

The Trojan Horse of the Paris Agreement on climate change: How Multi-Level, Non-Hierarchical Governance Poses a Threat to Constitutional Government

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There is little novelty to be found in the Paris Agreement. Nevertheless, it may have serious implications for climate policy-making. It establishes an international framework for decentralized climate policy-making by states, which should aim to achieve an ambitious collective objective of limiting global average temperature increase to well below 2°C or even 1.5°C. The agreement does not set any mechanism, methodology or criteria, however, for assigning individual mitigation obligations to party states. It does not impose any significant substantive obligations on the parties, and, from a legal, as opposed to political or moral, viewpoint, it seems to be virtually non-binding. This gap is destined to become the Paris Agreement's Trojan horse, because, under the guise of direct democracy in a system of multi-level, non-hierarchical governance, it grants not only credibility but also de facto authority to climate activists, thus posing a threat to constitutional government and representative democracy.

The Paris Agreement demands that nation states acknowledge explicitly that their efforts are inadequate, while setting them up for failure, thus changing the political environment in which climate policy is made. The ambition-obligation disparity creates a large arena for climate activism at international and national levels, effectuating a transfer of power, or at least of influence, that is inconsistent with the fundamental principles of constitutional government. If the collective efforts appear to fall short of achieving the Paris Agreement's objectives, the judiciary is likely to be dragged into climate policy-making. Climate action groups or executive governments supporting ambitious action will charge the body politic with impotence, declare "government failure," and seek the help of the courts to get governments to "do the right thing." To support their claims, they can invoke the admissions, objectives, and aspirations set out in the Paris Agreement.

Thus, in demanding that the signatories concede that their efforts are inadequate, the Paris Agreement paves the way for the new international climate governance movement. Its implicit reliance on political activism by the climate movement and the related non-hierarchical governance by courts constitute a threat

to constitutional government, the rule of law, and representative democracy. It risks an unconstitutional usurpation of power by activist groups and unelected and unaccountable judges that could undermine legislative power and the role of positive law in deciding legal disputes. This risk of subversion is not well understood by politicians and governments.

Nations should protect themselves against these threats. After all, signing away control over climate policy to unaccountable and unelected actors is not in the public interest. Nor is it, under even the most optimistic of circumstances, a viable path to rational, effective and sustainable climate policies. Indeed, the future of representative democracy may be at stake.

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Introduction*

At the COP-21 in Paris, 195 countries¹ negotiated a decision and an agreement on international climate change policy-making.² To a significant extent, the decision and agreement overlap and address many of the same issues, with the decision often going into more detail in an attempt to begin implementing the agreement. The Paris Agreement covers mitigation, adaptation, as well as “loss and damage,” a process aimed at addressing harms caused by climate change, and establishes processes for financing and technology transfer. With respect to mitigation, it sets an ambitious objective of limiting the global average temperature increase to well below 2°C or even 1.5°C.³ In pursuit of this objective, it establishes a procedural framework for future climate policy-making by the parties, based on national-level emission reduction targets set by governments, known as nationally determined contributions (NDCs). By 2020, the parties are requested to communicate new NDCs, and the COP periodically assesses the collective progress towards achieving the agreement’s objective, called the “global stocktake,” for the first time in 2023 and every five years thereafter unless otherwise decided.⁴

As expected, the Paris Agreement has been hailed as a “historic moment.”⁵ World leaders hastened to claim credit for this success.⁶ Emphasizing its “key role” in brokering the agreement, the European Commission calls the Paris outcome an “ambitious and balanced agreement.”⁷ President Obama referred to “the strong agreement the world needed,” which “makes America proud” and would

constitute “a tribute to American leadership.”⁸ Not everybody was so ecstatic, however. China’s lead negotiator said the deal “would change our way of life.”⁹ NGO Global Justice Now finds it “outrageous” to spin the Paris deal as a success, because it “undermines the rights of the world’s most vulnerable communities and has almost nothing binding to ensure a safe and liveable climate for future generations.”¹⁰ One extreme critic even called the agreement a “fraud” and “worthless words.”¹¹ Indeed, whether the Paris Agreement is viewed as a success depends on one’s perspective on the climate change conundrum: It may have been the *maximum* that was politically feasible, but, according to most climate policy experts, it is not even *the minimum* required to avoid prospective disruptions to human and natural systems.¹² As one commentator has pointed out, this kind of “constructive ambiguity” often is the only way “to get a deal done.”¹³

There is more to the Paris Agreement, however, than meets the eye. Both the EU and the United States were instrumental in brokering the Paris deal, even though their objectives were not aligned. The European Commission has presented the agreement as the “first universal, legally binding” climate agreement, calling it “ambitious and balanced.”¹⁴ But the US Government takes the position that the agreement is voluntary and imposes only reporting obligations—and no sanctions.¹⁵ That these two protagonists can give such different interpretations to the agreement is the result of the linguistic massage that was

* Dated January 27, 2016.

1 Historic Paris Agreement on Climate Change: 195 Nations Set Path to Keep Temperature Rise Well Below 2 Degrees Celsius, <http://newsroom.unfccc.int/unfccc-newsroom/finale-COP-21/>.

2 Paris Agreement, FCCC/CP/2015/L.9, <http://unfccc.int/resource/docs/2015/cop21/eng/l09.pdf>. The agreement is to be distinguished from the Decision of the COP, which precedes it. Pursuant to the UNFCCC, the COP is authorized only to make the “decisions necessary to promote the effective implementation of the Convention.” Article 7(2), UNFCCC. Thus, the decision that precedes the Paris Agreement may be binding with respect to implementation aspects.

3 Article 2(1), Paris Agreement.

4 Article 14(1) and (2), Paris Agreement.

5 Nations Approve Landmark Climate Accord in Paris, *New York Times*, Dec. 12, 2015, http://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html?_r=0.

