THE PARIS PARADIGM

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Global public discourse asserts that the Paris Agreement represents an irreversible turning point in the fight against climate change. The public outcry was correspondingly great when the Trump administration announced its intention to abandon the Paris Agreement. The Trump administration has since acted swiftly to repeal key regulations promulgated to implement U.S. Paris commitments, chief among them the Clean Power Plan. Problematically, the U.S. constitutional law literature on the Paris Agreement so far submits that neither the Paris Agreement nor commitments made pursuant to the Paris Agreement are an impediment to this policy reversal by the Trump administration. This directly contradicts the global expectation of what was achieved at Paris.

The Article submits that the existing constitutional law literature incorrectly treats the Paris Agreement as a purely procedural executive agreement. The Article relies upon transnational law theory to show that the Paris Agreement and action taken pursuant to it instead constitute a global governance network. The Article then develops a "Paris Paradigm" governing presidential authority to commit the U.S. in such global governance networks. The Article uses the under-theorized category of implied Congressional delegation of foreign affairs authority in Youngstown to shows that the President has the authority to enter into, and unilaterally to make commitments within, such a global governance networks in reliance upon domestic rulemaking authority. The President must, however, act with constitutional good faith to make such commitments.

The Article concludes that the Paris Paradigm has important repercussions for attempts by later administrations to undo administrative rules that support global governance commitments (such as the Clean Power Plan). Statutory canons of construction presume that acts of Congress comply with U.S. international legal obligations. This presumption requires that administrative agencies may not rely upon statutory authority to repeal a rule when doing so would violate an international legal obligation of the

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United States. To repeal or replace regulations promulgated as part of a global governance network commitment, a later administration thus has to show that the original regulation fell outside the good faith regulatory authority of the agency promulgating it or that the new proposed rule continues to meet existing global governance commitments. Reconceived as a global governance network, the Paris Agreement therefore represents a paradigmatic impediment to current efforts by the Trump administration to repeal regulations such as the Clean Power Plan.

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I. INTRODUCTION

United States participation in global rulemaking on climate change mitigation reveals a potential gap in the foreign affairs law literature. The foreign affairs literature operates according to a now-classic, agreement-based paradigm. Pursuant to this paradigm, the U.S. makes legally binding foreign policy commitments in one of two ways: by entering into international treaties or by entering into executive agreements.[1] To assert that the executive branch exceeded its constitutional authority in making a foreign policy commitment boils down to an argument that the executive branch failed to submit the commitment for advice and consent to the Senate as constitutionally required for treaties, or that it lacked the authority to enter into the executive agreement in question. The arguments directed against U.S. participation in the Paris Agreement, as well as the principal defenses of the Paris Agreement, took one of these two routes.[2]

As scholars like Dean Harold Koh have retorted, these critiques of the Paris Agreement are outmoded; they fail to account for how the U.S. actually makes foreign policy commitments and thus place evanescent form over emerging substance.[3] But this realization merely casts the problem in starker relief: can current foreign policy practice be reconciled with constitutional doctrine? Professors Jack Goldsmith and Curtis Bradley have powerfully submitted that it cannot.[4] Although they do not put it quite so sharply, Goldsmith and Bradley submit that the President's making of foreign policy commitments is usurping the constitutional role of the legislative branch.[5] This argument is ultimately committed to—and the most articulate defense of—the classic, agreement-based paradigm. The argument gains factual plausibility from a political reality that, in the case of the

1. *See* Harold Koh, *Tryptich's End: A Better Framework to Evaluate 21st Century Lawmaking*, 126 YALE L.J. FORUM 338, 338 (2017) [hereinafter Koh, *Tryptich*].

2. This point has most fully been articulated in Jack Goldsmith, *The Contributions of the Obama Administration to the Practice and Theory of International Law*, 57 HARV. INT'L L.J. 455, 466–67 (2016).

3. Koh, *Tryptich*, *supra* note 1 *passim.*

4. Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1297 (2018) ("As we have shown, the pathways of presidential control over international law have evolved and expanded over time and increasingly overlap in ways that tend to reduce constraints on presidential action. This growth in presidential power has not been accompanied by the development of mechanisms of accountability comparable to those that apply to exercises of domestic authority.").

5. *See id.*

Paris Agreement at least, executive action was purposefully directed at circumventing congressional oversight. As the press proclaimed, "*U.S. Negotiators Made the Paris Climate Deal Republican-Proof*."[6]

The (reversal of) U.S. participation in the Paris Agreement and the chief means by which the Obama administration sought to implement it, the Clean Power Plan, thus sets up an intriguing case study.[7] It squarely raises the issue: did the Obama administration act within its authority in committing the U.S. to aggressive climate change regulations through its participation in the Paris Agreement process? If the Obama administration lacked the authority to do so, the Trump administration would simply return the U.S. to regular order by disentangling the U.S. from corrupt "globalist" influences from "the class of Davos."[8] If, on the other hand, the Obama administration had such authority, this would indicate a paradigm shift away from the classic, agreement-based paradigm of foreign affairs law.

This Article seeks to push the insights by scholars like Koh a step further and submits that a paradigm shift has in fact taken place.[9] Using the Paris Agreement as a case study, this Article shows that legally binding foreign policy commitments can constitutionally develop according to a new "Paris Paradigm." This Paris Paradigm explains that the executive has the power to make *unilateral* commitments in governance networks as well as the traditional power to enter into classical bilateral or multilateral agreements. The executive's power to make such unilateral commitments is circumscribed not by the classic foreign affairs powers, but it augments these with the domestic administrative powers Congress, in its wisdom, chose to delegate to the executive.

This paradigm shift must acknowledge the political implications of the change. It arms the executive with additional policy tools. These policy tools are by their very nature political. They are the more political as they operate in both directions—they permit the executive to make more commitments internationally. But domestically, they have repercussions for successor administrations seeking to undo earlier administrative rules that served as the baseline for international commitments. In Koh's term, undoing such rules will prove a stickier

6. Suzanne Goldenberg, *How U.S. Negotiators Made the Paris Climate Deal Republican Proof,* GUARDIAN (Dec. 14, 2015), http://grist.org/politics/how-u-s-negotiators-made-the-paris-climate-deal-republican-proof/.

7. Paris Agreement (Dec. 13, 2015), in UNFCCC, Rep. of the Conference of the Parties on its Twenty-First Session, Addendum, at 21, UN Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) [hereinafter Paris Agreement]; 82 Fed. Reg. 16,329 (Apr. 4, 2017) [hereinafter Clean Power Plan] (publication of notice of review by EPA to revise or repeal the Clean Power Plan); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (proposed Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60); Robinson Meyer, *Trump's EPA Repeals a Landmark Obama Climate Rule*, ATLANTIC (Oct. 9, 2017), https://www.theatlantic.com/science/archive/2017/10/the-trump-administration-repeals-obamas-central-climate-rule/542403/ (indicating the Trump administration's intent to leave the Paris Agreement).

8. Andrew Ross Sorkin, *What to Make of the 'Davos Class' in the Trump Era*, N.Y. TIMES (Jan. 16, 2017), https://www.nytimes.com/2017/01/16/business/dealbook/world-economic-forum-davos-trump.html.

9. *See* Daniel Bodansky & Peter Spiro, *Executive Agreements+*, 49 VAND. J. TRANSNAT'L L. 885 *passim* (2016) (discussing the procedural nature of the Paris Agreement); Koh, *Triptych*, *supra* note 1, at 352.

enterprise than undoing a purely domestic rule. But as this Article will show, this new policy tool does not create the risk of a free-for-all.

The Article tackles head-on the notion that such use of executive power is a usurpation and instead embeds the Paris Agreement in a broader conception of global governance networks.[10] Global governance networks form when domestic regulators engage with their foreign counterparts on a problem-by-problem basis to adopt common approaches to achieve shared policy goals.[11] These networks range from informal exchanges between regulators across national boundaries to full-blown international administrative structures created to facilitate global exchange and coordination.[12] Participation in these networks can give rise to mutual reliance interests that in turn become enforceable legal rights under the international law of unilateral acts or customary international law.[13]

Such networks function like signs in a residential neighborhood near a school zone, reminding parents to "drive like your children lived here." The person posting the sign hopes to cause rushing drivers to internalize the shared goal of child safety. Drivers then may slow to well *below* the ordinary speed limit (*e.g.*, ten to fifteen miles per hour, rather than the permissible twenty-five miles per hour).[14] If fully internalized, such self-policing would make driving *at* the speed limit unreasonable and potentially negligent without any change to the speed limit or law enforcement presence.[15]

Such networks do not easily allow for usurpation of domestic constitutional orders. The networks are premised upon the open exchange between regulators exercising their respective mandates in good faith. Or, to put the point the other way around, the purposeful unconstitutional participation in networks would

10. Anne Marie Slaughter, *The Paris Approach to Global Governance*, PROJECT SYNDICATE (Dec. 28, 2015), https://www.project-syndicate.org/commentary/paris-agreement-model-for-global-governance-by-anne-marie-slaughter-2015-12?barrier=accessreg.

11. *See* ANNE MARIE SLAUGHTER, A NEW WORLD ORDER 38 (2004) (discussing the formation of regulatory networks); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 194–207 (1996) (explaining how the transnational legal process functions) [hereinafter Koh, *TLP*]; *see also* Melissa A. Waters, *Normativity in the "New" Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts,* 32 YALE J. INT'L L. 455, 456 (2007) (noting the common points between these different schools). For the broader governance literature, see EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE *passim* (2014); SLAUGHTER, *supra* note 11, at 261 ("Global governance through government networks is good public policy for the world and good national foreign policy for the United States . . . ."); Harold Hongju Koh, *Why Transnational Law Matters*, 24 PA. ST. INT'L L. REV. 745, 751 (2006) (linking transnational legal process with global governance) [hereinafter Koh, *Transnational*]; Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1, 1 (2006) ("[M]uch of global governance can be understood as regulation and administration, and that we are witnessing the emergence of a 'global administrative space[.]'").

12. SLAUGHTER, *supra* note 11, at 63–64.

13. *See* Frédéric Gilles Sourgens, *Supernational Law*, 50 VAND. J. TRANSNAT'L L. 155, 184–95 (2017) (discussing the law of unilateral acts and its grounding in reliance).

14. Ariel Porat, *Expanding Liability for Negligence Per Se*, 44 WAKE FOREST L. REV. 979, 984 (2009) (discussing school zone speed limits).

15. *See* Joanne M. Dicus, *Accidents Involving Speed*, 11 MAAD MD-CLE 161 § 11.3 (2002) ("[A] motorist may be considered to be proceeding at an 'excessive' rate of speed even when he is travelling within the posted speed limit . . . .").

weaken the network; it would destabilize mutual reliance interests by casting doubt on the reasonableness of its participants.

To the contrary, the good faith participation in global governance networks permits administrative actors to achieve together what none could do alone: jointly govern the global commons. They introduce foreign perspectives into domestic processes. But these foreign perspectives are informed by genuinely shared problems and the good-faith belief of the regulator that a coordinated solution is genuinely in the domestic best interest. In the current political climate of "America first," the notion of a global commons and coordination is a certainly a politically divisive point.[16] And yet the stability of global governance networks tends to shore up constitutional orders against internal radical changes rather than to threaten the constitutional orders in their own right.

This Article makes the argument for this wide-ranging paradigm shift in six parts. Part II shows that the foreign affairs law discussion of the Paris Agreement still leaves a significant theoretical gap by continuing to focus on the Paris Agreement as an agreement rather than understanding it as a constitutive step toward forming, and participating in, a transnational climate network aimed at achieving substantive action against climate change. Part III argues that the President may in fact exercise delegated domestic powers to commit the U.S. in transnational networks to the extent that the domestic regulator acts within its sphere of authority, on the basis of a historical reconstruction of presidential powers to bind the U.S. by means of unilateral acts.

This conception of the foreign affairs power may appear to elevate form over substance and frustrate the exercise by the Senate of its oversight over foreign affairs.[17] Part IV will explain that Congress retains significant functional oversight over the formation of transnational networks, a functional oversight that is appropriate in light of the fundamental design differences between transnational networks and multilateral treaties.

The Paris Paradigm benefits from inherent design advantages of transnational networks over multilateral treaties. Congress has already authorized the executive to act by delegating regulatory powers so long as the executive imposes reasonable regulatory burdens to achieve permissible policy ends. As Part VII will conclude, transnational networks depend upon reliance to trigger legal obligations and thus allow the executive to use its regulatory authority to achieve coordinative efficiencies at no additional regulatory cost. This is meaningfully different from multilateral treaties, which suffer from significant design inefficiencies caused by the lack of effective international enforcement mechanisms for prospective treaty promises.[18] Transnational networks under the Paris Paradigm do the exact opposite: they effectively reduce the regulatory burden under existing statutory regimes shouldered by the U.S. economy by achieving part of

16. *See* Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L.J. 413, 467 (2017) [hereinafter Koh, *Trump Administration*].

17. U.S. CONST. art. II § 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur . . . .").

18. Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487, 505 (2006).

their policy ends through global contributions by foreign network participants. Transnational networks by design, therefore, stay within the lines of existing congressional authorization by reducing permissible regulatory burdens rather than impermissibly expanding them.

Part V applies this understanding to the Paris Agreement itself. The Paris Agreement can no longer be criticized as a "kitchen sink" justification of executive action to mask political expediency fails to see the Paris Agreement if it is viewed as a step toward coordinating climate regulation through a transnational climate network.[19] The authorization cited for the Paris Agreement therefore had to, and did, anticipate authorization for both steps—the (1) formation of a network through which (2) substantive commitments could be exchanged.[20]

Part VI then applies this understanding to the second part of the Paris Paradigm: the unilateral commitments by the U.S. pursuant to the Paris Agreement by reference to the Clean Power Plan. It establishes that the constitutionality of commitments made in transnational networks depends upon their reasonableness in the broader statutory context.[21]

Part VII concludes by explaining the constitutional mechanism for the stickiness of the Paris Paradigm. Once the executive has constitutionally bound the U.S. to an international commitment by means of a unilateral act, the underlying regulation upon which the international commitment was based can only be changed to the extent that the new regulation would still comply with the underlying international obligation. An international legal obligation affects permissible rulemaking because the authorizing statute for a repeal or chance of a rule presumptively must be interpreted so as to comply with the United States' international legal obligations.[22] The authorizing statute, therefore, presumptively cannot be used to undercut a current international law commitment.

II. THE PARIS AGREEMENT, TRANSNATIONAL NETWORKS, AND THE CONSTITUTION

This Part sets out the constitutional problem with U.S. Paris Agreement commitments. Section A provides an introduction to the Paris Agreement. Section B sets out the U.S. commitments made pursuant to the Paris Agreement. Section C then outlines the current foreign affairs literature on the Paris Agreement and argues that the literature misses the core challenge posed by the Paris Agreement. Section D shows that the constitutional problem of U.S. action pursuant to the Paris Agreement manifests itself when one approaches U.S. conduct

19. *See id*.

20. Justice Jackson's *Youngstown* concurrence anticipates this need for such complex justification when it pointed to implied Congressional authorization as equivalent to express authorization. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson J., concurring).

21. The Article here relies upon David Pozen's work on constitutional good faith. *See* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 920–29 (2016).

22. Lori F. Damrosch, *Medellin and Sanchez-Llamas: Treaties from John Jay to John Roberts*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 451, 458 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds. 2011).

as a unilateral commitment made in a transnational network to other network participants.

A. The Paris Agreement

The Paris Agreement is a multilateral treaty. It is part of a broader multilateral treaty framework on climate change. The United Nations Framework Convention on Climate Change ("UNFCCC") is the constitutive charter for this broader framework.[23] The UNFCCC was negotiated in 1992.[24] The U.S. became a member of the UNFCC on October 15, 1992.[25]

The core mechanism of the UNFCCC is known as the "COP," or Conference of the Parties.[26] The goal of the COP is to implement the goals of the UNFCCC through further coordination of national measures to mitigate climate change.[27] Prior to the Paris Agreement, the most important of the agreements negotiated in the context of a COP was the Kyoto Protocol of 1997.[28] The Kyoto Protocol sought to commit developed UNFCCC member states to specific greenhouse gas emission reduction efforts.[29] The Kyoto Protocol would make reduction targets binding as a matter of the Kyoto Protocol itself.[30] Although the Clinton administration sought to join the Kyoto Protocol, the U.S. Senate voted unanimously that it would reject any treaty that did not include reciprocal commitments by industrializing countries such as China to reduce their greenhouse gas emissions.[31] Following the United States' exit from the Kyoto framework, Kyoto members defected from their commitments in significant numbers.[32]

The Bush administration in the 2000s remained reasonably unenthusiastic for COP processes.[33] The COP process became reenergized with the election of

23. U.N. Framework Convention on Climate Change May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 165, 166, 170.

24. *See* Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451, 493–96 (1993) (discussing the reason for the choice of a framework convention as the design for the UNFCCC).

25. *Id.* at 454 n.7.

26. *See id.* at 533–34 (analyzing the COP mechanism).

27. *Id.*

28. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998) [hereinafter Kyoto Protocol]; *see also* Michael Wara, *Building an Effective Climate Regime While Avoiding Carbon and Energy Stalemate*, 41 COLUM. J. ENVTL. L. 313, 343 (2016) (using Kyoto as point of comparison for achievements at Paris).

29. Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 688 (1999).

30. *Id.*

31. Cass R. Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, ENVTL. L. INST. 10,566, 10,568 (2008). The Clinton administration signed the Kyoto Protocol but never submitted it for ratification to the Senate. *Id.* The Bush administration made clear that it, too, would not submit the Kyoto Protocol to the Senate. *Id*.

32. *Id.* at 10,567.

33. *See* Koh, *Trump Administration*, *supra* note 16, at 435 ("[T]he Obama Administration did not withdraw, as the George W. Bush Administration previously had from the 1997 Kyoto Protocol, but rather *engaged* repeatedly with countries around the world to frame the global deal, including at annual Conference of Parties (COP) meetings in Copenhagen, Cancun, Durban and Paris: with the G-20 . . . .").

Barak Obama.[34] A core promise of the Obama administration had been to re-engage in climate change negotiations.[35]

Despite a greater willingness to engage in climate change diplomacy, COP meetings under the Obama administration remained largely unsuccessful prior to the Paris Agreement.[36] Perhaps symptomatically, a 2009 COP that took place in Copenhagen was close to ending without any kind of agreement.[37] U.S. diplomacy was able to avoid such a symbolic failure—but only by making the end agreement purely political and aspirational.[38] One of the main issues plaguing negotiations at this stage was what level of commitment would be necessary to reach agreement with states deeply affected by rising sea levels.[39] These states demanded significantly more ambitious climate change mitigation efforts than appeared achievable.[40]

In light of this negotiation history leading into the Paris negotiations, the Paris Agreement is an improbable success. It includes the U.S.[41] It struck a compromise between states deeply affected by climate change and industrialized and industrializing nations.[42] The goal of the Paris Agreement is to limit temperature increases to "well-below" 2°C above pre-industrialized levels.[43] This formulation bridged the gap between the goal advocated by states deeply affected by climate change of setting a 1.5°C cap for temperature increases and the 2°C formula preferred by others.[44]

The core means by which Paris Agreement members would achieve this goal was through nationally determined commitments ("NDCs").[45] States circulated intended NDCs during the Paris Agreement negotiations.[46] The Paris Agreement foresees that the Paris Agreement member states would communicate

34. *Id.*

35. *Id.*

36. David Shukman, *Paris Climate Summit: Don't Mention Copenhagen*, BBC (Sept. 16, 2015), http://www.bbc.com/news/science-environment-34274461.

