ For some, this will mean grief and guilt. For others, it will mean suffering. For still others, it will be just another day at the office. This will be life in the anthropocene. Climate change will trouble us but there is no magic bullet solution. John Wayne is dead and there is no Colt .45 peacemaker in sight.

¹²⁷ See respectively, Martin I. Hoffert, et al, *Energy Implications of Future Stabilization of Atmospheric CO₂ Content*, 395 *Nature* 881 (1998); Ted Nordhaus and Michael Shellenberger, *Break Through: From the Death of Environmentalism to the Politics of Possibility* (Houghton Mifflin 2007); Mary Christina Wood, *Nature's Trust: A Legal, Political and Moral Frame for Global Warming*, reprinted in Anna Leon-Guerrero and Kristine Zentgraf, eds, *Contemporary Readings in Social Problems* 274, 274–87 (Sage 2009). Interestingly “Gen X” seems to care less about climate change than their parents and Gen Xers with children seem to care even less than those without children (though there may be confounding variables). See Diane Swanbrow, *Generation X Is Surprisingly Unconcerned about Climate Change* (University of Michigan Institute for Social Research July 18, 2012), online at <http://www.sampler.isr.umich.edu/2012/research/generation-x-is-surprisingly-unconcerned-about-climate-change/> (visited Oct 14, 2012).

¹²⁸ In the 1980s Schelling wanted to frame the climate issue as a war on carbon financed by the rich countries, in which everyone is engaged against a common enemy. See Schelling, *Some Economics of Global Warming*, (cited in note 73). Generally on framing, see Mike Hulme, *Why We Disagree About Climate Change: Understanding Controversy, Inaction and Opportunity* (Cambridge 2009).

¹²⁹ Posner and Weisbach, *Climate Change Justice* at 75 (cited in note 16).