6 The Guardian even called it “the world’s greatest diplomatic success,” which “has proven that compromise works for the planet.” Fiona Harvey, Paris climate change agreement: the world’s greatest diplomatic success, <http://www.theguardian.com/environment/2015/dec/13/paris-climate-deal-cop-diplomacy-developing- united-nations>.

7 European Commission, Historic climate deal in Paris: EU leads global efforts, http://ec.europa.eu/news/2015/12/20151212_en.htm.

8 Follow Along: A Global Agreement to Act on Climate, Dec. 12, 2015, https://www.whitehouse.gov/blog/2015/11/24/follow-along-global-agreement-act-climate?utm_source=email&utm_medium=email&utm_content=email538-text1&utm_campaign=climate.

9 Has history been made at COP-21?, <http://www.bbc.com/news/science-environment-35085758>.

10 COP-21 climate change summit reaches deal in Paris, <http://www.bbc.com/news/science-environment-35084374>.

11 Paris climate deal: reaction from the experts, Dec. 12, 2015, http://www.theguardian.com/environment/2015/dec/13/paris-climate-deal-reaction-experts?CMP=share_btn_link.

12 It has been argued that “[t]o criticize the Paris Agreement of doing too little to force political reform at the global level shows a failure to learn the lessons of previous international negotiations, from Kyoto to Copenhagen, that reached too far and returned too little.” Eric W. Orts, The Paris Agreement Delivers a Champagne Moment, <http://www.regblog.org/2015/12/22/orts-the-paris-agreement-delivers-a-champagne-moment/>.

13 Oliver Geden, Paris climate deal: the trouble with targetism, *The Guardian*, Dec. 14, 2015, <http://www.theguardian.com/science/political-science/2015/dec/14/the-trouble-with-targetism>.

14 European Commission, Historic climate deal in Paris: EU leads global efforts, http://ec.europa.eu/news/2015/12/20151212_en.htm.

15 Kerry: Climate deal lacks penalties because of US Congress, <http://video.foxnews.com/v/4659760615001/kerry-climate-deal-lacks-penalties-because-of-us-congress/?#sp=show-clips>.

necessary to reconcile their conflicting objectives, but doubtlessly complicated the negotiations. The agreement's wording and legal force (or lack thereof), however, tell only part of the story. There are other forces at play that can explain why the agreement is both a failure¹⁶ and a success. For one, a reasonable solution of the climate change problem was not in the interest of all stakeholders that flocked to Paris; support for the nuclear energy option, for instance, has disingenuously been called "climate denialism."¹⁷ The key to understanding Paris, however, is asking the question why so much time and effort has been spent on non-binding commitments and proclamations; if it is all non-binding and unenforceable anyway, why bother? Part of the answer is that the Paris Agreement lays out a nice battlefield for climate activism for decades to come; President Obama, somewhat euphemistically, has called the agreement "politically binding."¹⁸ But, for many countries, it may also have profound effects on government and climate policy-making.

To assess the consequences of COP-21, it is necessary to analyze what the Paris Agreement does, and what it does not do, as a matter of both law and political dynamics. From a formal legal perspective, it may well fulfill the charge of the Durban Platform, as it would seem to be a "protocol, another legal instrument, or an agreed outcome with legal force."¹⁹ The question as to its binding effect does not have a simple answer, however. Even if the Paris Agreement is in some way legally binding, what exactly does it require and how could a signatory violate any of its provisions? As a related matter, although a multitude of political ramifications might apply, what are the tangible legal means of recourse to deal with non-compliance? The ill-fated Kyoto Protocol, negotiated in 1997 and effective as of 2004, simply penalized the offending party in the second commitment period, even though no such commitment period had been agreed, basically incentivizing a country that missed its target in the first commitment period to withdraw completely from the protocol, which is exactly

what Japan, Canada, and others did. Resolving these legal issues is important to understanding the Paris Agreement, but it is also insufficient.

Most importantly, the Paris Agreement does not close the gap between ambition and obligation and, indeed, has widened it by adopting ambitious temperature targets without the apparent means to reach them.²⁰ This creates not only internal tension, but has broader implications for the dynamics of climate policy-making. An analysis of the agreement should shed light not only on the nature, scope, and content of the obligations imposed on the parties, but also on the agreement's wider consequences for international and national climate policy-making. It should zoom in on the unspoken, and, maybe, unspeakable, intentions²¹ and consequences. This article discusses several issues relevant to this kind of broader understanding of the Paris Agreement. The first part discusses what the Paris Agreement does and does not do. In this context, attention should be paid also to political context of the negotiations, and the bureaucracy the Paris Agreement mandates. In the second part, issues regarding the agreement's legal force are discussed. As part of this analysis, the formal and informal sanctions for non-compliance are reviewed. The third part looks at the way the agreement treats science. Science, of course, informs policy-making, but it does not dictate any specific outcomes. Based on the previous analysis, the fourth part examines the agreement's implications for policy-making. Specifically, it considers how the widening gap between ambition and the positive law obligations contained in the agreement change the political environment in which climate policy is made. In all likelihood, these less visible changes may turn out to be the most significant effects of COP-21. With the Paris Agreement on the books, the prospects for climate activism²² and climate change litigation seem to have

16 "To say the Paris pact failed—on the grounds of science and justice—is not to be cynical. It is to be realistic." Martin Lukacs, Claim no easy victories. Paris was a failure, but a climate justice movement is rising, <http://www.theguardian.com/environment/true-north/2015/dec/15/claim-no-easy-victories-paris-was-a-failure-but-a-climate-justice-movement-is-rising>.