37. Richard Black, *Why Did Copenhagen Fail to Deliver a Climate Deal?*, BBC (Dec. 22, 2009), http://news.bbc.co.uk/2/hi/8426835.stm.

38. Harold H. Koh, *Twenty-First Century Law Making*, 101 GEO. L.J. 725, 740 (2013) [hereinafter Koh, *Twenty-First Century*].

39. John Vidal et al., *Low Targets, Goals Dropped: Copenhagen Ends in Failure*, GUARDIAN (Dec. 18, 2009), https://www.theguardian.com/environment/2009/dec/18/copenhagen-deal ("But it disappointed African and other vulnerable countries which had been holding out for deeper emission cuts to hold the global temperature rise to 1.5C this century.").

40. *Id.*

41. *Paris Agreement–Status of Ratification*, UNFCCC, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (last visited Sept. 2, 2019) [hereinafter *Paris Agreement – Status of Ratification*].

42. Fiona Harvey, *Paris Climate Change Agreement: The World's Greatest Diplomatic Success*, GUARDIAN (Dec. 14, 2015), https://www.theguardian.com/environment/2015/dec/13/paris-climate-deal-cop-diplomacy-developing-united-nations.

43. *Id.*

44. Vidal et al., *supra* note 39.

45. Daniel Bodansky, *The Paris Change Climate Agreement: A New Hope?*, 110 AM. J. INT'L L. 288, 289–90 (2016).

46. Kristina Daugirdas & Julian Mortensen, *United States Joins Consensus on Paris Climate Agreement*, 110 AM. J. INT'L L. 374, 375 (2016).

their NDCs to a depository, update them periodically, and set increasingly ambitious goals.[47] Centrally, however, the Paris Agreement—at the urging of the U.S. delegation—did not make NDCs binding.[48]

The Paris Agreement also provided for market and financing mechanisms to assist states to meet climate change mitigation goals.[49] These market and financing mechanisms create incentives for the development of carbon capture technology.[50] They also provided a way to permit states not otherwise financially capable to make commitments under the Paris Agreement to join the mitigation efforts.[51]

The Paris Agreement finally contains a robust procedural framework to prevent states from exiting early. The earliest possible date to deliver a notice terminating participation in the framework is three years after it becomes enforceable.[52] This notice date is in November 2019.[53] Further, the termination notice only takes effect one year after this earliest possible notice date, permitting a state to exit the Paris Agreement framework no earlier than November 2020.[54]

The U.S. communicated its acceptance of the Paris Agreement on September 3, 2016 and became a member of the Paris Agreement upon its entry into force on November 4, 2016.[55] The Obama administration did not submit the Paris Agreement for advice and consent of the Senate.[56]

B. The United States' Commitments Made Pursuant to the Paris Agreement

The U.S. submitted its NDC pursuant to the Paris Agreement on September 3, 2016.[57] The U.S. NDC set an "economy-wide target of reducing its greenhouse gas emissions by 26% [to] 28% below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%."[58] The American NDC set out how it proposed to meet these goals.[59] Specifically, it listed the Clean Power Plan as

47. Paris Agreement, *supra* note 7, at art. 4.

48. Koh, *Tryptich*, *supra* note 1, at 352.

49. Paris Agreement, *supra* note 7, at arts. 6, 9.

50. Bodansky, *A New Hope?*, *supra* note 45, at 307, 310–13.

51. *Id.*

52. Paris Agreement, *supra* note 7, at art. 28.

53. Frédéric Gilles Sourgens, *Climate Commons Law: The Transformative Force of the Paris Agreement*, 50 N.Y.U. J. INT'L L. & POL. 885, 949 (2018).

54. *Id.* at 895.

55. *Paris Agreement–Status of Ratification*, *supra* note 41.

56. Ron Allen, *Climate Change Deal: Obama Announces U.S. Joining Landmark Paris Accord*, NBC NEWS (Sept. 3, 2016, 5:00 AM), https://www.nbcnews.com/news/world/obama-u-s-joins-china-ratifying-paris-climate-accords-n642376.

57. *U.S. Nationally Determined Commitment*, UNFCCC (Sept. 3, 2016), https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf [hereinafter *U.S. NDC*].

58. *Id.* at 1.

59. *Id.* at 3–5.

one of the main policy initiatives that would permit the U.S. to meet its greenhouse gas emission reduction target.[60] It further listed proposed or existing regulations of car tailpipe emissions, methane emissions from oil and gas developments, and increased fuel efficiency standards.[61]

The Clean Power Plan is a rule promulgated by the Environmental Protection Agency ("EPA").[62] The EPA promulgated the Clean Power Plan citing statutory authority under the Clean Air Act.[63] The EPA relied upon precedent in *Massachusetts v. EPA* and *American Electrical Power Co. v. Connecticut* in which the Supreme Court interpreted the Clean Air Act as applying to greenhouse gases as pollutants.[64] The EPA, in response to this precedent, made the requisite findings under the Clean Air Act that greenhouse gases indeed pose a danger to health and welfare and set out to regulate their emission.[65] The EPA relied upon statutory authority in Section 111(b) of the Clean Air Act to regulate greenhouse gas emissions from new power plants.[66]

In addition, the EPA sought to regulate greenhouse gas emissions from existing power plants.[67] These existing power plants were statutorily exempted from new regulations under the Clean Air Act so long as the pollutants were already regulated under then-existing programs.[68] The EPA nevertheless relied upon Section 111(d) of the Clean Air Act to regulate greenhouse gas emissions, reasoning that greenhouse gases were new pollutants not covered by the Clean Air Act's exemptions.[69]

The Clean Power Plan did not directly regulate old power plants under Section 111(d) of the Clean Air Act.[70] Section 111(d) directs the EPA to determine the "best system of emission reduction."[71] The EPA determined that this best system was to replace old, high greenhouse-gas-emitting power plants with new

60. *Id.*

61. *Id.*

62. *See* Clean Power Plan, *supra* note 7; Tomas Carbonell, *EPA's Proposed Clean Power Plan: Protecting Climate and Public Health by Reducing Carbon Pollution from the U.S. Power Sector*, 33 YALE L. & POL'Y REV. 403, 405 (2015) (discussing the rulemaking dynamics behind the Clean Power Plan); Jody Freeman, *The Uncomfortable Convergence of Energy and Environmental Law*, 41 HARV. ENVTL. L. REV. 339, 405–16 (2017) (outlining the statutory basis for the Clean Power Plan); Hari Osofsky & Jacqueline Peel, *Energy Partisanship*, 65 EMORY L.J. 695, 773–74 (2016) (discussing the rulemaking dynamics behind the Clean Power Plan).

63. Freeman, *supra* note 62, at 405–07; Osofsky & Peel, *supra* note 62, at 773.

64. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 416 (2011); Massachusetts v. EPA, 549 U.S. 497, 528 (2007); Carbonell, *supra* note 62, at 405–06; Freeman, *supra* note 62, at 406.

65. Carbonell, *supra* note 62, at 406; Freeman, *supra* note 62, at 406.

66. Carbonell, *supra* note 62, at 408–12; Freeman, *supra* note 62, at 406–07; Osofsky & Peel, *supra* note 62, at 773–77.

67. Freeman, *supra* note 62, at 407; Osofsky & Peel, *supra* note 62, at 773–74.

68. Freeman, *supra* note 62, at 407; Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 698 (2017) (discussing the grandfathered status of existing plants under the CAA).

69. Carbonell, *supra* note 62, at 407 (discussing the statutory background to 111(d) regulation); Freeman, *supra* note 62, at 407; Nathan Richardson, *Trading Unmoored: The Uncertain Legal Foundations for Emissions Trading Under §111 of the Clean Air Act*, 120 PA. ST. L. REV. 181, 202 (2015).

70. Carbonell, *supra* note 62, at 409; Freeman, *supra* note 62, at 407.

71. Freeman, *supra* note 62, at 407; *see also* Alice Kaswan, *Controlling Power Plants: The Co-Pollutant Implications of EPA's Clean Air Act §111(D) Options for Greenhouse Gases*, 32 VA. ENVTL. L.J. 173 *passim* (2014) (discussing the policy implications of EPA action).

power plants covered by the stringent greenhouse gas emissions targets promulgated under Section 111(b) of the Clean Air Act.[72] The EPA therefore used its authority under Section 111(a) of the Clean Air Act to establish guidelines for states to implement this "best system of emission reduction," *i.e.*, to oversee a substitution of energy generators in their respective jurisdictions.[73]

The Clean Power Plan thus would make significant changes to electricity generation in the U.S.[74] States would be unable to comply with the emission reduction targets if they failed to shut down older fossil-fuel power plants.[75] It would particularly have caused the closure of coal-fired power plants and older gas-fired power plants that did not benefit from current generation carbon capture technology.[76] Commentators such as Jody Freeman have noted that the Clean Power Plan was unique in that it did not permit current producers to retrofit their plants with smokestack or other technology so as to comply with new regulatory mandates.[77]

The Clean Power Plan drew significant opposition from the moment of its proposal.[78] Challenges to the Clean Power Plan asserted that the EPA lacked regulatory authority over electricity generation and that this regulatory authority rested with the Federal Energy Regulatory Commission.[79] Challenges further asserted that the exemption of existing power plants in the Clean Air Act did apply to greenhouse gas emissions from older generation coal- and gas-fired power plants contrary to the EPA's interpretation of the statute.[80] Challenges finally asserted that the EPA misconstrued the definition of "system" in Section 111(d).[81]

The Clean Power Plan was an important reason for the success of the Paris Agreement on the international stage. During the negotiations of the Paris Agreement, parties exchanged their intended NDCs.[82] Aware of distrust of real U.S. commitments to climate change, the United States aggressively advertised the Clean Power Plan as part of its intended NDCs.[83] The U.S. further posted its intended NDC early in order to encourage matching commitments by other states.[84] Most importantly, as communicated in a White House statement, it was successful in achieving meaningful Chinese commitments by its communication

72. Freeman, *supra* note 62, at 407–08; Osofsky & Peel, *supra* note 62, at 773.

73. Freeman, *supra* note 62, at 408; Daniel Selmi, *Federal Implementation Plans and the Path to Clean Power*, 28 GEO. ENVTL. L. REV. 637, 643–44 (2016).

74. Freeman, *supra* note 62, at 407.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 410; Osofsky & Peel, *supra* note 62, at 774–77.

79. Freeman, *supra* note 62, at 410–11.

80. *Id.* at 407.

81. *Id*. at 413.

82. Osofsky & Peel, *supra* note 62, at 718–19.

83. Matthew J. Kotchen, *A View from the United States*, *in* TOWARDS A WORKABLE AND EFFECTIVE CLIMATE REGIME 143, 147 (Barrett et al. eds., 2015).

84. *Id.*

of the intended American NDC (and the Clean Power Plan).[85] The United States' NDC commitment did not waiver, even as the Clean Power Plan came under increasing challenge in the U.S. domestically with Secretary of State Kerry stating that it was "final" for purposes of Paris negotiations.[86]

C. The Paris Gap in the Current Foreign Affairs Law Literature

The current foreign affairs law literature focuses on the constitutionality of the Obama administration's conclusion of the Paris Agreement.[87] The debate particularly concerns whether the administration needed to submit the Paris Agreement to the Senate for its advice and consent.[88] Politically, such a requirement would have made all but certain that the Senate either would have voted down the treaty or simply never taken it up for a vote.[89]

The foreign affairs literature sets out two complementary paths to justify the path taken by the Obama administration. The first of these paths looks to the law governing executive agreements.[90] Professors Spiro and Bodansky, and to a lesser extent Professor Goldsmith, are the main champions of this path.[91]

Executive agreements are international agreements concluded as part of the President's foreign affairs powers.[92] Executive agreements tend not to impose binding, substantive, prospective obligations on the U.S.; rather, they tend to set out a *modus vivendi*, a procedure for the conduct of foreign affairs, or a settlement of existing claims by the U.S. government.[93]

85. Joint Statement-U.S.-China Joint Announcement on Climate Change, 2014 DAILY COMP. PRES. DOC. 852 (Nov. 12, 2014).

86. Press Release, John Kerry, U.S. Sec'y of State, Remarks Regarding the Clean Power Plan (Aug. 3, 2015), https://2009-2017.state.gov/secretary/remarks/2015/08/245629.htm.

87. *See generally* Bodansky, *supra* note 24 (discussing the Paris Agreement under U.S. foreign relations law); Bodansky & Spiro, *supra* note 9 (same); Bradley & Goldsmith, *supra* note 4 (same); *see also* Bryan H. Druzin, *The Parched Earth of Cooperation: How to Solve the Tragedy of the Commons in International Environmental Governance*, 27 DUKE J. COMP. & INT'L L. 73 *passim* (2016) (discussing the Paris Agreement from the perspective of the tragedy of the commons); Koh*, supra* note 1, at 352, 362–65 (discussing the Paris Agreement from the perspective of U.S. foreign relations law); Scott J. Shackelford, *On Climate Change and Cyber Attacks: Leveraging Policycentric Governance to Mitigate Global Collective Action Problems*, 18 VAND. J. ENT. & TECH. L. 653, 677–79 (2016) (discussing the governance benefits derived from the structure of the Paris Agreement); Abbey Stemler et al., *Paris, Panels, and Protectionism: Matching U.S. Rhetoric with Reality to Save the Planet*, 19 VAND. J. ENT. & TECH. L. 545 *passim* (2017) (providing a U.S.-based analysis of the Paris Agreement).

88. *See* sources cited *infra* note 195.

89. Suzanne Goldenberg, *How U.S. Negotiators Ensured Landmark Paris Climate Deal Was Republican-Proof*, GUARDIAN (Dec. 13, 2015 10:42 AM), https://www.theguardian.com/us-news/2015/dec/13/climate-change-paris-deal-cop21-obama-administration-congress-republicans-environment.

90. Bodansky, *supra* note 24, *passim*; Bodansky & Spiro, *supra* note 9, *passim*.

91. *See generally* Bodansky, *supra* note 24; Bodansky & Spiro, *supra* note 9, *passim*; *see also* Goldsmith, *supra* note 2, at 466–67.

92. *See* Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1581–84 (2007) (discussing sole executive agreements); Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1289–1301 (2008) (outlining the precedent for growing *ex ante* congressional authorization to enter into executive agreements).

93. *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 819–20 (1995) (discussing the limited temporal scope of sole executive agreements). *But see* Peter J. Spiro, *Treaties,*

The executive agreement approach to the Paris Agreement submits that the Paris Agreement fits the mold of an executive agreement for two reasons: (1) it is procedural in nature and (2) it does not impose any substantive obligations to comply with NDCs.[94] Thus, Spiro and Bodansky submit, the Trump administration (or any other administration) remains essentially free to make its own substantive foreign policy unconstrained by the Paris Agreement so long as it complies with the procedural regime set up by the agreement.[95]

The second of these paths takes a more holistic approach.[96] Dean Koh in particular has argued that the focus on the law of executive agreements may look to an outmoded mechanism of how the U.S. conducts its foreign affairs.[97] In *Triptych's End*, he submits that:

> The upshot of this analysis may be summarized as follows: (1) if a particular agreement does *not* embody new, legally binding commitments, it will almost certainly be lawful even with little or no congressional approval; (2) but if a particular agreement *does* embody new, legally binding international commitments, the constitutionality of that arrangement will depend on where the subject matter of the agreement and the degree of congressional approval fall on the scattergraph above. The further an agreement falls into the bottom right quadrant—*e.g.*, a sole executive agreement attempting to mandate appropriations—the more dubious its constitutionality will be. In evaluating the extent of congressional approval for an agreement of this type, one should look to factors similar to those applied in *Dames & Moore*: general preauthorization, consistent executive practice, and legal landscape. Instead of the two-dimensional triptych, this approach offers a more realistic, issue-specific, and agreement-specific way to reflect how political approval for Executive Branch international lawmaking actually works.[98]

Koh then applies his rubric to the Paris Agreement. He submits that the Paris Agreement is itself not a new policy initiative.[99] Rather, it provides a means to implement an existing treaty obligation of the U.S., the UNFCCC.[100] The Senate ratified the UNFCCC.[101] The Senate thus implicitly authorized the President to commit the U.S. to the implementation of the UNFCCC.[102] Again, central to the argument, the Paris Agreement provides for procedural steps to communicate information and to cooperate as part of a broader climate framework, and it does

Executive Agreements, and Constitutional Method, 79 TEX. L. REV. 961, 984–85 (2001) (critiquing Ackerman & Golove as overly restrictive regarding executive agreements).

94. Bodansky & Spiro, *supra* note 9, at 916–19; Goldsmith, *supra* note 2, at 465–67; *see also* Koh, *Triptych*, *supra* note 1, at 351–52 (critiquing the executive agreement view but noting that similar agreements have been accepted in the literature as constituting executive agreements).

95. Bodansky & Spiro, *supra* note 9, at 916–19.

96. Koh, *Triptych*, *supra* note 1, at 349.

97. *Id.*

98. *Id.*

99. *Id.* at 350.

100. *Id.*

101. *Id.*

102. *Id.*

not impose substantive obligations to act or abstain from climate change action.[103] The President thus had the power to enter into the Paris Agreement on his own authority as a matter of substance (rather than as a matter of the formalisms of executive agreements).[104]

The respective submissions of Spiro and Bodansky, as well as Koh, still do not fully theorize the most important part of what was achieved at Paris. President Obama announced that the Paris Agreement constituted a "turning point" in the fight against climate change.[105] As the tenor of his speech makes clear, he did not talk about the *procedural* provisions of the Paris Agreement discussed in the foreign affairs literature.[106] The point of the Paris Agreement was the *substantive* commitment of states like the U.S. to engage in paradigm-changing climate change mitigation policies.[107] The Obama administration thus spoke as if it really had substantively committed the U.S. to a path of climate change action consistent with the American NDC. The world, in turn, reacted to U.S. action in much the same way.[108] In other words, the legal analysis of Spiro and Bodansky, as well as Koh, remain focused on the procedural "agreement," *i.e.*, the Paris Agreement itself, when the world at large looked to the substantive commitments made in the (American) NDCs.[109]

The focus of the current foreign affairs literature on the Paris Agreement, in other words, does not fully address that the U.S.'s conduct created international legal obligations in a nonconventional way through the American NDC itself. International law recognizes unilateral commitments of states as binding to the extent that they create reasonable reliance interests in their intended audience.[110] The negotiation history of the Paris Agreement and the reception of the American NDC (as well as later pronouncements by the Trump administration seeking to contradict it) showcase both the intent of U.S. foreign policy to induce reliance and the actual reliance by states like China.[111] It is therefore an incomplete answer to submit that the U.S. failed to incur substantive international legal obligations "under" Article 4(4) of the Paris Agreement to defend that the President had the authority to sign it without Congressional approval; the point is that

103. *Id.* at 352.

104. *Id.*

105. Oliver Milman, *Paris Climate Deal a "Turning Point" in Global Warming Fight, Obama Says*, GUARDIAN (Oct. 5, 2016, 5:28 PM), https://www.theguardian.com/environment/2016/oct/05/obama-paris-climate-deal-ratification.

106. *See id.*

107. *Id.*

108. *See Live Blog: The World Awaits the Final Paris Agreement*, ECO-BUSINESS (Dec. 12, 2015), http://www.eco-business.com/news/live-blog-the-world-awaits-the-final-paris-agreement/ (quoting Pres. Francois Hollande) ("History is written by those who commit and not those who calculate. And today you committed, you did not engage in calculations.").

109. Bodansky & Spiro, *supra* note 9, at 916–19; Koh, *Triptych*, *supra* note 1, at 352–54.

110. Frédéric Gilles Sourgens, *Climate Commons Law: The Transformative Force of the Paris Agreement*, 50 N.Y.U. J. INT'L L. & POL. 885, 894 (2018).