17 Naomi Oreskes, There is a new form of climate denialism to look out for – so don't celebrate yet, *The Guardian*, Dec. 16, 2015, <http://www.theguardian.com/commentisfree/2015/dec/16/new-form-climate-denialism-dont-celebrate-yet-cop-21>.

18 Marlo Lewis, Jr, Obama Claims the Paris Climate Agreement Is Not a Treaty. Huh?, Dec. 18, 2015, <https://cei.org/blog/obama-claims-paris-climate-agreement-not-treaty-huh>.

19 Durban: Towards full implementation of the UN Climate Change Convention, http://unfccc.int/key_steps/durban_outcomes/items/6825.php.

20 As Geden observes, "setting ambitious long-term global climate targets has not been a prerequisite but a substitute for appropriate action." Oliver Geden, Paris climate deal: the trouble with targetism, *The Guardian*, Dec. 14, 2015, <http://www.theguardian.com/science/political-science/2015/dec/14/the-trouble-with-targetism>.

21 As Machiavelli has pointed out, "it is unnecessary for a prince to have all the good qualities (...), but it is very necessary to appear to have them." Niccolò Machiavelli, *The Prince* (1513), Chapter XVIII.

22 Commenting on the Paris Agreement, McKibben said "[t]his agreement won't save the planet. It may have saved the chance to save the planet (if we all fight like hell in the years ahead)." He added that climate activism "is the right project to pick, if your goal is something to keep you occupied for a lifetime." J. Schwartz, Climate Advocates See Need for Continued Activism, *New York Times*, Dec. 14, 2015, http://www.nytimes.com/2015/12/15/science/climate-advocates-see-need-for-continued-activism.html?_r=0.

improved.²³ As a result, as discussed below, these features challenge constitutional government and the rule of law in representative democracies. Conclusions are presented in the final part.

1. The Paris Agreement's Proclamations and Omissions

A. Political Background

The COP-21 process encompassed an astonishingly broad and complex array of issues, which had to be sorted out in a multilateral process that was somehow both exceedingly methodical and flamboyantly melodramatic. To reach agreement in Paris, the negotiators, many of whom have had the benefit of working full-time under the UNFCCC for years, or even decades, had to satisfy the many conflicting demands by the negotiating parties. While the United States wanted to avoid a legally binding treaty, so that the Obama administration does not have to obtain approval from Congress,²⁴ the EU insisted on a legally binding agreement. Developing nations required both the freedom to pursue economic development and financial aid in meeting adaptation needs, but the developed nations insisted that emerging economies also contribute to emission reduction. There are also tensions between those who do not want climate policy to become entangled with other issues, and those who want to use climate policy to

pursue other social justice objectives, such as reducing income inequality,²⁵ promoting gender equality,²⁶ and protecting persons with disability.²⁷ Even among those nations that support ambitious climate policy, views on the appropriate policy instruments diverge. And while the agreement suggests that it establishes a framework for science-based policy, as discussed below, it also can be viewed as an end run around the scientific debate. With so many conflicting demands, the Paris Agreement could achieve little else than repeat what had previously been agreed, and extend the same approach.

This tendency was reinforced by the centrifugal forces exercised by interested parties and special interests, which pushed in a wide variety of directions.²⁸ Due to the stigmatization of critical thinking about climate science, few dared to challenge the paradigm that anthropogenic emissions of greenhouse gases (GHGs) cause global warming and climate change. But pleas have been made for many different interests, from additional subsidies for renewable energy (in particular, solar and wind) and onerous emission reduction targets to an emphasis on adaptation, nuclear power, innovation, and geo-engineering.²⁹ Companies, trade associations and non-governmental organizations lobbied for a mechanism for setting a carbon price or some CO₂ tax, or promoting carbon capture and storage (CCS) or similar carbon removal technologies. The tensions between the negotiating states' positions and the conflicting views of private interests were

23 The Business & Human Rights Resource Centre has commented that "[a]mid uncertainty about how the agreement reached at the COP21 Paris climate conference will be implemented, civil society can take charge through climate litigation. Novel legal approaches will be crucial, both to strengthen company accountability and to spur effective climate regulation by governments." Sif Thorgeirsson & Ciara Dowd, Business & Human Rights Resource Centre, Post Paris climate talks, how to take charge through climate litigation, <http://business-humanrights.org/en/post-paris-climate-talks-how-to-take-charge-through-climate-litigation#>. Roger Cox, We must 'Reply All' to the Collective Action in Paris, <https://www.cigionline.org/blogs/global-rule-of-law/we-must-reply-all-collective-action-paris>.

24 On this issue, see Marlo Lewis, Is the Paris Climate Agreement a Treaty?, Dec. 16, 2015, <http://www.globalwarming.org/2015/12/16/is-the-paris-climate-agreement-a-treaty/>; Rupert Darwall, Paris: The Treaty That Dare Not Speak Its Name, <http://www.nationalreview.com/article/428448/paris-climate-agreement-bad-for-us-needs-congressional-approval>. Senator Inhofe has introduced a resolution that would require Senate ratification of the agreement. <https://www.gpo.gov/fdsys/pkg/BILLS-114sres329is/html/BILLS-114sres329is.htm> See also Barbara Hollingsworth, Analyst: US Senate Should Unilaterally Refuse to Ratify Paris Climate Treaty, Dec. 23, 2015, <http://www.cnsnews.com/news/article/barbara-hollingsworth/analyst-us-senate-should-unilaterally-refuse-ratify-paris-climate> (quoting Horner as saying "refusing to ratify sends a statement to the world that this agreement should be regarded as a promise, not a commitment. But not doing anything is, in fact, a commitment").

25 Climate change and inequality, <https://www.etui.org/content/download/5424/53609/file/Chap+6.pdf>; OECD, Poverty and Climate Change: Reducing the Vulnerability of the Poor Through Adaptation, <http://www.oecd.org/env/cc/2502872.pdf>.