111. *Id.* at 897, 897 n.50.

the U.S. had independently incurred such obligations pursuant to the Paris Agreement through submission of its NDC.[112]

The current literature is not without answer to this larger question of what happened to the American NDC commitments made pursuant to the Paris Agreement. Rather, Koh submits that substantive U.S. commitments and the fact of further diplomatic engagement in the Paris discourse create a prudential drag on defection from Paris.[113] In his words, the Paris Agreement proves "sticky."[114] Further, not only does the Paris Agreement prove sticky, but "bureaucratic stickiness and external litigation have slowed the pace of domestic dismantling of our Paris commitments" as well.[115]

This answer, however, is potentially troubling in its own right. It either risks treating the American NDC commitments as prudential ("bureaucratic stickiness")[116]—this characterization would miss the international legal consequence of the substantial reliance the U.S. sought to induce by making these commitments[117]—or it suggests that stickiness is more than prudential and assigns it legal force. But then how or why is the President authorized to make such commitments?

No matter the approach to U.S. commitments made pursuant to the Paris Agreement, the foreign affairs literature does not yet fully answer this question. Professors Bradley and Goldsmith appropriately query this gap in their article *Presidential Control over International Law*.[118] Thus, they correctly identify that the American NDC is a "political commitment" pursuant to the terms of the Paris Agreement itself. But as they also correctly note, "the Administration was nevertheless able to give this political commitment legal teeth under domestic law."[119] They further note that it is this combination of international and domestic mechanisms that creates a "core emissions-reduction pledge, which likely could not have been made binding" by any other means.[120] They astutely complain that the literature has provided no coherent account of how or why the President should have this power.[121] They conclude that the literature does not even provide a framework meaningfully to theorize the basis on which the executive may unilaterally appropriate increasing foreign affairs powers by utilizing regulatory tools to that effect.[122]

112. *Id.* at 897–98.
113. Koh, *Triptych*, *supra* note 1, at 339.
114. *Id.* at 364.
115. Koh, *Trump Administration*, *supra* note 16, at 437.
116. *Id.*
117. Sourgens, *Climate Commons Law*, *supra* note 110, at 898.
118. Bradley & Goldsmith, *supra* note 4, at 1241–44.
119. *Id.* at 1252.
120. *Id*.
121. *Id*. at 1259–63.
122. *See id.* at 1250 ("This 'kitchen sink' statement of legal authorities illustrates why it is so hard to categorize or even assess the legality of many non-treaty legally binding agreements, even in the rare case in which the bases for the agreements are made public.").

D. Re-Problematizing Paris Agreement Action as Participation in a Transnational Network

Transnational networks provide a more coherent account of U.S. action of entering into and acting pursuant to the Paris Agreement than accounts centered on executive agreements. These accounts build on existing efforts by Dean Koh and Professor Anne-Marie Slaughter to make sense of the Paris Agreement as a matter of international law.[123] They treat the Paris Agreement as a treaty constituting a transnational climate network.[124]

One of the main accounts of global governance focuses upon the creation and functioning of transnational networks among and between regulators.[125] Slaughter in particular has provided a helpful categorization of such transnational networks.[126] Slaughter places transnational networks on a spectrum from functioning entirely informally and ad hoc to formal international organizations coordinating these regulatory efforts.[127] On the informal end, networks form when regulators meet and discuss common problems and solutions they have attempted to implement.[128] These networks exchange know-how and can then develop into stable connections to improve the respective regulatory responses of the participants to their problems.[129] Eventually, and with the help of the respective departments of state or foreign affairs, these networks can be formalized through multilateral treaties that would set up standing bodies to manage the transnational regulatory engagement between state members.[130]

Transnational networks diverge from traditional forms of multilateral lawmaking. Traditionally, such multilateral lawmaking required states to convene diplomatic conferences.[131] These diplomatic conferences negotiated ex ante the prescriptions to be included in a multilateral treaty in a manner that resembles contractual bargaining.[132] At times, this bargaining might further be informed by the legal expertise of international scholars opining on the current state of customary international law in force at the time of diplomatic negotiations.[133] Once a diplomatic conference negotiated such a multilateral instrument to conclusion,

123. Koh, *Triptych*, *supra* note 1, at 350–54; Slaughter, *supra* note 10.

124. Slaughter, *supra* note 10.

125. *See* sources cited *supra* note 11.

126. SLAUGHTER, *supra* note 11, *passim*.

127. *Id*. at 48–49.

128. *Id.*

129. *Id.*

130. *Id.* at 63–64.

131. Timothy Meyer, *From Contract to Legislation: The Logic of Modern Lawmaking*, 14 CHI. J. INT'L L. 559, 568–69 (2014) (contrasting the traditional role of a diplomatic conference to bilateral prescriptive approaches).

132. *Id.* at 368.

133. *See* Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT'L L. 334, 352 (2013) ("The Diplomatic Conference rejected appeals from some governments to add economic and environmental crimes, preferring the list to include only crimes already found in other international instruments or clearly understood to be predicate acts of crimes against humanity under customary international law.").

the rules would then apply prospectively leaving only interpretive questions to be resolved during the implementation of the treaty.[134]

Transnational networks do not function on the basis of ex ante pre-commitment to negotiated norms typical of multilateral treaties. The goal of transnational networks is not the negotiation of a grand multilateral bargain. Rather, it is to discuss and coordinate solutions to shared problems.[135] The good faith discourse between network participants assumes that network participants accept that they share a common problem.[136] Network participants then assess the regulatory experience of their peers and engage in critical conversations about possible pathways to resolve their common problem.[137] In this process, they internalize the solutions adopted by others as their own and self-impose limitations upon their own choices.[138] This process of recognition, internalization, and implementation creates dynamic regulatory coordination between network participants ex post.[139]

The central feature of transnational networks is reliance.[140] Transnational network participants act in reliance upon the continued coordinative efforts by other participants.[141] Transnational networks assume that coordination creates shared benefits for all participants.[142] This shared benefit will only come about when all participants contribute honestly and reasonably. A failure by one participant to contribute will create a windfall for that member from the efforts of its peers. When this windfall imposes disproportionate burdens on the remaining participants, serious disincentives of further participation in the network arise.[143] In the worst case, networks will fall apart and the benefit of coordination will be lost.[144]

International law provides a legal backstop for reliance interests of states that can usefully be applied to transnational networks. The law of unilateral acts prevents a state from arbitrarily frustrating the reasonable reliance interests of third parties.[145] Where states have acted in a manner that invites reciprocal reliance by participation in a transnational network, the law of unilateral acts thus creates an orderly means to exit the network and maintain obligations in place

134. RICHARD K. GARDINER, TREATY INTERPRETATION 71 (2008).

135. SLAUGHTER, *supra* note 11, at 49.

136. *Id.* at 250.

137. *Id.*

138. Koh, *TLP*, *supra* note 11, at 194–206.

139. *Id.*

140. SLAUGHTER, *supra* note 11, at 49; Sourgens, *Climate Commons Law*, *supra* note 110, at 980; Sourgens, *supra* note 13, at 184–195.

141. SLAUGHTER, *supra* note 11, at 49.

142. *Id.*

143. Pierre-Hugues Verdier, *Transnational Regulatory Networks and their Limits*, 34 YALE J. INT'L L. 113, 125–26 (2009).

144. *See id*.

145. *See* Int'l Law Comm'n Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10, at 10 (2006); General Assembly, *Report of the International Law Commission*, U.N. Doc. A/61/10, princ. 10 (May 1, 2006) (discussing termination of unilateral acts).

for as long as reasonably necessary so as to prevent windfall wins and losses to network participants.[146]

The Paris Agreement and actions by states pursuant to it is a good example of a transnational network at work.[147] The Paris Agreement is the result of continued coordinated efforts of the UNFCCC member states to solve a common problem: climate change.[148] The Paris Agreement further creates new conduits for coordination and collaboration toward that end by means of the NDC process and the financing facilities and market mechanisms it sets up.[149] The Paris Agreement thus further formalizes the existing transnational network of climate change regulators first established through the UNFCCC.

The Paris Agreement, however, is revolutionary in one way: it supplements and potentially replaces the traditional COP diplomatic structure with a truly networked regulatory dialogue.[150] In addition to COP meetings, the centralized exchange of NDCs should over time provide a means for dynamic coordination of climate change efforts.[151] NDCs in other words will engender reliance and coordination of further, more ambitious NDCs, which in turn will benefit from shared knowledge how best to implement them.[152]

This understanding of the Paris Agreement places pride of place upon the NDCs—an aspect that remains essentially ignored by the current foreign affairs literature.[153] The Paris Agreement will only represent a turning point, to use President Obama's language, if NDCs in fact help propel climate change law from diplomatic negotiation to networked and joint problem solutions.[154] NDCs therefore must be sufficiently stable to permit reliance.[155] The law of unilateral acts already discussed above then turns NDCs that invited and reasonably induced reliance into binding commitments.[156] The U.S. commitment, consisting of the promise to pass and maintain in effect domestic regulation including the Clean

146. *Id.*

147. *See* Slaughter, *supra* note 10 (describing the Paris Agreement in these terms).

148. *Id.*

149. *Id.*

150. For a discussion of the COP structure of the UNFCCC, see Section II.A.

151. *See Implementing the Paris Agreement–Issues at Stake in View of the COP 22 Climate Change Conference in Markesh*, at 18 (2016), http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587319/IPOL_STU(2016)587319_EN.pdf [hereinafter *European Parliament Report*] ("These Parties played an important role in the preparation of the Paris Agreement, China and the United States *inter alia* through coordinated statements on their mitigation plans and the European Union e.g. by establishing a coalition of countries supporting a strong mechanism to increase ambition under the Paris Agreement").

152. *See id*.

153. *See* sources cited *infra* note 195.

154. Milman, *supra* note 105.

155. Sourgens, *supra* note 110, at 889. For a discussion of how the Katowice Climate Package implementing the Paris Agreement supports this development, see Frédéric G. Sourgens, *Paris Agreement Regained or Lost? Initial Thoughts*, EJILTALK! (Dec. 28, 2018), https://www.ejiltalk.org/paris-agreement-regained-or-lost-initial-thoughts/.

156. *Id.*

Power Plan, was made strategically so as to invite reliance.[157] It further demonstrably did induce reliance from states such as the People's Republic of China.[158] The participation of the People's Republic of China was instrumental to the success of the Paris Agreement.[159] From an international law perspective, it is therefore no longer freely revocable.[160]

In short, the Paris Agreement showcases how domestic regulatory responses (the Clean Power Plan) to a shared problem (climate change) create international legal obligation through coordination with other domestic regulators. Foreign affairs and domestic regulation are no longer distinct. Domestic regulation prescribed because of international coordination and foreign affairs efforts become commitments because of domestic regulation.[161] The foreign affairs literature so far has not fully theorized the constitutional consequences of the transnational network literature.[162] It thus invites precisely the challenge posed by Bradley and Goldsmith: assuming that transnational networks accurately describe the conduct of U.S. foreign affairs, how could it at all be legitimate without Congressional participation?[163]

E. Conclusion

Understanding the actions of the U.S. in bringing about the Paris Agreement, and pursuant to the Paris Agreement through the lens of transnational networks, has shown that existing foreign affairs literature pays too little attention to the role played by domestic regulations in foreign affairs. This understanding raises important constitutional questions in its wake: does the President have the constitutional power (and right) to use delegated domestic powers ceded by statute to specific administrative agencies to extend his or her foreign affairs power? If so, what are the limits to this power and what oversight do the other branches of government play? The remainder of this Article will outline an answer to these questions and submit that participation in transnational networks is constitutionally permissible so long as the networked regulators stay within the confines of their respective statutory authority delegated by Congress.

157. Coral Davenport, *What is the Clean Power Plan, and How can Trump Repeal It?*, N.Y. TIMES (Oct. 10, 2017), https://www.nytimes.com/2017/10/10/climate/epa-clean-power-plan.html.

158. *See* Joint Statement, The White House, U.S.-China Joint Announcement on Climate Change (Nov. 11, 2014).

159. Ambrose Evans-Prichard, *COP-21 Climate Deal in Paris Spells End of the Fossil Era*, TELEGRAPH (Nov. 29, 2015, 2:46 PM), https://www.telegraph.co.uk/finance/economics/12021394/COP-21-climate-deal-in-Paris-spells-end-of-the-fossil-era.html.

160. *European Parliament Report*, *supra* note 151, at 18.

161. Bradley & Goldsmith, *supra* note 4, at 1253.

162. *See* sources cited *infra* note 195.

163. Bradley & Goldsmith, *supra* note 4, at 1254.

III. PRESIDENTIAL POWERS UNILATERALLY TO BIND THE U.S. IN TRANSNATIONAL NETWORKS

This Part theorizes the foundation of the Paris Paradigm—what is the source and scope of presidential powers to bind the U.S. unilaterally on the international plane without ex post Congressional approval? Section A outlines the classic power of the President to bind the U.S. unilaterally with regard to military and predominantly extraterritorial matters. Section B then explains the basis in *Youngstown* for the President to "tack" or combine domestic delegated powers with foreign affairs powers to bind the U.S. unilaterally to the extent that the President acts within the scope of delegated authority. Section C finally superimposes the results of Part III over the nomenclature of transnational networks and concludes provisionally that the President in fact may direct or acquiesce in the participation of U.S. regulators in transnational networks in this limited set of circumstances.

A. Military and Diplomatic Commitments and the Foreign Affairs Power

International law has recognized military and diplomatic commitments as a prime area for states to impose binding legal obligations on themselves by means of unilateral acts.[164] The most well-known instance of such a commitment arose in the context of repeated statements by French officials, including the President, promising an end to atmospheric nuclear weapons tests in the South Pacific.[165] The judgment of the International Court of Justice in the *Nuclear Tests* case brought by New Zealand and Australia to enjoin future atmospheric tests by France is the *locus classicus* for the doctrine of unilateral acts.[166] The International Court of Justice concluded that the French statements in question imposed an obligation upon France to halt its atmospheric tests.[167]

It is reasonably uncontroversial that the U.S. President has constitutional powers to make similar commitments. One of the earliest examples of this power is the 1793 proclamation of neutrality by the Washington administration.[168] The proclamation of neutrality removed the U.S. from an ongoing armed conflict between France and England.[169] Though principally a military decision not to engage in an armed conflict, the proclamation had important repercussions for U.S. nationals.[170] It prohibited them from participating in the conflict on either side and provided means to secure enforcement of neutrality in U.S. courts.[171] The

164. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 417–420 (8th ed. 2012).

165. Nuclear Tests Case, Austl. v. Fr., Judgment, 1974 I.C.J. Rep. 253 (Dec. 20); Nuclear Tests Case, N.Z. v. Fr., Judgment, 1974 I.C.J. Rep. 457 (Dec. 20).

166. Nuclear Tests Case, Austl. v. Fr., Judgment, 1974 I.C.J. Rep. 253, 256 (Dec. 20).

167. *Id.* at 270.

168. The Proclamation of Neutrality (Apr. 22, 1793), reprinted *in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 140 (Walter Lowrie et al. eds., 1833).

169. William R. Casto, *Foreign Affairs Crises and the Constitution's Case or Controversy Limitation: Notes from the Founding Era*, 46 AM. J. LEGAL HIST. 236, 239–240 (2004) (discussing the proclamation).

170. *Id*. at 246.

171. *Id.*

executive's historical competence over military affairs was further confirmed by President Monroe's decision to limit military forces on the Great Lakes by means of a sole executive agreement with Great Britain.[172]

In a more contemporary setting, the power of the Presidency to make some military commitments without Congressional approval remains a mainstay of foreign relations law.[173] The Presidential power to enter into arrangements to secure national security goals with foreign states short of entry into hostilities seems reasonably uncontroversial.[174] For example, the U.S. has entered into intelligence sharing arrangements with key allies during the Cold War governed ostensibly by secret agreements such as the "Five Eyes Agreement" and other even more covert and informal arrangements.[175]

These agreements are reasonably instructive for current purposes as they set up an early transnational network between intelligence officials.[176] This transnational network functioned through continuous cooperation between the officials involved following the loose procedures set out in agreements like the Five Eyes Agreement.[177] This cooperation was not premised upon an understanding that a state had an enforceable treaty right to compel intelligence sharing by one of the members of the network.[178] Rather, it was largely built upon reliance.[179] Importantly for current purposes, this network operates within the confines of executive powers.[180]

172. *See* Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CALIF. L. REV. 671, 738 (1998); *see also* David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1968 (2003) (discussing Watts v. United States).

173. Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1620 (2007) (discussing *The Schooner Exchange*).

174. *See* Paul, *supra* note 172, at 748 ("Prior to the Truman administration, most executive agreements concerned military or diplomatic affairs, which related to the President's power as commander-in-chief or as diplomatic representative."); Nigel Purvis, *The Case for Climate Protection Authority*, 49 VA. J. INT'L L. 1007, 1028 (2009); David A. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against al Qaeda*, 41 PEPP. L. REV. 685, 734 (2014) ("[S]ince World War II, as the United States has engaged in more frequent military operations—many of which have been of a short duration—presidents have unilaterally ended wars—often without any formal legal termination agreement.").

175. Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT'L L. 291, 347–48 (2015); Frédéric Gilles Sourgens, *The Privacy Principle*, 42 YALE J. INT'L L. 345, 362–64 (2017).

176. Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 MICH. J. INT'L L. 1071, 1093–1100 (2006) (discussing the "quid pro quo" reliance base of multilateral intelligence networks); Ashley Deeks, *Intelligence Communities, Peer Constraints, and the Law*, 7 HARV. NAT'L SEC. J. 1, 8 (2015) (discussing the same).

177. Deeks, *supra* note 176, at 8.

178. *Id.* at 10.

179. Chesterman, *supra* note 176, at 1129.

180. *See* Ashley S. Deeks, *A (Qualified) Defense of Secret Agreements*, 49 ARIZ. ST. L.J. 713, 727 (2017) ("The U.S. CIA reportedly has established connections with more than 400 foreign agencies, which almost certainly entails concluding secret arrangements with some of those agencies. Likewise, the CIA's Canadian equivalent has more than 250 intelligence-sharing arrangements with foreign intelligence entities. These arrangements may take the form of memoranda of understanding or even oral agreements between intelligence officials. Defense agencies also seem to conclude a wide variety of secret cooperative arrangements.").

That is not to say that these transnational intelligence networks are without any controversy.[181] The progeny of these intelligence-sharing arrangements have come under scrutiny in the context of signals of intelligence cooperation between the NSA and other foreign agencies.[182] This scrutiny has led to some congressional scrutiny of intelligence gathering techniques used by the U.S.[183] It has not, however, led to an outcry over executive overreach in committing to share intelligence with allied powers.[184] The executive, in other words, is understood to have unilateral powers to do so as a matter of foreign relations law until Congress affirmatively steps in to limit executive powers.[185]

In summary, the President has unilateral powers to bind the U.S. in the context of many military and purely diplomatic matters. Although Congress has an oversight role to play in those settings, Congress must act affirmatively to stay the President's hand. Absent such action, the President (or more precisely the executive) remains at liberty to set up transnational networks such as the intelligence networks set up by the Five Eyes Agreement and other more informal arrangements like it. This action will lead to the type of reliance-based commitment by the U.S. described in the context of the discussion of transnational networks above. It thus is the first building block of the Paris Paradigm.

B. International Commitments with Significant Domestic Impact and the Foreign Affairs Power

Most transnational networks have significant domestic impact. The international legal logic of such actions with a domestic impact remains the same in this context, as well. States can impose international legal obligations on themselves to behave in a certain manner domestically through unilateral acts.[186] A frequent example of such obligations concerns the treatment by the state of foreign companies.[187] The executive may grant such foreign companies rights beyond those codified as a matter of its domestic law, and in many instances more favorable than the terms domestic law would provide.[188] Similarly, transnational networks such as the Paris Agreement rely upon the law of unilateral acts to bind

181. Stephen I. Vladeck, *Big Data Before and After Snowden*, 7 J. NAT. SECURITY L. & POL'Y 333, 334 (2014).

182. *Id.*

183. *Id.* at 336.

184. *See* Charlie Savage, *Surveillance and Privacy Debate Reaches Pivotal Moment in Congress*, N.Y. TIMES (Jan. 10, 2018), https://www.nytimes.com/2018/01/10/us/politics/nsa-surveillance-privacy-section-702-amendment.html (discussing the reauthorization of NSA's own data collection authority).

185. Deeks, *supra* note 180, at 767.

186. Sourgens, *supra* note 110, at 918.

187. *Id.* at 941; David D. Caron, *The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 649, 649 (Mahnoush Arsanjani et al. eds., 2010); W. Michael Reisman & Mahnoush Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, *in* VÖLKERRECHT ALS WERTORDNUNG 409, 422 (Pierre-Marie Dupuy et al. eds., 2006).

188. *See supra* note 187 and accompanying text.

states to commitments by which they sought to induce reasonable reliance by third parties.[189]

The use of such unilateral acts creates significant issues as a matter of U.S. law. It is reasonably clear that, without more, the President does not have constitutional foreign affairs powers to promulgate such unilateral acts.[190] Such unilateral powers would severely undercut the role of Congress.[191] It would thus pose significant separation of powers issues.[192] It would further pose potential federalism issues.[193]

The delegation of regulatory powers by Congress to the executive, however, creates a different starting position for analysis. If Congress creates regulatory authority by statute, the executive has delegated authority to create rules following the normal administrative law process.[194] Current jurisprudence considers that the exercise of these powers no longer creates a separation of powers issue.[195]

This raises the question whether the President may combine the executive's domestic regulatory authority with its foreign affairs powers. If the executive has the delegated authority to make a certain rule with regard to the regulation of CO_2 emissions by power plants, may the President bind the U.S. to this rule internationally by virtue of the foreign affairs power?

The answer to this question begins with Justice Jackson's canonical concurrence in *Youngstown*.[196] This concurrence breaks the President's foreign affairs powers into three categories.[197] He observed: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[198] Second, the President acts in a "zone of twilight" if he or

189. Sourgens, *supra* note 110, at 915.

190. Purvis, *supra* note 174, at 1028.

191. The literature continues to query the separation of powers issue. David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 WASH. & LEE L. REV. 171, 205–06 (2015) (discussing the separations of powers problem in the exercise of foreign affairs powers through administrative law in the immigration context).

192. *Id.*

193. For a discussion of the federalism issues, see generally Frédéric Gilles Sourgens, *States of Resistance*, 14 DUKE J. CONST. L. & PUB. POL'Y 91 (2019).

194. Raymond T. Diamond & Frédéric G. Sourgens, *Administrative Law in the United States*, *in* 3 ANGLOAMERIKANISCHE RECHTSSPRACHE 61–62 (Franz J. Heidinger & Andrea Hubalek eds., 2016).

195. There remains significant scholarly debate whether this practice is consistent with constitutional conventions of separation of powers. Rubenstein, *supra* note 191, at 219–20; *see also* David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1169 (2012).

196. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 419 (2012) (noting "the canonical three-tiered framework for assessing presidential power that Justice Jackson articulated in his own Youngstown concurrence").

197. *Id.*

198. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

she acts in the face of Congressional silence.[199] Third, the President's authority is at its weakest when he or she acts in defiance of Congress.[200]

The strength of the President's ability to promulgate unilateral acts under his or her foreign affairs powers in reliance upon domestic regulatory authority hangs upon the meaning of a single word in the *Youngstown* triptych—"plus."[201] This "plus" has been discussed in the context of an express advance authorization by Congress to enter into executive agreements.[202] In that context, it is now reasonably uncontroversial that the President may indeed act with "fast-track" authorization in hand.[203] This precedent thus means that the President may add or "tack" powers—be it that the precedent so far has focused on adding ***expressly*** delegated powers to the foreign affairs power.

But *Youngstown*'s "plus" allows for more than express delegation.[204] It also allows for implied delegation.[205] This leaves the question how "implied" authorization from Congress works.[206] The literature on sole executive agreements instructively sets out that executive agreements without Congressional authorization fall into the *Youngstown* "zone of twilight" and thus rely upon tenuous authority.[207] But what if the President relies upon general delegated authority rather than delegated authority granted him or her by Congress for the purpose of securing an international right or incurring an international obligation?

Again, the discussion of executive agreements in the foreign affairs literature is instructive. Professor Hathaway in her discussion of congressional authorization for executive agreements includes agreements negotiated on the basis of broad statutory language that does not on its face contemplate international action by the executive.[208] Specifically, she included statutes such as the International Anti-Corruption and Good Governance Act of 2000, which provides that "the President is authorized to establish programs that combat corruption, improve transparency and accountability, and promote other forms of good governance in countries [eligible to receive aid]."[209]

Professors Bodansky and Spiro recently have critiqued inclusion of such statutes in the first *Youngstown* category.[210] They reasoned that "[t]o say that agreements negotiated on the basis of these very general statutory provisions

199. *Id.* at 637.

200. *Id.*

201. *Id.* at 635.

202. Hannah Chang, *International Executive Agreements on Climate Change*, 35 COLUM. J. ENVTL. L. 337, 350 (2010) ("Ex ante congressional-executive agreements fall under the first Youngstown category because they rest in part on authority derived from congressional authorization"); *see also* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1286–1307 (2008) (discussing the practice of congressional executive agreements).

203. Bodansky & Spiro, *supra* note 9, at 896.

204. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson J., concurring).

205. *Id.*

206. *Id.*

207. Chang, *supra* note 202, at 350.

208. Hathaway, *supra* note 202, at 1259.

209. 22 U.S.C. § 2152c(a)(1) (2018).

210. Bodansky & Spiro, *supra* note 9, at 907.

were authorized ex ante, and to lump them together with agreements that receive clear approval from Congress, is to stretch the notion of delegation beyond any reasonable construction."[211] Authorization, according to Bodansky and Spiro, means something "clear" on the face of the statute.[212]

Their critique on its face unduly limits Presidential foreign affairs powers under *Youngstown*. The brunt of their critique is directed at the absence of express statutory authorization.[213] This, however, is only half of the first *Youngstown* category.[214] The *Youngstown* category also includes "implied" authorizations.[215] Such implication on its face would be present even when authorization is not clear on its face as Bodansky and Spiro would permit.

But what does implied authorization look like? The question of such implied cooperation between Congress and the executive has most commonly arisen in a different context: foreign affairs federalism. In that context, Professors Michael Glennon and Robert Sloane note that "the president cannot unilaterally preempt state law. He or she must cooperate with Congress to achieve certain foreign policy goals."[216] This cooperation in the preemption context is often far from express.[217] Rather, Congress stays silent whether and how far it intends to give power to the president to preempt. The courts have held that Congress by implication has given the president such power if the executive is legitimately pursuing a foreign policy objective within the framework of Congressional delegation. Specifically, the Supreme Court has allowed such preemption when state regulation risks frustrating congressionally sanctioned federal policy initiatives on the international stage.[218] And it does so by reference to both the congressional mandate *and* the executive's broad foreign affairs powers.[219] The notion of congressional implication of foreign affairs powers therefore is not as strange as it might at first appear.[220]

But the federalism context further suggests that implication is not one-size-fits-all. Rather, the strength of connection between the delegated authority and the conduct of foreign affairs remains a central, factual question in each case. In some cases, the link is obvious on the face of the statute—it directly mentions a specific foreign state.[221] In other instances, the implication may be more tenuous, such as when Congress legislates with regard to matters that are by their very

211. *Id*. (footnote omitted).

212. *Id.*

213. *Id.*

214. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

215. *Id.*

216. MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY 135 (2016) (footnote omitted).

217. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 387–90 (2000); GLENNON & SLOANE, *supra* note 216, at 296–300.

218. *Crosby*, 530 U.S. at 381; GLENNON & SLOANE, *supra* note 216, at 296–300.

219. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 424 (2003); *Crosby*, 530 U.S. at 381–82.

220. A full discussion of the federalism implications is beyond the scope of this Article. For the full federalism argument, see generally Sourgens, *supra* note 193.

221. *Crosby*, 530 U.S. at 381.

nature international.[222] In those instances, an acknowledgement by Congress in other related statutes of this international nature of the governance problem logically strengthens the executive's hand.

In other words, the disagreement between Hathaway on the one hand and Spiro and Bodansky on the other hand on whether the International Anti-Corruption and Good Governance Act of 2000 authorizes the President to enter into executive agreements is not one that can be reduced to absolutes.[223] Rather than advancing such an absolute claim, Spiro and Bodansky thus ask whether the statutory framework sufficiently implies foreign coordination or cooperation.[224] This question can be reframed in the context of the foreign affairs federalism case law—is it reasonable (that is, legitimate) for the executive to implement the statutory mandate by making commitments to third states?[225] This question would require a detailed look at the relevant statutory context. On its face, however, the link to foreign aid programs in the statutory language in the 2000 act would tend to give Hathaway a head start in making a case for implied authorization.[226]

The same point translates with greater force to the making of unilateral foreign affairs commitments by the executive based upon administrative rules (as opposed to the entry into treaties or agreements). The executive would be authorized to promulgate the rule under ordinary administrative processes and it has broad concurrent authority to enter into foreign affairs communications.[227] The question is simply whether that authority extends to communications about the rule in question (not whether it has authority in the first place).

Given the broad constitutional authority to enter into foreign affairs communications, and the narrow statutory authority to promulgate the rule in question, the question is one of constitutional good faith.[228] The statutory framework must just broadly imply that such a tacking of regulatory and foreign affairs powers is a reasonable exercise of the underlying regulatory mandate.[229] This reasonableness in all likelihood would already form part of the underlying justification for the promulgation of the rule as a matter of purely domestic application.[230]

222. *See* GLENNON & SLOANE, *supra* note 216, at 162–83 (discussing dormant foreign commerce preemption).

223. Bodansky & Spiro, *supra* note 9, at 907; Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 159, 165 (2009).

224. Bodansky & Spiro, *supra* note 9, at 907.

225. *Crosby*, 530 U.S. at 381.

226. Hathaway, *supra* note 223, at 165.

227. *Id.* at 207.

228. David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 920, 922 (2016).

229. *Id*. at 922.

230. *See Fact Sheet: Overview of the Clean Power Plan: Cutting Carbon Pollution From Power Plants*, EPA, https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-overview-clean-power-plan.html (last visited Oct. 24, 2019) ("It also shows the world that the United States is committed to leading global efforts to address climate change.").

This use of concurrent authorities precisely is the *Youngstown* "plus": the executive combines powers from different sources—one implicitly granted by Congress, the other already inherent in the constitutional foreign affairs power.[231]

The President thus may add or tack powers delegated by Congress to his or her foreign affairs powers when the regulatory scheme in question is by its nature international in scope, even if this tacking is left to implication alone. These foreign affairs powers include the power to make diplomatic commitments both as a matter of constitutional practice from the earliest days of the republic and as matter of congressional approval.[232] As the executive branch has authorization from Congress to act under administrative law enabling statutes, this authorization implies the right to utilize the administrative process for the conduct of foreign affairs to coordinate regulatory responses and thus achieve permissible policy goals in a more efficient manner. This authorization is implied in the statutory language if the regulation itself meets the requirement of the administrative process and does not impermissibly subordinate the regulatory scheme to a foreign affairs mission.[233] Further, the statutory scheme must allow a reasonable implication that the executive would in fact coordinate with foreign actors to achieve regulatory ends.[234]

C. The Paris Paradigm: Constitutionality of Assuming Obligations in Transnational Networks

The implied power analysis in *Youngstown* thus contains the Paris Paradigm's key to why the coordination of regulatory action through transnational networks is indeed constitutional.[235] In the first place, there is no constitutional impediment to regulatory dialogue. More importantly, there is no constitutional prohibition on regulatory coordination so long as there is sufficient statutory authority to promulgate the rule without such coordination. The executive may then transform this rule into the predicate for a binding unilateral commitment to the extent that the statutory scheme broadly permits the executive to meet regulatory goals through international cooperation.

The discussion so far began from the unremarkable starting point that the executive broadly must follow statutory mandates in promulgating rules. Broadly, the executive further has broad powers to conduct foreign affairs. Put together, this means that there is no constitutional impediment to regulatory dialogue. Such an impediment could only exist as a matter of statute. And such a statutory prohibition would have to be reasonably clear given the broad foreign affairs latitude afforded the executive.

231. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson J., concurring); Hathaway, *supra* note 223, at 211, 213.

232. See *supra* Section III.A.

233. *See* Koh, *Tryptich*, *supra* note 1, at 349 (emphasizing the importance of context to understand implied foreign affairs powers).

234. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000) (discussing implied foreign affairs preemption).

235. *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson J., concurring).

This means that rudimentary transnational networks are constitutional. There is no constitutional impediment that would prevent regulators from exchanging with each other.

Importantly, regulators may coordinate with each other without further constitutional impediment. Regulators on their own are rarely able to incur international legal obligations on behalf of the state.[236] International law reserves this power to the President or the Secretary of State in ordinary circumstances.[237] The simple coordination of regulatory responses thus does not mature into an international obligation of its own. Rather, it is only when the regulatory response is combined with a foreign affairs component that an international obligation would arise—and reliance upon the commitment by fellow regulators that a state would indeed act consistently with its commitment becomes reasonable.

On the flipside, the result of the coordinated effort is subject to the ordinary administrative process. Coordination does not exempt regulators from that ordinary process. To the extent that coordination would suggest additional gains that should be taken into account when assessing the resulting rule, the regulator is likely to include it. But the rule stands and falls on its own merit in light of the underlying statutory mandate.

But pursuant to *Youngstown*, the statutory scheme may also allow the executive to use coordination to create reliance interests and leverage its actions with those of third-state regulators as a foreign policy tool by implication.[238] It does so if the achievement of policy through coordination with third states is a reasonable way to achieve the statutory mandate. Transnational networks then become a free-standing actor in global governance. They create mutual reliance interests. These mutual reliance interests in turn strengthen the international obligations of its participants.

This understanding of *Youngstown* thus can explain the difference between the normative force of different transnational networks depending on their varying degree of formality and involvement of high-ranking foreign service personnel.[239] Not all transnational networks are created equal. Most informal networks will not create international legal obligations because they do not rely upon a combination of regulatory and foreign affairs powers.[240] Once networks have become formalized, however, and responses are coordinated with the State Department or the Office of the President, contributions in transnational networks take on a different complexion and combine the outcome with the force of both combined executive powers, the original regulatory power and the foreign affairs power to bind the U.S. unilaterally.

This answer is intuitive. Transnational networks are a fact of global life.[241] Regulators talk to one another to learn from one another how best to achieve

236. *See* sources cited *supra* note 140.
237. *Id.*
238. SLAUGHTER, *supra* note 11, at 38.
239. *Id.*
240. *Id.*
241. *See id.*

policy goals they share in common.[242] To impose constitutional barriers upon their exchange would appear to be self-defeating as it would prevent regulators to engage in their appointed task to find the best solution for a policy problem they have been tasked to address. Similarly, when these solutions can only be achieved through formalized transnational networks, it would be strange indeed to straightjacket governmental responses to serious problems by requiring a strict separation between foreign affairs and all other walks of life.

If the President is authorized as a matter of foreign relations law to act unilaterally, it follows by necessary inference that the executive does not need to receive the advice and consent of the Senate to implement its policy goals. Nor does the executive need to return to Congress to pass implementing legislation. The delegation of regulatory authority by Congress provides the consent in question and already permits implementation of the policy in question by administrative law means. The use of combined executive powers certainly extends the powers of the presidency as Bradley and Goldsmith noted in their article.[243] But it does not do so unchecked. Rather, it simply takes the executive powers inherent in the administrative state global.

IV. TRANSNATIONAL NETWORKS AND THE TREATY CLAUSE

This Part will address the objection that the Paris Paradigm as theorized would undercut the role of the Senate in advising and consenting to the treaties entered into by the President.[244] Section A will outline the objection that the creation of transnational networks through unilateral acts by the President elevates form over substance and undercuts the role of the Senate in foreign relations. Section B will show how, pragmatically, the Senate and Congress continue to have a significant role in the formation of transnational networks by reference to Senate action regarding U.S. negotiations of the Kyoto Protocol. Section C then will conclude with a theoretical explanation of why transnational networks meaningfully differ from the treaty commitments and thus should be governed by a different legislative framework as a matter of first principles.

A. Separation of Powers Concerns and Transnational Networks

The discussion so far has focused on the positive question of what power the President can exercise unilaterally in foreign affairs. This discussion so far has not addressed the obvious limitation on presidential powers contained in the Constitution: the President must seek the advice and consent of the Senate to ratify U.S. treaty commitments.[245] The President's power to act unilaterally should be understood against this obvious limitation of presidential powers.

242. *Id.*
243. Bradley & Goldsmith, *supra* note 4, at 1204.
244. U.S. CONST. art. II, § 2.
245. *Id.*

Transnational governance networks pose a serious problem for the distinction between unilateral presidential foreign affairs action and international treaties requiring Senate approval.[246] Transnational networks differ substantively from other forms of unilateral presidential action. Presidential action in transnational networks is not ad hoc and limited to a specific narrow question or controversy.[247] Rather, the point of transnational networks is to set up comprehensive governance frameworks for the coordination of policy responses around the globe.[248]

The function of transnational governance networks appears to encroach on the domain traditionally reserved for multilateral treaties. As already discussed above in another context, the world community historically set up comprehensive normative frameworks using diplomatic conferences. For instance, at the end of the Second World War, the world community breathed life into international human rights law by concluding successive multilateral treaties.[249] These multilateral treaties provided the very broadly worded substantive human rights obligations by which states agreed to abide.[250]

These multilateral treaties also set up monitoring and enforcement structures alongside the broadly worded substantive human rights obligations contained in the multilateral treaties.[251] These structures included the United Nations Human Rights Commission and the United Nations Human Rights Committee, among others.[252] These bodies and others like it were further tasked to interpret the human rights treaties and define the scope of the human rights protected through their adoption.[253] These bodies were also tasked with ensuring state compliance.

Multilateral treaties like these human rights instruments are clearly "treaties" for the purpose of U.S. constitutional law. It would not have been possible for the President to commit the U.S. to the International Covenant on Civil and Political Rights ("ICCPR") without submitting that treaty to the Senate for advice and consent. It would thus appear that the President could not have bound the U.S. to the substantive commitments laid out in the ICCPR or enlisted the U.S. in the enforcement structures set out by the ICCPR and its sister treaties without legislative authorization.

Transnational networks on their face appear to function in much the same way as multilateral framework conventions. They set out broad policy goals that

246. This distinction is likely what is to blame for Bradley and Goldsmith's complaint that the Paris Agreement was justified on the basis of a "kitchen sink" approach of reasons by the Obama administration. Bradley & Goldsmith, *supra* note 4, at 1250.

247. *See generally* SLAUGHTER, *supra* note 11, at 36–65.

248. *Id.* at 40.

249. DOUGLAS M. JOHNSTON, THE HISTORICAL FOUNDATIONS OF WORLD ORDER: THE TOWER AND THE ARENA 754–760 (2008).

250. *Id.* at 756–57.

251. *Id.* at 759.

252. *Id.* at 758–59.