26 UN Fact Sheet, Women, Gender Equality and Climate Change, http://www.un.org/womenwatch/feature/climate_change/downloads/Women_and_Climate_Change_Factsheet.pdf.

27 The Global Partnership for Disability & Development (GPDD) & The World Bank (Human Development Network - Social Protection/Disability & Development Team), The Impact of Climate Change on People with Disabilities, Jul. 8, 2009.

28 Confronted with inconsistent demands by various stakeholders, Geden explains, the most practical way for governments to deal with this challenge is "to address some stakeholder groups by talk, some by decisions, and some by actions." Oliver Geden, Paris climate deal: the trouble with targetism, *The Guardian*, Dec. 14, 2015, <http://www.theguardian.com/science/political-science/2015/dec/14/the-trouble-with-targetism>.

29 A group of climate scientists have argued that the Paris Agreement is fatally flawed, "kick[s] the can down the road," and offers false hope: "Our backs are against the wall and we must now start the process of preparing for geo-engineering." COP21: Paris deal far too weak to prevent devastating climate change, academics warn, *The Independent*, Jan. 8, 2016, <http://www.independent.co.uk/environment/climate-change/cop21-paris-deal-far-too-weak-to-prevent-devastating-climate-change-academics-warn-a6803096.html>.

not amenable to putting together a clear, consistent and practical plan for addressing this issue.

As a result, the Paris Agreement is bland and conventional. To a large extent, it restates or repeats existing agreements and rules.³⁰ There is little in the way of innovative approaches to international law that might adapt its approach, expand the scope of instruments, or otherwise enhance its effectiveness. As such, it remains vulnerable to the same infirmities of all ordinary international accords: They are not enforceable in any real sense and ultimately persist as indicators of prevailing political will—or the lack thereof. Beyond the four corners of the Paris Agreement, however, the United Nations Framework Convention on Climate Change (UNFCCC) has all but completed its transition from a genteel treaty secretariat into a sophisticated global climate action movement,³¹ often articulating highly ambitious goals that pale in comparison to the objectives accepted by the negotiating parties under the Paris Agreement—and the agreed objectives were acceptable only because they are collective, not binding on any individual country. This transition will ensure that the UNFCCC's high profile international meetings will continue to keep the issue of climate change at the center of geopolitical debate for the foreseeable future.

At the same time, the Paris Agreement and the UNFCCC's political savvy reinforces social norms and expectations around climate change that would make it difficult for any government to pull away from it or otherwise violate its provisions, lest it be treated such as, for example, Russia after annexing Crimea (or worse). On the flip side, the murky quality of its directives provide future governments with a great deal of flexibility, should they need it. This may prove to be one of the agreement's greatest strengths: Unlike the Kyoto Protocol, which lost Japan, Canada, and Australia and quickly became irrelevant, the general inability of a Party to violate the Paris Agreement, save for instances of gross indifference, will

preserve the UNFCCC's credibility, even as various Parties undergo periodic changes in government wherein swings from climate action to inaction (and back again, as in the case of Canada this past decade) must be endured. Or is there more to the deal than this?

The Paris Agreement addresses mitigation as well as adaptation, and establishes processes for financing and technology transfer. To understand the Paris Agreement, one should focus just as much on what is there than on what is *not* there. The key issue is not whether the agreement is legally binding, but what exactly is legally binding and enforceable. Clearly, the agreement's substantive aspects are less significant than its procedural and administrative aspects.³² Further, its somewhat ambiguous relation with science requires close scrutiny. Maybe the most critical issue of all, however, will be whether this agreement will place the issue of climate policy firmly back into the political process, to the exclusion of adjudication by courts of law, whether international or national. In some countries, there has been a trend of power shifting away from elected representatives to the judiciary, which has inserted itself in climate policy-making. In June 2015, a Dutch court found that the government is required by law to step up its emission reduction policies. Belgian courts are currently considering claims that their governments over the years have unlawfully failed to implement more ambitious climate policies.³³ United States courts have been asked to rule on the legality and constitutionality of the Obama administration's executive action to implement the commitments made in Paris.³⁴ A key question is what effect the Paris Agreement will have on this trend.³⁵

B. The Paris Agreement in a Nutshell

Not surprisingly, the text of the Paris Agreement reflects the tensions between the parties' diverging interests and perspectives. For one, the recital notes that parties may be

30 Jean Galbraith, *The Legal Structure of the Paris Agreement*, <http://www.regblog.org/2015/12/21/galbraith-legal-structure-paris-agreement/>. Daniel Bodanksy, *Reflections on the Paris Conference*, <http://opiniojuris.org/2015/12/15/reflections-on-the-paris-conference/>.

31 Christiana Figueres, the UNFCCC's executive secretary, has said that climate policy pursues the more general goal of changing "the economic development model that has been reigning for at least 150 years." U.N. *Official Reveals Real Reason Behind Warming Scare*, <http://news.investors.com/ibd-editorials/021015-738779-climate-change-scare-tool-to-destroy-capitalism.htm>. Cf. the proposed creation of a "movement of movements." Martin Lukacs, *Claim no easy victories. Paris was a failure, but a climate justice movement is rising*, <http://www.theguardian.com/environment/true-north/2015/dec/15/claim-no-easy-victories-paris-was-a-failure-but-a-climate-justice-movement-is-rising>.

32 Cf. Jean Galbraith, *The Legal Structure of the Paris Agreement*, Dec. 21, 2015, <http://www.regblog.org/2015/12/21/galbraith-legal-structure-paris-agreement/>.