253. *Id.* at 757–58.

each member of the networks endeavors to secure.[254] In the context of the Paris Agreement, one such overarching policy goal is limiting global temperature increases to well below 2°C below pre-industrialized levels.[255] In the context of the ICCPR, one such overarching policy goal is to prevent states from depriving people in their territory of their right to privacy.[256] Both goals on their face appear equally vague and ambitious.

Transnational networks further use the network mechanisms of continued engagement and discussion to further interpret and define the goals set by the network.[257] The NDC process, for instance, is a means to engage globally with other regulators to define what actions can meaningfully be taken at a given time toward the goal of the Paris Agreement.[258] The network mechanism would then allow for means to measure compliance and secure cooperation toward the overall policy goal. The Bonn meeting on climate change, the next climate meeting following the Paris Agreement, in fact endeavored to agree to rules toward such a framework.[259] The meeting at Katowice then in fact achieved meaningful agreement on such a rulebook.[260] Again, the Paris Agreement looks to function very much like multilateral human rights instruments.

So far, the argument has been that the President has the authority to commit the U.S. to the Paris Agreement and the American NDC because of his or her foreign affairs powers in combination with other powers delegated to administrative agencies. The argument is that so long as the President binds the U.S. unilaterally and does not formally require a substantive return promise of some sort, the President is acting within his or her exclusive powers.[261] The President thus would not need Senate approval.

It is easy to understand how such an argument could run into the objection that the Paris Paradigm's conception of transnational networks constituted by unilateral action elevates form over substance.[262] If the President in the past needed to use multilateral treaties to achieve similarly broad policy goals, it would be apparent sophistry to submit that the same goals could be achieved by the President by simply treating U.S. commitments as unilateral—knowing full well that they will form part of a global governance network over time.

254. SLAUGHTER, *supra* note 11, at 261.

255. Paris Agreement, *supra* note 7, at art. 2.

256. Sourgens, *The Privacy Principle*, *supra* note 175, at 351–360.

257. SLAUGHTER, *supra* note 11, at 262–64.

258. Paris Agreement, *supra* note 7, at art. 4; Slaughter, *supra* note 10.

259. Jonathan Ellis, *The Bonn Climate Conference: All Our Coverage in One Place*, N.Y. TIMES (Nov. 13, 2017), https://www.nytimes.com/2017/11/13/climate/bonn-climate-change-conference.html.

260. Sourgens, *Paris Agreement Regained or Lost? Initial Thoughts*, *supra* note 155.

261. *See* Bradley & Goldsmith, *supra* note 4, at 1252 (discussing how the U.S. NDC as international political commitment as given teeth through domestic regulation); Sourgens, *supra* note 53, at 907–09 (discussing the U.S. NDC as an international legal obligation by means of unilateral act).

262. This seems to be the gist of the critique raised by Bradley and Goldsmith throughout their article. *See generally* Bradley & Goldsmith, *supra* note 4. It also underpins Galbraith's analysis of the fragility of process. Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675, 1742–44 (2017).

This substantive view would thus accuse the Paris Paradigm of putting angels on the pins of needles to achieve a result that common sense should dictate is impossible. The obligation is too far reaching and the goal too clearly to set up a broad multilateral framework to count as "unilateral" in anything but the formal legal sense of the word. The Senate therefore should be given a meaningful ability to play its role in advising the President in committing the U.S. to such multilateral frameworks.

The Paris Paradigm does not permit this, the objection would conclude, and it precisely deprives the Senate of its constitutional role in foreign affairs. The Senate does not have a meaningful opportunity to check the President. The Senate was intended to have such a role.[263] The Paris Paradigm is thus an exercise in sophistry rather than an explanation of the legitimate extension of executive powers in the administrative state to the global stage.

B. Pragmatic Rejoinder in Defense of the Paris Paradigm

As is frequently the case, the critique suffers from the vice it purports to identify. It uses a functional analysis of prescriptive global practices to conclude that transnational networks function like multilateral treaties. Even though the commitments may not formally be multilateral treaties, the argument runs, they use similar mechanisms to achieve the same ends. It then uses this functional analysis to make a formal argument: transnational networks must therefore receive the advice and consent of the Senate under the Treaty Clause of the Constitution.[264]

The argument is structurally problematic. It complains about the impermissible formalism of treating transnational networks as being anything other than treaties by looking at their effects. It thus submits that things should be judged by what they achieve in the world, not the formal mechanism by which that end is achieved. But the argument then uses the functional insight to make a formal argument—*i.e.*, the effect requires advice and consent of the Senate under the Treaty Clause.[265] The argument does not and cannot explain why advice and consent should not be viewed through the same functional lens applied to transnational networks. This problem is arguably fatal, as transnational networks *formally* sidestep the Treaty Clause as discussed above.[266] To draw an appropriate functional conclusion, the critique of transnational networks therefore would have to submit that the Senate does not have a functional role to play in transnational network-making.

263. U.S. CONST. art. 2, § 2, cl. 2.

264. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 537 (1988) (discussing the formalism/functionalism distinction). Simply put, functionalism is focused on outcome; formalism on the other hand is focused on rules as opposed to "the reasons for decision lying *behind* the rule." *Id.*

265. U.S. CONST. art. 2, § 2, cl. 2.

266. *See supra* Part IV.

1. The Senate's Kyoto Power to Check

The Kyoto Protocol provides a case study to test the functional ability of the Senate to act as a check on the executive in formulating transnational climate policy.[267] The Kyoto Protocol was the first significant attempt by the world community to negotiate toward binding greenhouse gas emission reduction targets.[268] The Kyoto Protocol was negotiated under the auspices of the U.N. climate framework treaty, the UNFCCC, the same framework treaty that led to the conclusion of the Paris Agreement.[269] The Clinton administration took part in Kyoto negotiations for the U.S. The goal of the Clinton administration was to secure a binding agreement to reduce greenhouse gas emissions.[270]

The efforts of the Clinton administration in negotiating toward the Kyoto Protocol were thwarted.[271] There was significant political headwind for any climate agreement that would have obligated the U.S. to reduce greenhouse gas emissions.[272] This political headwind reflected widespread public opposition to greenhouse gas emission reduction policies in the U.S.[273]

The ultimate reason that the Clinton administration proved unable to continue its negotiation stance at Kyoto was Senate action.[274] One of the key questions discussed during the Kyoto negotiations was whether industrializing economies would also be required to cut greenhouse gas emissions.[275] Such industrializing economies were unwilling to do so, pointing in part to the greenhouse gasses already emitted by Western industrialized economies for the last 100 years prior to the Kyoto negotiations.[276] The core commitment in Kyoto therefore would have to be borne by Western industrialized nations.

The U.S. Senate used this negotiation posture at Kyoto in order to pass a resolution. It resolved that the U.S. should not participate in any climate agreement that would obligate the U.S. to reduce greenhouse gas emissions but would not also obligate industrializing countries to do the same. The resolution passed unanimously by a vote of 95–0.[277] This resolution proved a poison pill for U.S. negotiating efforts as an agreement that would comply with Senate demands would never achieve buy-in from industrializing countries.[278]

267. *See generally* Kyoto Protocol, *supra* note 28.

268. For a discussion of the Kyoto Protocol, see generally Sunstein, *supra* note 31. *See also* Bodansky, *supra* note 45.

269. *See supra* notes 26–32 and accompanying text.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. David A. Wirth, *The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?*, 39 HARV. ENVT'L L. REV. 515, 522–23 (2015).

275. *See* Sunstein, *supra* note 31, at 10,577.

276. *Id.*

277. John K. Setear, *Learning to Live with Losing: International Environmental Law in the New Millennium*, 20 VA. ENVTL. L.J. 139, 145 (2001).

278. *Id.*

Instructively for the Paris Agreement, the Senate, in response to Kyoto negotiations, did not act directly under the Treaty Clause. The President had not yet submitted a treaty for the Senate's advice and consent. Rather, the Senate acted during negotiations in order to set out guidelines as to what policy the Senate would be willing to carry.[279] The unanimous vote by the Senate functionally deprived the Clinton administration of any and all negotiating room.[280] It thus deeply affected the course of U.S. and global climate policy.[281]

The Clinton administration's eventual signature of the Kyoto Protocol in defiance of the Senate resolution was purely symbolic.[282] The U.S. Senate resolution eroded reliance upon U.S. leadership and sent a signal that any action at Kyoto by the administration inconsistent with the Senate's policy mandate would face an immediate and successful legislative override.[283] No third state could therefore reasonably rely upon U.S. representations that it could promulgate regulations to meet Kyoto goals—these regulations would be immediately targeted by the legislative process.[284]

The context of the Kyoto Protocol negotiations shows that a functional perspective of U.S. foreign policy commitments to transnational networks precisely defies form. The Constitution would not formally permit the U.S. Senate to *negotiate* treaties.[285] This power is reserved to the executive.[286] Yet the U.S. Senate did set the parameters for the conduct of foreign affairs and possible agreements ahead of time.[287] It did so by using its deliberative powers early to indicate resolve against the foreign policy initiative of the President. It thus acted in a formally strange manner—but a manner that was fit to engage the new regulatory world forming around the U.S.

It is instructive that in the context of the Paris Agreement, Congress tried but failed to implement the same strategy. Congress has passed resolutions in opposition to the Clean Power Plan.[288] Members of Congress similarly have expressed their opposition to the Paris Agreement.[289] Unlike in the context of the Kyoto Protocol, however, the Clean Power Plan faced only "limited prospects for federal legislative overrule."[290] The substantive commitments made by the

279. *Id.*; Sunstein, *supra* note 31, at 10,568.

280. Sunstein, *supra* note 31, at 10,568.

281. Wirth, *supra* note 274, at 523; *see also supra* Part II.

282. Wirth, *supra* note 274, at 523.

283. *Id.* at 522–23.

284. Timothy Meyer puts the same point in slightly different terms. Timothy Meyer, *Power, Exit Costs, and Renegotiation in International Law*, 51 HARV. INT'L L.J. 379, 424 (2010) ("But the United States failed to ratify the Kyoto Protocol and thus ultimately failed to agree to binding targets. Moreover, in neither agreement did developing nations—the fastest-growing producers of greenhouse gas emissions and thus ascendant states in this Article's terminology—accept any binding obligations to reduce emissions, despite the United States' insistence that they do so."). Reliance interests could only have matured to the extent that developing nations would have reduced greenhouse gas emissions.

285. U.S. CONST. art. 2, § 2, cl. 2.

286. *Id.*

287. Meyer, *supra* note 284, at 424; Setear, *supra* note 277, at 145; Wirth, *supra* note 274, at 523.

288. Osofsky & Peel, *supra* note 62, at 774.

289. *Id.* at 780.

290. *Id.* at 774.

U.S. pursuant to the Paris Agreement therefore was safe from legislative interference—something that was not the case in the context of the Kyoto Protocol. Congress therefore has not acted to undermine the reliance interests of third states in the mechanisms upon which U.S. commitments in its NDC rested.

In short, the functional answer to the question of whether transnational networks violate the Treaty Clause is that they do not. The Senate is capable of acting with due speed and deliberation to thwart the formation of networks or to indicate that commitments made by the U.S. as part of these networks could not reasonably be expected to be put into practice.[291] This role is far more active than advice and consent to a concluded treaty as it permits the Senate to inform the U.S. stance in ongoing treaty negotiations.

But this does not mean that there is no functional change in the relationship between the executive and the legislature. The comparison of the Kyoto and Paris experiences shows that it will be necessary for the Senate to muster supermajorities in opposition to presidential foreign policy initiatives. This is in the inverse of the Treaty Clause, which requires the executive to muster a supermajority in the Senate in support of a treaty.[292] As discussed more fully below, however, this inversion of the ordinary treaty process is theoretically justifiable in the context of the modern-day administrative state created by Congress itself.

2. Congress vs. the Senate

A functional analysis of the power of Congress to check executive foreign policy overreaches further must zoom out from the confines of the technical argument premised in Article 2, Section 2 of the Constitution. The Paris Paradigm does not concern treaties or agreements that would facially be subject to Article 2, Section 2 of the Constitution. It concerns unilateral commitments made in transnational networks in which the federal executive participates due to congressional statutory delegation of administrative powers.[293] The Paris Paradigm submits that this statutory delegation can be combined with foreign affairs powers when Congress has given the executive an implied mandate to coordinate policy with foreign counterparts.

The logical check for such unilateral action lies not with the Senate but with Congress as a whole. As the ability of the executive to tack regulatory powers on to foreign affairs powers rests upon the delegation of those regulatory powers by statute in the first place, the statute ultimately controls the executive. Congress remains free to change the statute in question in response to agency action.[294] Such a change could immediately target the delegation in question by making express that the statutory framework did not implicitly permit the executive to

291. *See, e.g.*, Galbraith, *supra* note 262, at 1732–33.

292. U.S. CONST. art. 2, § 2, cl. 2.

293. Bradley & Goldsmith, *supra* note 4, at 1243.

294. *See* Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593, 620–21 (2008) ("Congress neither never nor always remains actively interested in monitoring established regulatory regimes.").

coordinate regulatory responses with foreign actors.[295] Such a change alternatively could change the specific statutory provisions pursuant to which the executive sought to make regulatory commitments.[296] Much like the Kyoto example above, Congress as a whole would likely signal its willingness to act contemporaneously with executive action, meaning that reliance interests by foreign partners in U.S. executive commitments would remain relatively weak until Congress had fully shown its hand. The Congressional check thus would meaningfully alter the ability of executive representations to transform into internationally binding commitments.[297]

Congress as a whole thus can always check Paris Paradigm foreign policy efforts even if the Senate cannot muster a supermajority to do so. The point, however, is that it requires Congress as a whole rather than just the Senate to do so.

The Paris Paradigm's lodging of principal control powers over executive foreign policy in Congress as a whole is broadly consistent with a broader development in U.S. foreign policy. As Professor Oona Hathaway has elegantly established, traditional treaties under Article 2, Section 2 of the Constitution have been displaced by executive agreements authorized by Congress as a whole over the course of recent constitutional history.[298] These executive agreements in Hathaway's terminology are congressional-executive agreements.[299] As Hathaway points out, congressional-executive agreements for which Congress gave its consent ex ante (as opposed to ex post) "make up the largest group of congressional-executive agreements."[300] The benefit for the executive of entering into an ex ante congressional-executive agreement is that such an agreement does not require Senate approval ex post.[301]

The Paris Paradigm applies a similar logic to unilateral action. Rather than requiring specific authorization for unilateral commitments ex ante, however, the Paris Paradigm rests on the implied authorization to fashion coordinated regulatory responses. This implied authorization has two parts—the regulatory response is authorized and the ability to coordinate responses effectively is implied in the statutory framework. The point of the Paris Paradigm is that Congress has implicitly authorized the unilateral commitment ex ante by ceding regulatory authority. As this authorization was implicit, however, Congress remains at liberty

295. *Id.*

296. *Id.*

297. *See* Meyer, *supra* note 284, at 424.

298. *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1287 (2008) ("The average number of treaties concluded each year has grown from slightly over one per year during the first fifty years of the republic to about twenty-five per year during the 1990s. Executive agreements, on the other hand have gone from one on average every two years during the first fifty years of the republic to well over three hundred per year.").

299. *Id.* at 1238.

300. *Id.* at 1256.

301. *Id.*

to clarify the intended scope of delegation as it pleases and thus check executive action pursuant to the Paris Paradigm as it sees fit.[302]

3. Democratic Accountability

One need not be a cynic to point out that the functional arguments in favor of the Paris Paradigm fail in one important respect. They free the hands of the executive where the Constitution sought to bind them. It thus creates the specter of exacerbating the democracy deficit of rule by executive action.[303] Not only that, it deprives the electorate of the most-ready means of having any ability to affect policy in this toxic environment: change the executive and thus bring in executive action that is more consistent with the wishes of the electorate.[304]

It would be foolish to submit that it would not be more desirable to submit far-reaching initiatives like the Paris Agreement to legislative debate. In fact, as recently as the Bush administration one could safely surmise that the Paris Agreement would have been submitted for advice and consent the Senate.[305] Had it been able to successfully pass through the Senate, it would thus have benefited from broader public support, and thus greater ultimate authority as a result.

But the political moment is precisely not one in which such legislative debate would have been fruitful. Political exigencies have pushed the legislative branch to a significant impasse. This impasse in fact has led to an unprecedented number of government shutdowns, near misses of government shutdowns, or near misses on a U.S. debt default.[306] At the same time, the regulatory problems facing the world community are not getting less urgent, less complex, or less in the general interest to resolve.

Given this environment, the argument for democratic accountability should lead us to ask some sharp questions. American civil society has come to rely upon watershed legislation like the Clean Air Act.[307] The speed of technological and industrial development and the depth of globalization reasonably suggest that this kind of watershed legislation cannot achieve its express goals without

302. As the basis of the authority is ordinary legislation, the vexing questions about the relationships between the President and Congress in the context of the termination or modification of congressional-executive agreements do not arise. For a discussion of congressional-executive agreements, see *id*. at 1328–38.

303. *See* Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1566 (2004) ("One may fairly assume that democratic accountability is at its nadir on matters involving foreign affairs . . . .").

304. *See id.* at 1597 ("The last-in-time rule does not, however, affect a nation's obligations on the international plane, where obligations are surprisingly sticky—if not precisely constitutional in tenure.").

305. Massachusetts v. EPA, 549 U.S. 497, 509 (2007) (stating that "[t]he Senate unanimously ratified" the UNFCCC signed by President George H.W. Bush).

306. *See* Sheryl Gay Stolberg & Nicholas Fandos, *As Gridlock Deepens in Congress, Only Gloom is Bipartisan*, N.Y. TIMES (Jan. 27, 2018), https://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html (outlining the state of gridlock in Congress prior to the 2018 midterm elections and the 2018–2019 government shutdown).

307. *See* Richard J. Lazarus, *Presidential Combat Against Climate Change*, 126 HARV. L. REV. F. 152, 153 (2013) ("The Clean Air Act was the first of a series of truly transformative environmental protection legislation that Congress passed with lopsided bipartisan majorities between 1970 and 1990, before partisan gridlock took over.").

regulatory action like the one contemplated by the Paris Paradigm.[308] It is thus a not so slow path to the effective repeal of such legislation without ever putting such a repeal to a vote. That result is similarly difficult to square with democratic accountability.

When legal arguments meet reality, it is therefore important to question all sides equally. The Paris Paradigm gives the first-mover advantage to the executive. It does so to permit the executive faithfully to execute existing statutory frameworks so as to achieve their ends in a globalized economy through the administrative process. It consequently puts the onus to block, and thus the power to check, in the hands of those currently least likely to act, Congress. It ultimately takes sides in the democratic accountability question: it prefers to see broad statutory frameworks imperfectly enforced and pruned through transnational legal processes rather than to break their original promise at the altar of general partisan gridlock. As the next Section will show, there are good theoretical reasons for doing so. But none are more important than the ultimate value question of whom democratic accountability should serve—those affected by regulation or those passing legislation.[309] For reasons beyond this Article, in this value question the author chooses the former.

C. A Theory of the Constitutionality of Transnational Networks

The critique that the unilateral formation of transnational networks by the executive runs afoul of the Treaty Clause in the Constitution requires an additional theoretical response. The pragmatic response set out in the prior section assists in understanding why Congress continues to have a role when the executive seeks to set up and act through transnational networks under the Paris Paradigm. It so far does not answer two important questions—first, why are transnational networks qualitatively different from multilateral treaties? Second, and relatedly, why should this qualitative difference between multilateral treaties and transnational networks result in a burden-shifting of sorts from the treaty regime requiring the President to secure the consent of the Senate by a supermajority to a transnational network regime in which Senate opposition to the formation of a transnational networks would need to muster a majority or supermajority in opposition to its formation to defeat it?

The theoretical answer to these questions must begin with a more searching analysis of the underlying difference between governance through multilateral treaties and governance through transnational networks. It is a trite observation that the world at large is not relying upon transnational networks as a U.S. Senate-avoidance mechanism.[310] Transnational networks have design advantages over multilateral treaties even if the U.S. President did not have to seek the advice

308. *See id.* at 154–55 (discussing the need for action in light of Congressional gridlock).

309. *See* GRALF PETER CALLIESS & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW 129 (2010) (discussing the importance of affectedness to governance).

310. That is not to say that the use of such networks for a Senate avoidance purpose does not receive significant press when it happens. Goldenberg, *supra* note 89.

and consent of a fractious Senate to commit the U.S. to these international instruments.[311] It is therefore important to understand how the design of transnational networks differs from the design of multilateral treaties to fully appreciate what constitutional analysis should be applied to the creation of such networks.

International treaties are governmental pre-commitment devices.[312] They commit the signatories of the treaty to engaging in some form of state conduct and abstaining from other forms of state conduct.[313] They do so on the basis of reciprocal promises—a promise to engage in or abstain from behavior in exchange for a promise by other participants in the treaty regime to abide by some form of enforcement mechanism with regard to their respective promises to do the same.[314] Treaties, in other words, are akin to old-fashioned bilateral contracts in which all parties exchange promises of future performance with each other.[315]

The design problem of international treaties arises at the enforcement stage. Intuitively, the stronger the enforcement mechanism backing a promise, the firmer the commitment expressed by the promisor.[316] Inversely, the weaker the enforcement mechanism, the greater the risk to the promisee of noncompliance.[317] This intuitive nature of promissory pre-commitment runs into design problems on the international stage. In the domestic setting in developed economies, bilateral contracts are reasonably enforceable due to the presence of courts of general jurisdiction backed by a reliable executive enforcing judicial orders.[318] In the international setting, there are no courts of general jurisdiction.[319] Rather, courts only entertain jurisdiction to the extent that states have given their advance consent to empower them to hear specific dispute.[320] Furthermore, there is no global executive enforcing the judicial orders of international courts.[321] By way

311. *See* SLAUGHTER, *supra* note 11, at 284 n.63.

312. Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707, 710–11, 721–26 (2006).

313. *Id*. at 724–25.

314. Craig Martin, *Taking War Seriously–A Model for Constitutional Constraints on the Use of Force in Compliance with International Law*, 76 BROOK. L. REV. 611, 675–76 (2011).

315. *See* Alex Glashausser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1267 (2005) (discussing the design differences between bilateral and multilateral treaties); *see also* Catharine Pierce Wells, *Langdell and the Invention of Legal Doctrine*, 58 BUFF. L. REV. 551, 566 (2010) (discussing the distinction between unilateral and bilateral contracts).

316. *See* E. Allan Farnsworth, *Promises and Paternalism*, 41 WM. & MARY L. REV. 385, 390 (2000) ("Even if he had made a legally binding promise, Peter would have had to discount the value of the gift to take into account the difficulty of enforcement should Jack renege.").

317. *Id.*

318. *See* Posner, *supra* note 18, at 498.

319. Frédéric G. Sourgens, *By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations*, 38 N.C. J. INT'L L. & COM. REG. 875, 876 (2013).

320. *See id.* at 879 (explaining how "[t]he ICJ thus imposes a balancing test [for determining state consent to jurisdiction], taking into consideration two factors that address both the legal and factual elements involved").

321. *See* Posner, *supra* note 18, at 505 ("Because no world government exists that could enforce international law, international law can be sustained only if states enforce it in a decentralized fashion. But decentralized enforcement is highly problematic and can be effective in only limited circumstances."); Amnon Rubinstein & Yaniv Roznai, *The Right to A Genuine Electoral Democracy*, 27 MINN. J. INT'L L. 143, 167–68 (2018) ("[O]ne of the biggest problems of international law is enforcement.").

of example, the judgments of the International Court of Justice, the principal judicial organ of the United Nations, must be enforced through the U.N. Security Council.[322] This enforcement mechanism is in theory at least more political than the enforcement of an order of attachment through the local sheriff's office.

The design problem of multilateral treaties therefore is that participants in these instruments should rationally discount the commitments made by their peers consistent with enforcement uncertainty.[323] By commercial analogy, parties frequently wish to sell on their rights under a commercial contract to avoid enforcement risk. For the sake of simplicity, assume a contract with a face value of $1 million. Further assume that the likelihood of enforcement of that promise against the obligor is 10%. The market value of the rights to be sold on—the price a willing buyer should pay to step into the shoes of the original contract creditor—is $100,000.[324]

This analogy can be applied for purposes of illustration to international treaties. Assume that a multilateral treaty calls for the reduction of greenhouse gas emissions by 10% in five years. Further assume that the likelihood that the treaty obligation could be enforced should a participant fail to meet these targets is 10%. Following the same logic, the "value" of the treaty commitment is a reduction of greenhouse gas emissions in the amount of 1% (10% of 10%), not the 10% originally promised.

This feature creates design incentives to over-promise to increase the "value" of treaty commitment. Should I look for a "value" of greenhouse gas emissions in the amount of 3% with the same enforcement risk, I should rationally negotiate for a treaty commitment of a 30% reduction.[325] Insistence on such over-promising to achieve value further incentivizes that states would only partially comply (everyone negotiating the treaty knows that the 30% number is not real and instead is inflated to secure actual compliance to a lesser amount—this means that the 30% is never taken seriously to begin with). This in turn creates international precedent that confirms—to some extent falsely—that there exists enforcement risk. (It creates risks for false positives, as compliance with 3% reduction targets should count as a success under the treaty regime as designed but will appear to outsiders as an abject failure in light of the stated goal of a 30% reduction.)

The upshot of the feature of treaty design is that treaties are inherently risky propositions. They require over-commitment to achieve discounted policy goals. This over-commitment could lead to enforcement in the amount of the over-committed promise. To illustrate, if there is a 30% change of $1 million judgment against me due to a novel merits theory, the value of the litigation is $300,000 to a person wishing to "buy" the litigation. If I lose the case, however, the value of

322. Sourgens, *supra* note 175, at 359.

323. Farnsworth, *supra* note 316, at 390.

324. Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 112–13 (1994) (discussing rational actor discounting analysis).

325. *Id.*

the loss to me is $1 million when realized.[326] Here, both litigants increase the face value of the claim in order to increase the respective value to them of the litigation before judgment. An adverse judgment, however, would make the entire sum enforceable against the loser, not the discounted sum.

Transnational networks reasonably avoid these design problems of multilateral treaties. Actors in transnational networks set joint targets. These targets then are constantly checked against actual unilateral state action in the network through the communication conduits the network creates.[327] The stronger the performance of a party toward a goal, the higher the likelihood that the party in fact intends to, and will, perform. This track record of unilateral compliance with goals gives rise to reasonable reliance interests in third parties to follow suit.[328] These reliance interests of network participants then mutually reinforce each other by creating a group dynamic toward compliance with the goal.[329] This group dynamic in turn is internalized by network participants as an independent participant value outside of the network. This again exponentially increases the drive toward compliance.[330]

In other words, it is no small wonder that the literature discussing transnational network literature is intimately connected with the voluntary compliance with international legal obligations in the absence of strong enforcement mechanisms.[331] Network participants do not look to external enforcement mechanisms to look to the likelihood of performance but to track records of voluntary compliance.

Transnational networks rely upon a mechanism that greatly resembles the use of credit scores by lenders.[332] Lenders assess the terms on which they should offer a car or house buyer a loan, not just against the basis whether they could successfully sue the borrower. Instead, they look to a score of the borrower's past credit history. The better the credit history, the more likely the financial institution will lend him or her money on favorable terms because the lender has greater trust in repayment. In other words, trust in repayment on the basis of past action increases the value of the loan to the lender.[333] Importantly, it does so even if every other factor is held constant—the borrower with the higher credit score has the same asset base, same income, offers the same collateral, and can be sued as

326. *See id.*

327. SLAUGHTER, *supra* note 11, at 284 n.64.

328. Sourgens, *supra* note 13, 184–88.

329. Koh, *TLP*, *supra* note 11, at 194–206.

330. *Id.*

331. *Id.*

332. Brent T. White, *Under Water and not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 1005–06 (2010) (discussing the design function of a bad credit score).

333. *Id.*

easily as the borrower with the lower credit score. The higher credit score translates into a lower discount, or risk, for the lender on the loan.[334] The reliance mechanism in the transnational networks follows the same logic.

The first key benefit of transnational networks as pre-commitment devices is that they do not present the same risk of over-commitment. Participants in the networks can credibly communicate with each other about their goals without need to inflate promises to match value. Instead, they can look to a real-time compliance record exchanged through constant and reasonably transparent communications between skilled regulators. This means that the reliance value of joint action in transnational networks is simply worth more than the discounted expectation value of advance promises in multilateral treaties.[335]

The second key benefit of transnational networks is that they allow early exit if the network were not to lead to reasonably fast internalized compliance.[336] The international legal basis for commitments in transnational networks, as discussed above, is reasonable reliance.[337] If such reasonable reliance materializes, each participant in the network reaps common benefits. Defection therefore should lead to a disgorgement of windfall to the participant. But the reverse is also true. Pre-commitment is softer until reliance materializes. If the network does not create the intended value, reliance interests creating the commitments between the parties to each other weaken.[338] This weakening dynamic would permit network participants to adapt their course without incurring any negative costs from network defection of adjustment.

It is now possible to apply this design difference to the second question—why should Congressional oversight be more onerous for Congress to perform in the context of transnational networks as compared to international treaties? The answer is that both are fundamentally different devices, imposing fundamentally different burdens and presenting radically different benefits. They therefore cannot meaningfully be treated as equivalents to each other.

Functionally, it makes sense to require Senate confirmation of pre-commitment through promise. Pre-commitment through promise is both more risky and less rewarding than the face value of the promise received in return. If both parties have the same enforcement risk, they must inflate their potential exposure to adjust the benefits conferred by the treaty to achieve the desired present-day

334. On the importance of trust and reputation in the climate commons context, see Carol M. Rose, *Commons, Cognition, and Climate Change*, 32 J. LAND USE & ENVTL L. 297, 318 (2017) (discussing the importance of esteem as a motivator to overcome collective action problems).

335. *See id.* at 326 ("A strategy of this kind can have an impact on incentives, while it can also have an impact on cognitive element of distrust. Suppose that Country A has an interest in trade (X), and Country A knows that Countries B–Z are also interested in trade, so that Country A can have some confidence that Countries B–Z will also agree to emission controls (Y). The strategy creates a version of common knowledge, but here it is common knowledge of something positive: that others are likely to make cooperative contributions to dealing with climate disruption.").

336. Sourgens, *supra* note 13, at 185.

337. *Id.*

338. *Id.*

value. To comply, a party would thus have to over-comply. Such a commitment, sensibly, requires political buy in.[339]

To apply this dynamic to an over-simplified model of climate action, the problem of the multilateral treaty approach is that the U.S. would have to over-commit on reduction of emissions to receive a significantly discounted value of reduction of emissions by third states. To incentivize performance by others, the U.S. would have to inflate its own emission reductions by a satisfactory factor to account for compliance risk. This, in essence, was the driver of policy objections to the Kyoto Protocol in the Senate: "we give disproportionately for this deal."[340]

This difference would create public law issues should it not be backed by Senate approval. If the President did not submit the rule for Senate approval, then he or she would have to attempt to act through administrative agencies to implement treaty commitments. Should the administrative agency then promulgate regulation consistent with U.S. commitments, the administrative agency would facially impose a disproportionate burden on the U.S. economy.

Rather than imposing what U.S. treaty negotiators believed to be a reasonable reduction target, the agency in this scenario would impose a higher reduction target. It would do so to satisfy the hopes of the treaty negotiators of receiving a reasonable (but lesser) net reduction in return from other states. This difference, however, would require that the regulation in question be permitted to rely upon the foreign policy rationale of discounted value in multilateral treaties to justify an increased regulatory burden in the U.S. This is not, however, what the laws in question intended to permit.[341] Facially, the agency would thus have to rely upon inconsistent definitions of reasonable.[342] It would impose a regulatory burden domestically as "reasonable" that treaty negotiators understand to be excessive.[343] And yet the regulator would not have made such a rule were it not for the urging of treaty negotiators. The foreign policy component in this context thus requires additional congressional action.

The situation is fundamentally different when the executive acts through transnational networks. The absence of a discount factor means that the executive can speak with one voice in its foreign affairs commitments and its domestic implementation of regulation. To the extent that it is authorized to act domestically, the executive further is achieving net benefits from network participation (*i.e.*, global reductions in greenhouse gas emissions it would not have been able reasonably to achieve on its own). Should Congress wish to stand in the way of the formation of such networks, it would essentially have to stand in the way of the efficient achievement of permissible policy targets the implementation of which it already delegated to the executive.

339. U.S. CONST. art. II, § 2.

340. *See* sources cited *supra* note 268.

341. Bradley & Goldsmith, *supra* note 4, at 1239–40.

342. Imagine the following hypothetical exchange; negotiator to administrator: "x% is reasonable but impose x% times 2 as 'reasonable' to secure global compliance at the x% rate."

343. Rubenstein, *supra* note 191, at 234–35 (discussing hard look judicial review after notice and comment).

The theoretical dynamic of how transnational networks and treaties differ in pre-committing the U.S. precisely explains why one (treaties) but not the other (transnational networks) requires Senate approval. It thus showcases that existing regulatory regimes in the U.S. are sufficiently robust to support a pragmatic and theoretically sound expansion of the administrative state to global problems.

V. CONGRESS' DELEGATION OF POWER TO ENTER INTO THE PARIS AGREEMENT

The Paris Agreement transforms existing transnational climate change networks. As discussed above, the goal of the Paris Agreement is to change the process pursuant to which climate change coordination occurs from a traditional diplomatic model to a fully-fledged transnational regulatory network. May the President act to commit the U.S. to participating in such network without further authorization from Congress?

The answer to this question has two components, one substantive and one formal. The substantive component must establish whether the President has the authority to commit the U.S. with regard to the subject matter of the Paris Agreement. Climate change—and the regulation of greenhouse gas emissions—is a matter that does not fall within the traditional national security or diplomatic categories.[344] It would further be a stretch of legal analysis to consider climate change as concerning principally the acquisition or loss of territory (although climate change implies it). The President therefore enters the Paris Agreement under the third heading—action with significant domestic implications.

The President therefore in the first place must look to a regulatory basis that would delegate powers to combat climate change to the executive. The memorandum to Congress outlining congressional authorization for the President's signature without advice and consent of the Senate does so. It submitted the following authorizations: the UNFCCC, the 1969 National Environmental Policy Act, and the 1987 Global Climate Protection Act in addition to his constitutional and statutory grant of foreign affairs powers outright.[345] The 1969 act directed all agencies to "where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment."[346] The 1987 act, on the other hand, "found (among other things) that the global nature of climate change required 'vigorous efforts to achieve international cooperation' that would be enhanced by 'United States leadership,' and stated that U.S. policy should seek to 'work toward multilateral agreements' in this area."[347]

344. *But see* Mark P. Nevitt, *The Commander in Chief's Authority to Combat Climate Change*, 37 CARDOZO L. REV. 437 *passim* (2015) (arguing that climate change falls under the President's national security powers).

345. Bradley & Goldsmith, *supra* note 4, at 1250.

346. *Id*. (quoting 42 U.S.C. § 4332(2)(F) (2018)).

347. *Id.* (quoting 15 U.S.C. § 2901 (as amended 1987)).

As Professors Bradley and Goldsmith submit, these invocations of executive authority by the Obama administration viewed on their own are problematic and on their face appear a haphazard attempt at justifying unilateral executive action after the fact.[348] They do not provide the kind of specific Congressional advance consent to conclude executive agreements found in other statutory provisions.[349] The 1987 act on its face appears to give authority only for the negotiation of "multilateral agreements."[350] It thus does not grant the executive the authority to *conclude* such agreements.[351] This authorization would therefore have to derive from the 1969 Act.[352] It facially does not appear to do so.

But the 1969 Act—just like the *Youngstown* formula—has to be read in its full regulatory context. It authorizes executive agencies to "lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation" to foreign affairs efforts.[353] This implies that the foreign affairs power may lean on administrative agencies for "appropriate support," *i.e.*, that foreign affairs in the environmental realm can be conducted by tacking EPA regulatory powers to the traditional foreign affairs powers.[354] This means that the President has the authority to enter into the Paris Agreement under the 1969 Act to the extent that the EPA has the authority independently to regulate greenhouse gas emissions and thus to "support" the President in the conclusion of the Paris Agreement.[355] The 1969 Act, in other words, authorizes a networked solution to the conduct of foreign affairs. This networked solution will of necessity involve multiple bases of overlapping statutory authority. This networked nature does not, however, undercut the authority of the President, as Bradley and Goldsmith suggest.[356] It rather strengthens it by lending multiple layers of cross-support to executive action.

This means that the Paris Agreement must look to an independent delegated authority that would permit the EPA to regulate greenhouse gas emissions. As further discussed in more detail in the next Section, the Clean Air Act empowers the EPA to regulate airborne pollutants.[357] The Clean Air Act further has been interpreted to treat CO_2 emissions as airborne pollutants.[358] The President therefore has the substantive authority to direct that the EPA implement policies to reduce CO_2 emissions.[359]

In light of this statutory web, it is permissible and rational for the President to look to a global response to climate change mitigation. The reduction of CO_2

348. *Id*. at 1251–52.

349. *See* Hathaway, *supra* note 202, at 155–67 (outlining the precedent for growing *ex ante* congressional authorization to enter into executive agreements).

350. Bradley & Goldsmith, *supra* note 4, at 1250.

351. *Id*.

352. *Id*.

353. 42 U.S.C. § 4332(2)(F) (2018).

354. *Id*.

355. *Id*.

356. Bradley & Goldsmith, *supra* note 4, at 1250.

357. Clean Air Act, 42 U.S.C. §§ 7401–7671q (2018).

358. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011); Massachusetts v. EPA, 549 U.S. 497 (2007).

359. *See* U.S. CONST. art. 2, § 2, cl. 2.

emissions by the U.S. alone is unlikely to yield efficient results.[360] The coordination of reduction in CO_2 and other greenhouse gas emissions is far more likely to bring about faster and more lasting effects than efforts undertaken by the U.S. alone.[361] It is therefore implicit in the premise that the executive is authorized to address climate change through the reduction of greenhouse gas emissions that the executive may look for global ways to leverage its own regulatory actions to achieve exponentially more impactful outcomes.[362] As a substantive matter, the President therefore is authorized by statute to create the kind of transnational network the Paris Agreement in fact set up.

This leaves the formal question whether the Obama administration imperfectly executed its power to create a transnational network when it entered into an agreement at Paris. The Paris Agreement is a treaty.[363] Treaties typically require submission to the Senate for its advice and consent.[364] No contortion of international law or U.S. law will turn the entry into a treaty by the U.S. into a unilateral act. The question thus is whether the Obama administration should have submitted the Paris Agreement to the Senate for advice and consent upon signature.

Here, the answer given by the foreign affairs literature is again instructive.[365] The substantive discussion has established that the President had the substantive authority to enter into the Paris Agreement to create a transnational climate network.[366] In this context, the formal question whether the Paris Agreement constitutes an executive agreement for purposes of U.S. law or otherwise is an implementation of existing treaties again makes sense.[367] It queries merely whether President Obama executed his authority in a formally appropriate manner—not whether he was authorized to make commitments with regard to the subject matter of the Paris Agreement.[368] The Paris Agreement is itself predominantly procedural in nature; it creates a transnational network rather than mandating its substantive prescriptive outcomes.[369] The Paris Agreement further continues on an existing conventional framework as to which the Senate already gave its advice and consent.[370] It is therefore more appropriate to treat the Paris Agreement as a formal analogue to the Five Eyes Agreement discussed above creating intelligence sharing networks than a multilateral treaty like the International Covenant on Civil and Political Rights.[371]

360. *Fact Sheet: The Need for Strong Global Action on Climate Change*, UNFCCC (Nov. 2010), https://unfccc.int/files/press/fact_sheets/application/pdf/fact_sheet_climate_deal.pdf.