33 Lucas Bergkamp, *A Dutch Court's 'Revolutionary' Climate Policy Judgment: The Perversion of Judicial Power, the State's Duties of Care, and Science*, *Journal of Environmental & Planning Law*, 12 (2015) 239–61. Lucas Bergkamp & Jaap C. Hanekamp, *Climate Change Litigation Against States: The Perils of Court-Made Climate Policies*, *European Energy and Environmental Law Review*, 24, 2015, pp. 102–114.

34 L. Bergkamp & F. W. Brownell, *Dutch Treat* (forthcoming, 2016).

35 The Paris Agreement itself may also become the subject of court action. See Rupert Darwall, *Paris: The Treaty That Dare Not Speak Its Name*, <http://www.nationalreview.com/article/428448/paris-climate-agreement-bad-for-us-needs-congressional-approval>. Cf. Daniel Bodanksy, *Legal Options For U.S. Acceptance of a New Climate Change Agreement*, Center for Climate and Energy Solutions, May 2015.

affected “not only by climate change, but also by the impacts of the measures taken in response to it.”³⁶ Consequently, climate action measures may have to be tempered to reduce the impact on other states, in particular developing countries.³⁷ Although the main objective is to limit the global temperature increase, the agreement would seem to over-promise where it suggests that a range of other social problems will be addressed. As climate change is a “common concern of humankind,” when taking action to address climate change, parties should “respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.”³⁸ It is hard to see how limiting global warming can do much good for any of these concerns. Likewise, the agreement recognizes that sustainable lifestyles and sustainable patterns of consumption and production should play an important role in addressing climate change,³⁹ in particular in developed countries, but the problem has been all along that there is no political support for frugal lifestyle changes.

As mentioned above, any sophisticated understanding of the Paris Agreement should focus on both what has been included and what has been left out. Although the COP-21 Decision and Paris Agreement have much to say about mitigation and finance of climate-related projects, they do not impose any emission reduction obligations on industrialized countries⁴⁰ or major emerging economies, nor do they include quantifiable financial commitments to assist developing countries in mitigation and adaptation. There is no agreed roadmap for limiting global warming and climate change, nor is there any binding long-term goal. While the parties have agreed to continue the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts,⁴¹ the COP-21 Decision provides explicitly that the “loss and damage” clauses of the agreement⁴² do not

“involve or provide a basis for any liability or compensation.”⁴³ Despite efforts to give the Paris Agreement real teeth, the final text does not establish an “international tribunal of climate justice,” which would allow nations to take developed countries to court. Pursuant to one of the draft texts discussed during the COP-21 preparatory meetings, the tribunal would take up issues such as “climate justice,” “climate finance,” “technology transfers,” and “climate debt.”⁴⁴ It is no surprise that this proposal did not make it into the final agreement, since the UNFCCC already provides for a dispute resolution procedure;⁴⁵ the Paris Agreement refers to this procedure.⁴⁶ The concept of climate justice is referenced only in passing, where a recital acknowledges “the importance for some” of this concept.⁴⁷

A key, but not novel concept of the Paris deal is the program of nationally determined contributions (NDCs). These are national climate action plans. Importantly, the Paris Agreement sets little or no substantive criteria for NDCs. A country is free to set its own level of ambition, which may be close to zero, and adopt the specific mix of measures it intends to pursue, which may include solely innovation policies and no emission reduction measures. Upon ratification, parties must submit their NDCs⁴⁸ to the Paris secretariat,⁴⁹ which are entered in a public registry.⁵⁰ National plans submitted after the agreement’s entry into force⁵¹ may or may not be binding;⁵² once a country has submitted an unqualified NDC, there is a good case to be made that it has entered into a legally binding agreement to perform its commitment,⁵³ subject to the conventional defenses and exceptions applicable under international law. By 2020, the parties are requested to communicate new NDCs, and the COP periodically assesses the collective progress towards achieving the agreement’s purpose (also called the “global

36 Recital, Paris Agreement.

37 Article 4(15), Paris Agreement.

38 Recital, Paris Agreement.

39 Recital, Paris Agreement.

40 To avoid Congressional approval, the US insisted on a last minute change to Article 4(4), which now reads “should” rather than “shall.” (“Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets.”)

41 COP-21 Decision, para 52. For further analysis, see William C. G. Burns, *Loss and Damage and the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change*, Forum for Climate Engineering Assessment, Jan. 2, 2016, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710086.

42 Note that the Paris Agreement does not establish a procedure for deciding whether any impact is related to climate change.

43 Article 8, Paris Agreement.

44 http://unfccc.int/files/adaptation/application/pdf/mechanical_light_editing.pdf.

45 Article 14, UNFCCC.

46 Article 24, Paris Agreement.

47 Recital, Paris Agreement.

48 In accordance with the COP-21’s Decision, such a plan should cover all sources of anthropogenic emissions and must explain why any categories not included have been excluded. COP-21 Decision, para 31(c) and (d).

49 Article 4(2), Paris Agreement.

50 Article 4(12), Paris Agreement.

51 The agreement enters into force once 55 ratifications from states representing 55% of global emissions have been submitted. Article 21(1), Paris Agreement.

52 Whether they might be binding also under international law, if not properly qualified, once they have been submitted, is an open question.