361. *Id.*

362. Koh, *Triptych*, *supra* note 1, at 352.

363. Paris Agreement, *supra* note 7.

364. U.S. CONST. art. II, § 2.

365. *See* sources cited *supra* note 195.

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *See supra* Sections II, III.A.

VI. CONGRESS' DELEGATION OF POWER TO COMMIT TO THE AMERICAN NDC

This leaves the question whether the Obama administration also had the authority to make unilateral foreign affairs commitments pursuant to the Paris Agreement. Section A will address the power and pay particular attention to the importance of the Clean Power Plan to the U.S. NDC. Section B will then outline that current challenges to the Clean Power Plans facially create issues for the authority of the Obama administration to commit the U.S. to its NDC.[372] The Trump administration has since sought a revision or rescission of the rule.[373] This procedural posture creates significant complications for analyzing whether the Obama administration could rely upon its regulatory authority under the Clean Air Act to make internationally binding commitments in the American NDC. To sidestep confusion, this Part will proceed on the basis of two competing hypotheses. Section C will address the hypothetical that the EPA was empowered to promulgate the Clean Power Plan and will set out the consequences in that scenario. Section D will address the hypothetical that the EPA was not empowered to promulgate the Clean Power Plan. Section E concludes that under both hypotheses, it is likely that the Obama administration had authority to commit the U.S. to its NDC but notes that it is on firmer ground if the EPA in fact had the authority to promulgate the Clean Power Plan.

A. Authority for the American NDC

The fact that the President has the power to constitute a transnational network strongly suggests, but not necessarily implies, that the executive also must have the power to participate in the network. In the context of the Paris Agreement, the question thus is whether the Obama administration acted within its powers when it submitted an internationally binding NDC.[374] As discussed above, the Paris Agreement itself does not make NDCs binding.[375] Rather, the binding nature of NDCs is a consequence of the reasonable reliance interests induced by their submission.[376] Here, the U.S. did in fact induce reasonable reliance interests that it would maintain in place the regulations outlined in its NDC or replace them with other regulations that would have similar greenhouse gas emission mitigations.[377]

The American NDC sets out the following greenhouse gas mitigation goals: The NDC set an "economy-wide target of reducing its greenhouse gas emissions by 26% [to] 28% below its 2005 level in 2025 and to make best efforts to reduce

372. *See supra* Section II.B.

373. Frank Chang, *The Administrative Procedure Act's Stay Provision: Bypassing Scylla and Charybdis of Preliminary Injunctions*, 85 GEO. WASH. L. REV. 1529, 1535–36 (2017) (discussing the impact on litigation of the Trump administration's reversal of the Clean Power Plan and related regulations).

374. *See* Sourgens, *supra* note 53, at 889–909 (submitting that the U.S. NDC is binding as a matter of international law).

375. *Id.*

376. *Id.* at 913–15.

377. *Id.* at 934–35.

its emissions by 28%."[378] The NDC further spells out on what basis it intends to meet these greenhouse gas mitigation goals and refers in particular to the Clean Power Plan.[379]

The starting point for analyzing whether the Obama administration could bind the U.S. to its NDC on the international plane again begins with the tacking of executive powers in the conduct of foreign affairs by the President. Per Justice Jackson's canonical *Youngstown* concurrence, the President has the power to bind the U.S. unilaterally to the extent that Congress has delegated powers to the executive to regulate.[380] The relevant grant of authority for the U.S. NDC to reduce greenhouse gas emissions is the Clean Air Act.[381] As discussed in Section II.B, the Supreme Court interpreted the Clean Air Act as applying to greenhouse gas emissions.[382] This in turn means that the Clean Air Act is a means by which the executive can "lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation" to reduce greenhouse gas emissions under the 1969 Act.[383]

The EPA therefore reasonably had a mandate to act so as to minimize the environmental hazard from climate change.[384] This mandate would allow for more than setting up a transnational regulatory network like the Paris Agreement.[385] It permitted concerted global action to mitigate greenhouse gas emissions.[386] Action as part of U.S. NDCs that would accomplish this goal would therefore presumptively fall within the scope of the *Youngstown* "plus": foreign affairs powers plus regulatory authority under the Clean Air Act.[387]

The EPA attempted to use its authority in promulgating the Clean Power Plan discussed in detail in Section II.B. As also discussed in Section II.B, the EPA's authority to promulgate the Clean Power Plan was challenged immediately in federal court. This challenge raises important questions for the authority of the Obama administration to rely upon the Clean Power Plan as a core piece of its NDC. The remainder of this Part therefore addresses this question.

B. The Current Procedural Posture Regarding the Clean Power Plan

The procedural posture of challenges to the Clean Power Plan significantly complicates the analysis whether the Obama administration had sufficient authority to promulgate the NDC. As already outlined in Section II.B, states

378. *U.S. NDC*, *supra* note 57, at 1.

379. *Id.* at 4–5.

380. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

381. *See supra* Section II.B.

382. *See supra* Section II.B. *See generally* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011); Massachusetts v. EPA, 549 U.S. 497 (2007).

383. 42 U.S.C. § 4332(2)(F) (2018).

384. *Id.*

385. *Id*.

386. *Id*.

387. *See supra* Section II.C.

promptly challenged the Clean Power Plan in federal court.[388] These challenges secured a stay of the rule prior to a court review on the merits of the rule.[389]

The election of Donald Trump dramatically changed the course of U.S. energy policy. The Trump administration instructed agencies by executive order to review regulatory burdens.[390] The EPA responded to this instruction on October 16, 2017, with a notice of proposed rulemaking to repeal the Clean Power Plan.[391] At the same time, the Trump administration halted litigation challenging the Clean Power Plan pending the new proposed rulemaking process.[392]

As Professor Beermann insightfully points out, the current procedural posture creates significant issues for the repeal efforts.[393] Deregulation typically falls under a "hard look" judicial review meaning that "an agency must establish that, at the time it took its action, it had a contemporaneous rationale sufficient to satisfy the requirements of 'reasoned decisionmaking.'"[394] The Trump administration seeks to insulate itself from such a searching judicial review of its repeal efforts by relying upon a point of statutory construction—the Trump EPA interprets the Clean Air Act in a different manner from its predecessor as to what constitutes the "best system of emission reduction."[395] Beermann notes that "[g]iven the unique circumstances of the Clean Power Plan repeal proposal, it is not surprising that no court has ever been called upon to answer the question of [how to appraise] an agency's unreviewed and now disavowed construction of an ambiguous statute."[396]

This posture creates its own interpretive problems. As he points out:

> This would be a relatively straightforward inquiry but for complications injected by the Chevron doctrine, under which reviewing courts defer to agency interpretations of ambiguous statutes they administer (Chevron step two). Without Chevron, if a reviewing court were persuaded that the new construction of the Clean Air Act offered by the Trump-era EPA was the best understanding of the statute, the Court would uphold the rescission and leave it to the Trump Administration to determine, as a matter of policy, how to best effectuate the Clean Air Act's requirements. However, under Chevron, as elaborated in the Brand X decision, the validity of a new statutory construction does not necessarily imply the invalidity of the prior

388. *See supra* Section II.B.

389. Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1940 (2017).

390. *See* Jack Beermann, *The Deregulatory Moment and the Clean Power Plan Repeal*, HARV. L. REV. BLOG (Nov. 30, 2017), https://blog.harvardlawreview.org/the-deregulatory-moment-and-the-clean-power-plan-repeal/ (outlining the current status of litigation regarding the Clean Power Plan repeal by the Trump administration).

391. *Id.*

392. *Id.*

393. *Id.*

394. Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look*," 92 NOTRE DAME L. REV. 331, 333 (2016).

395. Beermann, *supra* note 390.

396. *Id.*

construction, and under Chenery, as discussed above, the rescission should be upheld if and only if the prior construction was invalid.[397]

This posture can lead to any one of three main permutations. It could require that the courts give deference to different statutory interpretations by successive administrations (*i.e.*, the statute permits more than one interpretation at a time).[398] It could give deference only to the Trump administration if it permits judicial review of the Clean Power Plan to go forward but now participates in the litigation against the rule.[399] Or it could cause the court to come up with its own best construction of the statute.[400] Each of these constructions in light of impending judicial review could lead to different results.[401] To answer the more immediate question at hand for the validity of the American NDC, this Article therefore will hypothesize what the consequence of either statutory construction would be for U.S. participation in transnational climate networks.

C. Scenario 1: Clean Power Plan Victorious

A court could conclude that the Obama EPA had statutory authority to promulgate the Clean Power Plan.[402] This scenario provides the most direct path to a permissible exercise of unilateral act powers by the President. As discussed in the previous section, the President would then rely upon an existing regulation—*i.e.*, the Clean Power Plan.[403] As that existing regulation survived a statutory challenge, it would then be incontrovertible that the regulation was within the executive's power to promulgate. The President would therefore have acted within his or her statutory authority on the domestic front.

The President then could straightforwardly use the Clean Power Plan in the NDC to create an international legal obligation by way of a unilateral act.[404] The President has broad diplomatic foreign affairs powers.[405] These foreign affairs powers include the conduct of diplomacy and the making of commitments on behalf of the U.S.[406] And the President may combine the power to make diplomatic commitments with the power to regulate domestically as these commitments stay within the *Youngstown* zone of implicit Congressional authorization.[407]

397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.*
402. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011) ("We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. *Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. And we think it equally plain that the Act speaks directly to emissions of carbon dioxide from the defendants' plants." (citation omitted)).
403. *U.S. NDC*, *supra* note 57, at 4.
404. *Id.*
405. *See supra* Part IV.
406. *See supra* Section IV.A.
407. *See supra* Section IV.C.

In short, a President can validly bind the U.S. on the international stage by reliance upon regulation if (but not only if) the regulation in fact was appropriately promulgated. Should the Clean Power Plan meet this hurdle, there would be no further American law impediment to this NDC. The Obama administration would then have acted within its power to bind the U.S. to the Paris Agreement and to the American NDC pursuant to the Paris Agreement.

D. Scenario 2: Clean Power Plan Vanquished

It is similarly a reasonable assumption that the courts would ultimately agree with the Trump administration that the Obama administration lacked the requisite statutory authority to promulgate the Clean Power Plan.[408] This scenario creates hurdles for the permissibility of the Obama administration's commitment of the U.S. to its NDC. Centrally, the American NDC could then no longer rely upon a regulation that the Obama administration had the power to promulgate. The Obama administration therefore would not in fact have combined regulatory and foreign affairs powers toward complementary ends (*i.e.*, to reduce greenhouse gas emissions in the U.S. and achieve global consensus toward the reduction of greenhouse emissions by other states).

This turn of events is not necessarily fatal. To start, a conclusion that the EPA lacks statutory authority to promulgate the Clean Power Plan now does not necessarily equate with a conclusion that the EPA lacked statutory authority to promulgate the Clean Power Plan at the time of its publication. As set out in Section A, the Obama administration may have been entitled to *Chevron* deference and be deprived of such deference as a matter of the procedural strategy of the Trump administration.[409] Further, on its face, the current challenge of the Trump administration challenges that the EPA would only have authority to impose technology requirements at the emissions source.[410] This would at least theoretically leave open the possibility of reframing the Clean Power Plan (be it that appropriate smokestack technology that could be retrofitted on to existing power plants does not currently exist).[411] In other words, the challenge as it is currently advanced is one of implementation rather than one of fundamental authority to regulate existing power plants.

The reliance upon the Clean Power Plan in American NDC should therefore be viewed in context. The *Youngstown* question is not whether specific regulation upon which foreign policy commitments rely were validly promulgated.[412] Rather, it asks whether the President had implied authority from Congress to

408. Heinzerling, *supra* note 389, at 1940.
409. Beermann, *supra* note 390.
410. *Id.*
411. Freeman, *supra* note 62, at 407.
412. *See supra* Section III.C.

regulate consistent with the foreign affairs commitment.[413] The current procedural posture encountered by the Clean Power Plan shows that this question must meaningfully be separated from the fate of the underlying regulation.[414]

A good faith analysis best captures the appropriate contextual frame. In the first instance, did the Obama administration act with honesty in fact?[415] A knowing regulatory overreach solely to expand foreign affairs powers would not meet this requirement.[416] The detailed reasoning of the EPA to defend its statutory authority to promulgate the Clean Power Plan more than suggests that the Obama administration believed that it was authorized to promulgate the Clean Power Plan.[417]

Further, a good faith analysis would also impose an objective reasonableness requirement.[418] In the constitutional context, this objective reasonableness requirement is framed in terms of an "unwarranted deviation[] from constitutional convention."[419] The Supreme Court's decisions in *Massachusetts v. EPA* and *American Electric Power v. Connecticut* would militate in favor of the constitutional conventionality of the Clean Power Plan; the EPA responded directly to interpretive jurisprudence contemplating that the EPA would regulate greenhouse gas emissions under the Clean Air Act.[420] Similarly, the interpretive challenge raised by the Trump administration would also suggest a level of normalcy and convention in that the issue is one of technical statutory construction.[421]

Second, the question would further turn on the availability of alternative means to achieve the American NDC's goals without the Clean Power Plan. This is both a factual and a legal question. Factually, if the market is turning to cleaner sources of energy and more emission-efficient technology, the need for regulatory ambition is reduced.[422] The push by states and municipalities as well as industry appears to be toward significant greenhouse gas emission reduction.[423] This may make the regulatory lift needed to create conditions to close the remaining gap easier to achieve. Legally, it would be necessary to determine what other regulatory avenues would reasonably be able to close the gap if the Clean Power Plan failed. Although the Clean Power Plan does seek to reduce emissions

413. *Id.*

414. *See supra* Section IV.A.

415. Pozen, *supra* note 21, at 921.

416. *Id.* at 922 ("A second paradigmatic type of constitutional bad faith, more internal to government, involves (2) *usurpation of another actor's constitutional prerogatives by deliberately violating constitutional constraints or disregarding constitutional duties*.").

417. *The Clean Power Plan: EPA Interprets the Clean Air Act to Allow Regulation of Carbon Dioxide Emissions from Existing Power Plants*, 129 HARV. L. REV. 1152 *passim* (2016).

418. Pozen, *supra* note 21, at 929.

419. *Id.* at 930.

420. 564 U.S. 410 (2011); 549 U.S. 497 (2007).

421. *See supra* Section IV.B.

422. Joe Ryan, *Despite Trump, Still on Pace to Reach Paris Climate Goals*, BLOOMBERG (Sept. 20, 2017, 11:30 AM), https://www.bloomberg.com/news/articles/2017-09-20/despite-trump-states-still-on-pace-to-reach-paris-climate-goals.

423. *Id.*

from the largest greenhouse sector, other sectors may well provide the means to create alternative efficiencies.[424]

E. Conclusion

The Obama administration stood on reasonably firm constitutional grounds to commit the U.S. to the NDC. Should the Clean Power Plan be deemed to have been a valid exercise of regulatory authority by the EPA, the NDC would necessarily be within then-President Obama's power to authorize under his foreign affairs powers. Should the Clean Power Plan be deemed to have fallen outside the scope of EPA's regulatory authority to promulgate, the question becomes more complex. The Supreme Court's interpretation of the Clean Air Act as covering greenhouse gases as pollutants gives significant purchase to the conclusion that the EPA must have a meaningful ability to regulate their emissions under the Act.[425] On balance, the NDC would likely survive even if the Clean Power Plan were to have been struck down. Nevertheless, this preliminary conclusion would need to be re-appraised in light of future litigation touching (now indirectly) on the issue.

VII. THE PUBLIC LAW STICKINESS OF TRANSNATIONAL NETWORKS

This Section outlines the administrative consequences of the constitutional theory of transnational networks developed so far. Section A will outline the existing literature addressing the effect of the Paris Agreement on U.S. regulation promulgated pursuant to it. Section B will then critique this literature because it discounts the significance of the international legal obligations undertaken by the U.S. Section C will then theorize that a combination of foreign affairs and regulatory powers operates not only to extend the foreign affairs powers of the President as outlined above, but also to extend the normative scope of the regulatory powers domestically. This conclusion will meaningfully impact ongoing efforts by the Trump administration to rescind the Clean Power Plan by means of its current notice of proposed rulemaking.

A. Existing Literature—the Fragility of Paris Agreement Regulatory Action

The existing literature on the domestic impact of the Paris Agreement network on regulation promulgated pursuant to it has been guarded on its normative force. Professors Bradley and Goldsmith, Dean Koh, and Professor Galbraith have outlined three approaches to the domestic impact of the Paris Agreement on regulation promulgated pursuant to it.[426] Each of these approaches, however,

424. EPA, SOURCES OF GREENHOUSE GAS EMISSIONS, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last visited Sept. 2, 2019).

425. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 429 (2011); Massachusetts v. EPA, 549 U.S. 497, 534 (2007).

426. Bradley & Goldsmith, *supra* note 4; Galbraith, *supra* note 262, at 1735; Koh, *Triptych*, *supra* note 1.

stops short of answering the question—what is the legal consequence of an international legal obligation incurred by the U.S. pursuant to the Paris Agreement on the future development of U.S. environmental regulation?

As outlined above, Professors Bradley and Goldsmith are skeptical regarding the legal basis for the Obama administration to enter into the Paris Agreement without congressional approval.[427] They appear to agree that the tacking domestic and foreign affairs powers is technically permissible.[428] They submit, however, that "Congress did not remotely contemplate" such a use of executive powers in passing the underlying statutes.[429] They therefore leave open the question whether a later administration could employ similar regulatory means to ***undo*** the actions of its predecessor (and thus presumably return them to "regular order").

Koh provides the beginnings of an answer to the questions raised by Bradley and Goldsmith.[430] He notes that the justification for executive foreign affairs action is messy and defies easy classification.[431] Unlike Goldsmith and Bradley, Koh does not find this state of affairs to be problematic.[432] Rather, he integrates this state of the law into a broader conception of transnational legal processes.[433]

As discussed above, Koh's transnational legal process theory submits that states comply with (new) international legal obligations because an administrative structure internalizes its normative force.[434] The U.S. federal government has internalized the Paris Agreement—and more importantly its NDC.[435] Through administrative compliance, the international commitments embedded within the American NDC become a policy imperative internal to the administrative structure.[436] This policy imperative exercises gravitational forces upon future administrative decision-making.[437] The international legal obligation—and the means of its domestic implementation—have become "sticky."[438] Koh's theory is helpful in understanding why states as a whole would comply de facto with international obligations even if the President were doing everything in his or her power to alter course.[439] Koh, however, does not provide a legal theory

427. Bradley & Goldsmith, *supra* note 4, at 1249.

428. *Id*. at 1266.

429. *Id.* at 1269.

430. Koh, *Triptych supra* note 1, *passim*.

431. *Id*. at 342.

432. *Id*. Koh is at home in a heavily context-dependent justification for foreign affairs powers. Bradley and Goldsmith on the other hand, look for single, doctrinal justifications for the exercise of foreign affairs powers. Bradley & Goldsmith, *supra* note 4, at 1257–59. Both thus perceive the state of affairs in a reasonably analogous way. The difference is focus. Bradley and Goldsmith embed regulatory conduct of the executive predominantly in U.S. law. *Id.* at 1257. Koh on the other hand tries to place regulatory conduct in a broader global context. Koh, *Triptych*, *supra* note 1, at 352.