53 Many commentators disagree, however. See, for instance, Philip Lloyd, *The Paris ‘Agreement’ – chock full of noble intentions*, Dec. 21, 2015, <http://wattsupwiththat.com/2015/12/21/the-paris-agreement-chock-full-of-noble-intentions/>.

stocktake⁵⁴), for the first time in 2023⁵⁵ and every five years thereafter unless otherwise decided.⁵⁶ Successive national plans should be more ambitious.⁵⁷ Further, a party is free to withdraw from the agreement at any time after three years from the agreement's entry into force.⁵⁸

Thus, the Paris Agreement does not impose any emission reduction obligations, nor does it include quantifiable financial commitments to assist developing countries with mitigation and adaptation. There is no agreed roadmap for limiting global warming and climate change, nor is there any binding long-term goal. Indeed, it imposes no obligations on countries to adopt any specific climate policy or emission reduction targets. Objectively viewed, the Paris Agreement would appear to be no more than a procedural framework for future, flexible "bottom-up"⁵⁹ climate policy-making by the parties to it, dressed up with some non-binding language that emphasizes ambition and progression. Global emissions should peak "as soon as possible," but peaking may take longer for developing countries.⁶⁰ By the second half of this century, greenhouse gas emissions should be balanced out by sinks, processes that remove them from the air.⁶¹ Pursuant to the COP-21 Decision, developed nations should collectively contribute at least US\$100 billion a year from 2020 to help poorer nations deal with climate change.⁶² Even if strongly reinforced by social norms and expectations, as a matter of international law, all of these can be said to be non-binding, best efforts recitations. In practical terms, the Paris Agreement merely elaborates upon the concepts first articulated in 1992 under the UNFCCC itself, rather than set off in a new, and more affirmative, policy direction.

C. Bureaucracy

Given the lack of any new substantive law, the Paris Agreement's main accomplishments are new processes and "management" procedures.⁶³ It establishes various

submission, reporting, assessment, application, review, and decision-making processes. The administration of these processes will result in a substantial expansion of bureaucracy, both domestically and at the international level.⁶⁴ Specifically, procedures around the NDCs, climate change adaptation, and climate action finance will require significant administrative and bureaucratic efforts. Some of the necessary bureaucracy will be established at international level and some at the national levels. Under the COP-21 Decision, the proposed cash flow for climate finance will be at least US\$100 billion per year. Given that this amount will not all flow through a single channel, the challenge of marshaling such a figure and ensuring it is appropriately dispersed and deployed is likely to invoke substantial administrative costs. These legitimate administrative expenses are in addition to other losses due to inefficiencies, bad investments, "grease payments," and the like.

With the Paris climate deal, the number of bodies involved with international climate change management will expand further. The COP is only one of the bodies established by the Paris Agreement. There already is an "Ad Hoc Working Group on the Paris Agreement," and there will also be a "Paris Committee on Capacity-Building," which will address gaps and needs in implementing capacity-building in developing countries and oversee the pertinent work plans.⁶⁵ Further, a new committee will be charged with facilitating implementation of and promoting compliance with the provisions of the Paris Agreement. This committee will be expert-based and facilitative in nature and function in a manner that is "transparent, non-adversarial and non-punitive."⁶⁶ In addition, the COP will establish a body for supporting mitigation of greenhouse gas emissions and sustainable development.⁶⁷ The bodies that have already been established pursuant to prior agreements, such as the Adaptation Committee, the Least Developed Countries Expert Group, the Standing Committee on Finance, the Executive Committee of the Warsaw International Mechanism (which is instructed to establish a new task force),⁶⁸ the Technology Executive Committee, the Climate Technology Center, the Network Forum on the Impact of the Implementation of Response Measures, the Subsidiary Body for Implementation, and the Subsidiary Body for Scientific and Technological Advice

54 The outcome must inform the update and enhancement of national plans. Article 14(1) and (3), Paris Agreement.

55 Despite the EU's initial insistence on a first review of nationally determined contributions before 2020, the Paris Agreement imposes a more relaxed timeframe. Europa moet inbinden op klimaatconferentie, De Standaard, 11 december 2015, http://www.standaard.be/cnt/dmf20151210_02015644.

56 Article 14(1) and (2), Paris Agreement.

57 Article 4(3), Paris Agreement.

58 Article 28(1), Paris Agreement.

59 Richard Stewart, Benedict Kingsbury & Bruce Rudyk (eds.), *Climate Finance Regulatory and Funding Strategies for Climate Change and Global Development*, NYU Press, 2009.

60 Article 4(1), Paris Agreement.

61 Article 4(1), Paris Agreement.

62 COP-21 Decision, para 54.

63 Coglianese refers to the Paris Agreement's "management-based" regulatory approach. Cary Coglianese, *When Management-Based Regulation Goes Global*, <http://www.regblog.org/2015/12/23/coglianese-when-management-based-regulation-goes-global/>.

64 Under totalitarian regimes, as Arendt argues, the preferred "models of organization" are "bureaucratic regimes." Hannah Arendt, *The Origins of Totalitarianism* (1951), New Edition, New York: Harcourt, 1985, p. 247.

65 COP-21 Decision, paras 72 and 73.

66 Article 15(1) and (2), Paris Agreement.

67 Article 6(4), Paris Agreement.

68 COP-21 Decision, para 50.

will see an expansion of their tasks or workload.

Thus, while the Paris Agreement has rejected substantive obligations for the parties, it has been successful in expanding an already congested international bureaucracy to administer the multiple procedures, processes, and financial transactions to be conducted under it. In doing so, ostensibly, it has confirmed that climate policy-making is an inherently political, iterative exercise, which requires national support, not international dictates. Most importantly, this bureaucratic load is self-perpetuating, with COP-21 serving only as the latest reminder that no matter which way the political winds may blow in the U.S. Senate or the national legislatures of other similarly recalcitrant countries, and irrespective of how one might feel about climate science, the issue of climate change will figure prominently at the highest levels of policy-making for decades to come. Viewed from this angle, the Paris Agreement may be seen as respectful of national democracy, if only because it need not be otherwise to be effective.