433. *Id.* at 361.

434. *Id.*; Koh, *TLP*, *supra* note 11, at 194–206 (discussing internalization as mechanism for compliance in transnational legal process).

435. Koh, *TLP*, *supra* note 11, at 203–05.

436. Koh, *Triptych*, *supra* note 1, at 361.

437. *Id.* at 339.

438. *Id.* at 364.

439. *Id. passim*; Koh, *Twenty-First Century*, *supra* note 38, *passim*.

how such compliance could be compelled if the executive had become entirely "unglued."[440]

Both Bradley and Goldsmith, as well as Koh, thus leave open the possibility that a later administration could legally undo the commitments of its predecessor through administrative action.[441] Galbraith fully theorizes this approach in *From Treaties to International Commitments*.[442] She suggests that the combination of regulatory action with foreign affairs powers by the Obama administration at Paris to sidestep the advice and consent of the Senate weakens the Paris framework.[443] She submits that the Obama administration's ability to conclude an agreement masterfully relied on administrative action in order to find a pathway for climate compromise left open by Congress.[444] In this Galbraith agrees with both Bradley and Goldsmith, as well as Koh.

Galbraith continues that the use of the administrative framework to achieve foreign policy ends rendered the foreign policy achievements of the Obama administration more fragile.[445] What could be done through administrative action by one administration, she submits, could just as easily be undone by the next.[446] And when undone by the next administration, the international legal obligation undertaken by the Obama administration would disappear alongside the original regulation (*i.e.*, the Clean Power Plan).[447]

In conclusion, all three author sets, Bradley and Goldsmith, Koh, and Galbraith, grapple with the overlap between regulatory and foreign affairs powers. Bradley and Goldsmith problematize the relationship between both.[448] Koh describes the pragmatic operation of the relationship and the gravitational pull it exerts without providing a theoretical justification in U.S. domestic law for it.[449] Galbraith finally suggests that the relationship is fragile, thus in essence denying

440. Allan Smith, *Trump Comes Unglued: President Spends Hours After Bombshell Comey Firing Blasting Away at Democrats*, BUS. INSIDER (May 10, 2017, 10:05 AM), http://www.businessinsider.com/trump-tweets-comey-democrats-firing-fired-2017-5 (discussing the firing of then-FBI Director James Comey). Koh's theory strongly relies upon the continued functioning of the core career civil service. Koh, *Trump Administration, supra* note 16, at 466. The Trump administration has gone to great lengths not to refill the career civil service and in fact has acted consistently with an intent to decimate it. Gardiner Harris, *Diplomats Sound the Alarm as They Are Pushed Out in Droves*, N.Y. TIMES (Nov. 24, 2017), https://www.nytimes.com/2017/11/24/us/politics/state-department-tillerson.html (discussing large scale departures of career foreign service officers); Brian Naylor, *Trump Administration Has More than 250 Unfilled Jobs*, NPR (Nov. 22, 2017, 4:44 PM), https://www.npr.org/2017/11/22/566098660/trump-administration-has-more-than-250-unfilled-jobs (discussing political appointments); Sophie Tatum, *Reports: Hundreds of EPA Employees Leave Under Trump*, CNN (Dec. 22, 2017, 5:11 PM), https://www.cnn.com/2017/12/22/politics/epa-trump-administration-new-york-times/index.html (discussing large scale departures of EPA career civil servants). These reports make Koh's strategy less durable if it relies exclusively on prudential conditions rather than legal backstops for them.

441. Koh, *Trump Administration*, *supra* note 16, at 439–40.

442. Galbraith, *supra* note 262, at 1742.

443. *Id*. at 1743–44.

444. *Id.* at 1739–41.

445. *Id.* at 1741–43.

446. *Id*. at 1743.

447. *Id.* at 1742.

448. Bradley & Goldsmith, *supra* note 4, at 1243, 1256.

449. Koh, *Triptych*, *supra* note 1, at 352.

the gravitational pull theorized by Koh and positing a state of latent fragility when both regulatory and foreign affairs powers are combined.[450]

B. Critique of the Literature

All three approaches in the literature do not fully theorize the interrelationships between regulatory powers, foreign affairs powers, and international law. Professor Galbraith and to a lesser extent Professors Bradley and Goldsmith set aside that the creation of an international legal obligation by the U.S. (no matter whether it was constitutionally undertaken) has domestic consequences in the U.S. for future regulations.[451] Dean Koh, on the other hand, encounters the opposite problem—though he assumes that a combination of international legal obligation and pragmatic compliance mechanisms very much affect future regulations, he does not provide a legal theory under U.S. law why this must be so.[452]

Galbraith's submission in this regard is particularly interesting and insightful. She submits that the Obama administration tacked foreign affairs and regulatory powers in order to commit the U.S. to the Paris Agreement.[453] It highlighted the importance of existing regulatory powers under the Clean Air Act for the Obama administration to be able to commit the U.S. to the Paris Agreement goals, at all.[454] This submission thus recognizes the importance of the combination of foreign affairs powers and ordinary administrative powers.[455]

In the next step of her analysis, Galbraith assumes that an international legal obligation can be undone in the same manner that it can be done.[456] She submits that the United States' international legal obligations under the Paris Agreement are frail because of the manner in which they have been achieved—regulation.[457] A successor administration would have the ability to undo the regulations that allowed the U.S. to thread the needle to commit the U.S. to the Paris Agreement without Senate advice and consent.[458] This, she submits, would therefore undermine the basis of the international obligation.[459]

This assumption loses from sight that the U.S. has in fact incurred an *international* legal obligation from promulgated domestic environmental regulations

450. Galbraith, *supra* note 262, at 1743.

451. *Id*.; Bradley & Goldsmith, *supra* note 4, 56–57.

452. Koh, *Triptych*, *supra* note 1, at 352.

453. Galbraith, *supra* note 262, at 1743.

454. *Id.* at 1741.

455. *Id.* As discussed in the previous section, Bradley and Goldsmith make a similar move. Bradley & Goldsmith, *supra* note 4, at 1256. The difference between Bradley and Goldsmith on the one hand and Galbraith on the other hand is that Galbraith submits that the international and domestic effects are easily undone by future regulatory action. Galbraith, *supra* note 262, at 1742–43. Bradley and Goldsmith do not make such a submission, noting instead that overturning the (foreign affairs) effect of the U.S. NDC will be difficult to achieve. Bradley & Goldsmith, *supra* note 4, at 1248–52.

456. Galbraith, *supra* note 262, at 1742.

457. *Id*. at 1743.

458. *Id.* at 1744.

459. *See id.* at 1743 ("For just as other institutional actors can serve as checks on executive power in the making of international commitments, so too can they check the effects of withdrawal.").

under the Obama administration.[460] This international legal obligation can only be undone in accordance with international law. It is no defense to a claim that the Trump administration is violating international law that the Trump administration was entitled to change the regulatory framework upon which the Paris Agreement was built as a matter of American law.[461] Such a change in the regulatory framework would of course appear at first blush to be permissible as a matter of American administrative law.[462] But U.S. administrative law would not be a defense to a claim that the U.S. violated its international legal obligations incurred in and pursuant to the Paris Agreement.[463] The step to international law thus creates an obstacle to domestic action for which Galbraith does not account.

On the other hand, the fact that an international legal obligation exists does not make compliance unproblematic as a matter of municipal law, either. Koh, in *Triptych's End*, sets to the side the question whether the continued compliance with Paris commitments by U.S. administrative agencies presents public law problems.[464] He submits—consistently with the question he seeks to answer—that the fact of bureaucratic compliance with the Paris commitments will make it extraordinarily difficult for the Trump administration to change course or to change course quickly.[465] He submits further that this was precisely the goal of the Obama administration in making exit from the Paris Agreement cumbersome as a matter of international law.[466]

In light of the question posed by Bradley and Goldsmith (as opposed to the question set by Koh for purposes of his research), this answer becomes problematic.[467] A state's mechanism for compliance with international law is a laudable goal as a matter of international law.[468] But it is not laudable as a matter of municipal law if it displaces existing constitutional norms and conventions of separation of powers. The preclusive effect of an international obligation on domestic legal processes in other words should not be automatic and complete. Such an effect would give unilateral lawmaking powers to the executive and thus threaten to topple the checks and balances at the core of the United States' constitutional framework.[469]

In other words, the existing state of the literature appears to want too little or too much. It does not fully contextualize the international and domestic lawmaking processes in each other. It either assumes that the constitutive processes

460. *Id.*

461. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at art. 3 (2001), http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [hereinafter *ILC Draft Articles*] ("That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled.").

462. *See* Beermann, supra note 390 (discussing the posture of current attempts by the Trump administration to repeal the Clean Power Plan).

463. *ILC Draft Articles*, *supra* note 461, at art. 3.

464. Koh, *supra* note 1, *passim*.

465. *Id.* at 352.

466. *Id.*

467. Bradley & Goldsmith, *supra* note 4, at 1206.

468. Koh, *TLP*, *supra* note 11, at 194–206.

469. Bradley & Goldsmith, *supra* note 4, at 1287–88.

governing international obligations or domestic public law powers can be bracketed out or held constant. Transnational networks precisely do not permit this assumption but interweave both processes into each other.[470] As discussed above, this interweaving of both the domestic and the foreign affairs process is itself permissible as a matter of U.S. law. It is also consistent with international law. A theory of its effects therefore must first and foremost be able to deal with the reality of this new regulatory web across legal domains. The existing literature cannot do so.

C. Stickiness Reconstituted

American law is capable of reconstituting both processes. As discussed above, U.S. law permits the executive to create international legal obligations unilaterally by taking foreign affairs and regulatory powers.[471] The executive, on its face, appears to have had the authority under the foreign affairs power, when combined with the Clean Air Act, to bind the U.S. to the procedural framework of the Paris Agreement as well as the substantive commitments set out in the NDC.[472] This leaves the question of what consequence this international legal obligation has for future rulemaking in the U.S.

The first step to answering this question is to accept that the U.S. is bound by an international legal obligation to honor its commitments contained in the Paris Agreement and its NDC.[473] Once it has been determined that these obligations were indeed validly entered into by the Obama administration, the fact that the U.S. did not follow a traditional treaty route becomes irrelevant to the legal analysis that follows. Rather, one must then take the international legal obligation at face value in the domestic analysis of its legal significance.

In other contexts, it would be reasonably uncontroversial that the international legal obligations of the U.S. have domestic legal effect. Treaties to which the Senate has given its advice and consent become part of the law of the land by operation of the Constitution's Supremacy Clause.[474] The U.S. also enters into international legal obligations by means other than treaties, most centrally customary international law.[475] These obligations are "non-conventional" in the sense that they are not premised upon a treaty.[476]

It is similarly uncontroversial that nonconventional U.S. international legal obligations have domestic legal effect. As Professor Lori Damrosch explains:

470. SLAUGHTER, *supra* note 11, at 250–53 (discussing positive comity in transnational networks).

471. *See supra* Section VII.B.

472. *See supra* Section VI.A.

473. Sourgens, *supra* note 13, at 186–87.

474. Carlos Manuel Vázques, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 694 (2008) ("By declaring treaties to have the force of law, the Supremacy Clause makes them enforceable in the courts in the same circumstances as statutory and constitutional provisions of like content.").

475. *See* Mora v. New York, 524 F.3d 183, 196 (2d Cir. 2008) ("Although the United States has not ratified the Vienna Convention on the Law of Treaties, our Court relies upon it 'as an authoritative guide to the customary international law of treaties,' insofar as it reflects actual state practices.").

476. Alan Nissel, *Continuing Crimes in the Rome Statute*, 25 MICH. J. INT'L L. 653, 677 (2004).

> [T]he Supreme Court from at least 1804 to the present era has presumed that Congress intends to legislate compatibly with U.S. international obligations. Thus, under what we now call the *Charming Betsy* canon, the Court will not construe a statute to place the United States in violation of customary international law unless no other construction is possible, and it will interpret later-in-time statutes consistently with existing treaty obligations if there is a way to reconcile the two. The Court reaffirmed this principle as recently as 2004, when it said that its rules of statutory construction reflect "principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow."[477]

The international legal obligations incurred by the U.S. pursuant to the Paris Agreement fall within this broad presumption. In the first place, administrative agencies seeking to undo a prior administration's regulations must do so consistently with the statutes empowering the agency to act.[478] These statutes in turn must be interpreted consistently with the presumption that Congress did not intend to violate international law in passing it.[479] This presumption logically must carry to the administrative agency as an administrative agency cannot exercise power Congress could not expressly or implicitly delegate to it.[480] Whether this presumption carries to administrative rulemaking the fact of an international legal obligation presents formidable obstacles to a policy reversal, indeed.

This consequence on its face attaches not only to customary international law. It also applies to other international obligations created by executive action. The Supreme Court in its 1981 *Dames & Moore v. Regan* decision thus was faced with the question whether a sole executive agreement constituted the law of the land.[481] The sole executive agreement concerned a claim settlement agreement with Iran by the Carter administration and ratified by the Reagan administration.[482] The Supreme Court had no difficulty in concluding that it did.[483] This conclusion is consistent with the overall presumption in favor of international law compliance adopted by the U.S. courts.

This has important legal consequences for the Clean Power Plan. The EPA is currently seeking to propose a new rule that would rescind the Clean Power Plan.[484] The Clean Power Plan is part and parcel of an international legal obligation incurred by the U.S. pursuant to the Paris Agreement.[485] An agency seeking to undo regulatory action that is part and parcel of an international legal obligation of the U.S. on its face must choose between two paths. First, it can promulgate a new rule that continues to comply with the international legal obligation

477. Damrosch, *supra* note 22, at 458 (footnotes omitted) (quoting F. Hoffmann-La Roche Ltd. v. Empagran, S.A., 542 U.S. 155, 164 (2004)).

478. Beermann, *supra* note 390.

479. Damrosch, *supra* note 22, at 458.

480. Rubenstein, *supra* note 191, at 205 n.153.

481. 453 U.S. 654, 659 (1981).

482. *Id.* at 665–66.

483. *Id.* at 681.

484. Beermann, *supra* note 390.

485. *U.S. NDC*, *supra* note 57, at 4.

to replace the original regulatory action. As part of its rule making process, the new rule could be challenged if the agency could not demonstrate on the record that the new rule complies with the United States' international legal obligation.[486] In the context of its NDC, the U.S. is not bound to the Clean Power Plan as such. It is bound to meeting the emissions targets set out in the U.S. NDC.[487] The EPA remains at liberty to find different policy tools to achieving this goal in its new proposed rulemaking process.

Second, an administrative agency can seek to overcome the presumption reflected in the *Charming Betsy* canon.[488] The agency could then propose a rule that would violate the United States' international legal obligation to the extent that it could prove that it has clear statutory authority to do so.[489] The agency could attempt to show that the statutory regime could not be used to achieve the U.S. international obligation. In this case it would essentially challenge that the prior administration appropriately had any statutory authority that it could tack with foreign affairs powers.[490] It could also do so by showing that the statutory framework as a whole otherwise intended to give such additional flexibility to the agency.

Both paths provide a legal justification for the gravitational pull exerted by international legal obligations once they have internalized in an administrative agency. Koh's "stickiness" is not only a pragmatic fact of life in a world connected by transnational networks.[491] It reflects a legal presumption of compliance with international legal obligations that has been part of U.S. law "since 'at least 1804.'"[492]

This presumption, too, is not a power-grab by the executive inconsistent with the original separation of powers enshrined in the Constitution.[493] Rather, it is a logical continuation of the trajectory of the administrative state in a world gone global. Bradley and Goldsmith's unease regarding the extensive use of foreign affairs powers does not take into account that core problems affecting the U.S. can only be regulated through global coordination.[494] The global coordination of regulatory responses viewed in this light is a necessary condition for administrative agencies to fulfill their domestic mandates. U.S. law fundamentally supports this retooled mission of administrative agencies facing down global problems.

486. *See* Damrosch, *supra* note 22, at 458 (laying out the presumption in the statutory construction context).

487. *U.S. NDC*, *supra* note 57, at 1.

488. Damrosch, *supra* note 22, at 458.

489. *Id.*

490. This comports with Professor Beermann's suggestion premised in administrative law standards of deference that "the result of judicial review should turn on the reviewing court's best estimation of the meaning of a statute. That's what the rule of law is concerned with, not an imaginary set of possible meanings that an agency might employ to meet current political exigencies." Beermann, *supra* note 390.

491. *Koh*, *Triptych*, *supra* note 1, at 361.

492. Damrosch, *supra* note 22, at 458.

493. Bradley & Goldsmith, *supra* note 4, at 1240.

494. *Id.* at 1239–40.

This means that the apparent frailty of the Paris framework identified by Professor Galbraith hides a surprising normative force.[495] When the effect of an international legal obligation created by the Obama Administration is assessed on its own terms, it becomes apparent that the combination of the foreign affairs power with a regulatory power adds significant security and longevity to regulatory action as a matter of U.S. public law. It secures that future administrations cannot easily undo the results agreed upon in transnational networks. It thus provides greater reliance protections to all participants in these networks. This in turn inures to the benefit of the U.S., as it is able to improve its relative trustworthiness when it engages in transnational governance dialogues.

In other words, transnational networks, once formed, create regulatory one-way streets. The process that one administration used to create the network and to make commitments in the network cannot be used against the network. The traffic flows naturally in the way of compliance both as a matter of international law, as Koh theorizes, and as a matter of U.S. public law, as this Article has shown.[496] This is not to say that a change of heart or direction is not possible—just that it must be a change of heart that can rationally and reasonably be explained on the basis of a record assembled by the agency for that purpose. In the context of climate regulation, it would be a tall order to assemble such a record that would reasonably support a defection from the Paris Agreement.

VIII. CONCLUSION

This Article has submitted that the use of transnational networks by the U.S. executive are more than just desirable from a foreign policy perspective. They are fully legal from a U.S. constitutional law perspective so long as the executive stays within existing administrative authorizing statutes. The Article has used the Paris Paradigm (the Paris Agreement and U.S. commitments made pursuant to the Paris Agreement) to demonstrate how this policy tool can achieve meaningful commitments even in politically trying times. The Obama administration has successfully participated in transforming existing climate action into a new, robust transnational climate network. Initial state conduct suggests that the Paris network is in fact altering global climate policy dynamics. The Obama administration further used the Clean Power Plan as a key commitment to implement the Agreement and sought out and induced reliance by third states to make similar emission reduction commitments. The Obama administration's use of transnational networks to achieve this policy goal has had a significant impact on the Trump administration. Attempted reversals of policies adopted through transnational networks can now only affect the means of implementing the goals to which the U.S. has committed itself internationally. It is no longer possible to change course and pursue different, inconsistent policy goals, *i.e.*, the Trump administration must implement the goals of the Clean Power Plan even as it is engaged in rulemaking efforts to undo it.

495. Galbraith, *supra* note 262, at 1743.

496. Koh, *Triptych*, *supra* note 1, at 352.

This Article therefore has provided a means to further strengthen the complicated administrative law analysis of current repeal efforts of the Clean Power Plan. Existing analysis suggests that only a clear lack of statutory authority by the Obama administration to promulgate it should permit the Trump administration to reverse the Clean Power Plan on the basis of a statutory re-interpretation. The Paris Paradigm provides further ammunition in support of this analysis. It has further provided authority for the proposition that even if the Obama administration lacked statutory authority for the Clean Power Plan rule, the Trump administration may need to adopt a policy consistent with the Clean Power Plan so long as the policy goal behind the Clean Power Plan was statutorily permissible and achievable had other means been chosen. This conclusion therefore showcases the utility of the transnational legal perspective for ongoing U.S. public law debates.