2. Legal Force and Sanctions

A. Legally Binding Effect

The contradictory statements by the EU and United States about the Paris Agreement's legally binding effect suggest that the agreement's legal force is not a straightforward issue.⁶⁹ Closely related to the agreement's legal force is the issue of sanctions for non-compliance. Such sanctions can include formal and informal sanctions. Before getting into the details, it should be noted that under international law the concept of legally binding is relative.⁷⁰ There is no international police force or army that can force nations to comply with their international law obligations. Serious violations of international law may justify action by other nations, such as economic sanctions, but, in the case of climate change, military intervention would not seem to be proportional or effective. Although international climate policy may hinge much more on diplomacy than on enforcement, the extent to which the Paris Agreement

should be regarded as legally binding is an important issue in assessing the level of commitment,⁷¹ setting stakeholders' expectations⁷² and defining the focus of future diplomatic efforts.⁷³ It is also relevant to domestic law, which, in monistic systems, may directly incorporate binding international law.⁷⁴

Not surprisingly, the Paris Agreement does not state explicitly which parts are binding on the parties and which parts are not. Reflecting French diplomacy in the service of compromise and American wordsmithing to circumvent Congress, the Paris Agreement is the epitome of constructive ambiguity. It uses many techniques to enable all parties to claim that they got what they wanted. For instance, some provisions do not address the parties, but state general aspirations or conclusions.⁷⁵ In the provisions spelling out the obligations of the parties, the draftsmen employed not only the verbs "shall"⁷⁶ and "should,"⁷⁷ but also "are to"⁷⁸ and "aim to."⁷⁹ Pursuant to the rules of interpretation commonly employed under international law,⁸⁰ the parties are only bound by the obligations the

69 For an argument that the Paris Agreement is non-binding and that this does not matter, see Samantha Page, No, The Paris Climate Agreement Isn't Binding. Here's Why That Doesn't Matter, Dec. 14, 2015, <http://thinkprogress.org/climate/2015/12/14/3731715/paris-agreement-is-an-actual-agreement/>.

70 Bodansky has observed that "it has proved difficult to assess the strength of [binding effect] in promoting effectiveness, both absolutely and relative to other elements of treaty design, such as an agreement's precision and its mechanisms for transparency and accountability." Daniel Bodansky, Legally Binding versus Non-Legally Binding Instruments, in: Scott Barrett, Carlo Carraro & Jaime de Melo (eds.), *Towards a Workable and Effective Climate Regime*, London: VoxEU eBook (CEPR and FERDI), 2016, pp. 155–65.

71 "Formulating an agreement in legally binding terms signals stronger commitment, both by the executive that accepts the agreement and by the wider body politic, particularly if domestic acceptance requires legislative approval." Daniel Bodansky, Legally Binding versus Non-Legally Binding Instruments, in: Scott Barrett, Carlo Carraro & Jaime de Melo (eds.), *Towards a Workable and Effective Climate Regime*, London: VoxEU eBook (CEPR and FERDI), 2016, pp. 155–65.

72 Legally binding treaties can serve as "a stronger basis for domestic and international mobilization." Daniel Bodansky, Legally Binding versus Non-Legally Binding Instruments, in: Scott Barrett, Carlo Carraro & Jaime de Melo (eds.), *Towards a Workable and Effective Climate Regime*, London: VoxEU eBook (CEPR and FERDI), 2016, pp. 155–65.

73 See also Article 31 of the Vienna Convention on the Law of Treaties.

74 Legally binding international agreements "can have domestic legal ramifications, to the extent that treaties prompt legislative implementation or can be applied by national courts." Daniel Bodansky, Legally Binding versus Non-Legally Binding Instruments, in: Scott Barrett, Carlo Carraro & Jaime de Melo (eds.), *Towards a Workable and Effective Climate Regime*, London: VoxEU eBook (CEPR and FERDI), 2016, pp. 155–65.

75 Article 3, Paris Agreement ("The efforts of all Parties will represent a progression over time.").

76 Article 4(2), Paris Agreement ("Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve."), http://unfccc.int/documentation/documents/advanced_search/items/6911.php?preref=600008831 (hereafter, "Paris Agreement").

77 Article 4(19), Paris Agreement ("All Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies.").

78 Article 3(1), Paris Agreement ("All Parties are to undertake and communicate ambitious efforts.").

79 Article 4(1), Paris Agreement ("Parties aim to reach global peaking of greenhouse gas emissions as soon as possible.").

80 Article 31(1) of the Vienna Convention on the Law of Treaties provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and

agreement imposes on them,⁸¹ not by its aspirational or conclusory bits, at least not directly. If only the use of “shall” signals binding obligations,⁸² the parties are directly bound solely by procedural obligations, such as that “each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve.”⁸³

For a binding obligation to be enforceable, however, it must also be sufficiently precise and any conditions to which it is subject must be fulfilled. Whether a party has taken “the lead by undertaking economy-wide absolute emission reduction targets,”⁸⁴ or has “taken into consideration (...) the concerns of Parties with economies most affected by the impacts of response measures,”⁸⁵ is hard to verify for a court. Whether a party is aiming “to reach global peaking of greenhouse gas emissions as soon as possible,” is beyond adjudication for more than one reason. In general, where the verb “should” or a similar verb is used, only an ethical, or political, non-binding rule is intended, but, as discussed below, it cannot be excluded that such rules may play a role in construing binding obligations.

B. Indirectly Binding Effect

Importantly, a key provision of the Paris Agreement is not phrased as an obligation for the parties. Rather, it specifies that the agreement “aims to strengthen the global response to the threat of climate change,” including by “holding the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”⁸⁶ The provision further details that the agreement “will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”⁸⁷ To achieve this purpose, Parties “are to” undertake and communicate “ambitious efforts” as defined in other provisions of the agreement.⁸⁸ The meaning of “are

to” is ambiguous; it could mean must (normative) or will (descriptive). “Ambitious” is not defined, and the parties have not committed to any specific binding level of emission reduction or financial contributions. Rather, each party must set its own “nationally determined contribution”⁸⁹ progress, consistent with its “highest possible ambition,”⁹⁰ and “account for their nationally determined contributions.”⁹¹ With respect to finance, developed countries must “provide financial resources to assist developing country Parties with respect to both mitigation and adaptation,”⁹² but, while the decision refers to “a floor of USD 100 billion per year,”⁹³ the agreement does not set forth any amount.

Thus, consistent with the United States Government’s demand to avoid ratification by Congress, the Paris Agreement, while reflecting political ambition, would not seem to impose substantive obligations. All of the provisions that clearly impose obligations are procedural and process-related, and require further political decisions by the parties; once a party has made a commitment, however, it is probably bound by that pledge. Consequently, national pledges submitted pursuant to the Paris Agreement may be binding, as the parties rely on other parties’ pledges. Even if that is the case, a party may be able to invoke a defense or exception. For instance, even where a party fails to meet its own contribution commitment, it may be able to plead necessity, force majeure,⁹⁴ or the exception of non-performance by other parties to justify such failure.⁹⁵ Indeed, aside from a belligerent repudiation of one’s pledge, a succeeding administration in the United States or elsewhere has ample means at its disposal to evade even the expectation of compliance.

There is another way, however, in which the agreement could be deemed to impose more than merely procedure and process. As noted above, in addition to a few binding procedural obligations, the COP-21 Decision and Paris Agreement set forth many non-binding requirements, such as developed nations’ obligation to set economy-wide absolute emission reduction targets,⁹⁶ as well as an

purpose.” Article 31(2) stipulates as follows: “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”

81 Cf. Article 20(2), Paris Agreement.

82 For an overview, see Jennifer Morgan & Eliza Northrop, Form AND Function: Why the Paris Agreement’s Legal Form Is So Important, Dec. 16, 2015, <http://www.wri.org/print/43692>.

83 Article 4(2), Paris Agreement.

84 Article 4(4), Paris Agreement.

85 Article 4(15), Paris Agreement.

86 Article 2(1), Paris Agreement.

87 Article 2(2), Paris Agreement.

88 Article 3, Paris Agreement.

89 Article 4(2), Paris Agreement.

90 Article 4(3), Paris Agreement.

91 Article 4(13), Paris Agreement.

92 Article 9(1), Paris Agreement.

93 COP-21 Decision, paras 54 and 115.

94 Cf. Federica I. Paddeu, A Genealogy of Force Majeure in International Law, *British Yearbook of International Law* (2012), doi: 10.1093/bybil/brs005.

95 Cf. Filippo Fontanelli, The Invocation of the Exception of Non-Performance: A Case-Study on the Role and Application of General Principles of International Law of Contractual Origin, *Cambridge Journal of International and Comparative Law* (1)1: 119–36 (2012).

96 Article 4(4), Paris Agreement.

ambitious objective of limiting global temperature increase to well below 2°C or even 1.5°C.⁹⁷ Of course, the gap between ambition and actual policy commitments creates tension. In this space, a grey zone between binding and non-binding may arise, which could result in uncertainty over individual countries' obligations. Given the importance of the fight against climate change, claims will be made that countries must do their fair share and that the non-binding obligations imposed by the agreement are moral imperatives, which must be enforced one way or another, at the international or national level. To support claims that the Paris Agreement imposes substantive obligations, reference could be made to the rules of interpretation set forth in the Vienna Convention on the Law of Treaties. Under these rules, the objective and non-binding parts of the agreement play a role in the interpretation of the procedural, reporting requirements. Specifically, the argument would be that the obligation to submit a national climate plan⁹⁸ must be read in light of the objective of the agreement (to keep the temperature rise well below 2 degrees⁹⁹) and the provision that requires progressively more ambitious policies.¹⁰⁰ Thus, this ostensibly merely procedural obligation would obtain mandatory substantive content.

C. Sanctions

While the Paris Agreement imposes a process for regular review of progress towards the collective objective, it is by and large silent on sanctions. With respect to dispute resolution, the Paris Agreement¹⁰¹ refers to the procedure established by the UNFCCC.¹⁰² As there are no substantive criteria for assessing individual countries' contributions towards the agreement's objective, one might wonder both how a substantive dispute could arise and, particularly in the absence of articulated criteria, how such a dispute would be resolved.¹⁰³ However powerful, the "peer pressure" among countries to set ambitious goals must eventually give way to the practical realities involved in meeting them. In other words, successful climate policy still remains a function of innovation, subsidies for renewable or low- or zero-emissions energy, carbon sinks, emission reduction, carbon capture and storage, or any combination thereof. It is not, as so often portrayed around

the UNFCCC, a consequence of momentary political will.

Thus, it is fair to ask whether the real champions of climate policy will be the countries whose political leaders set long-term goals or the countries whose industrial bases become capable of achieving more immediate-term progress. Regardless, the liberal make-up of the post-Paris climate regime creates legitimate uncertainty over whether any collective temperature target can be achieved without legally enforceable commitments approved by national democracies. Undoubtedly, the first line of attack post-Paris will be international bullying of democracies to get them to strengthen their mitigation measures (and hand over more money). Such intimidation may have an appreciable effect on policy-making in nations sensitive to international or national pressure.¹⁰⁴ Indeed, some politicians susceptible to public castigation might find it hard to resist the pressure applied by an authoritative international organization supported by hyperbolic activists and civil society groups bent on influencing the public media and people's emotions.¹⁰⁵ If, however, diplomacy, bullying, intimidation, "naming and shaming," and other exercises of "soft" power will prove insufficient to remedy the problem, what sorts of sanctions or other harder-edged actions will emerge as appropriate and effective? Inter-state court proceedings may produce judgments, but the level of their enforceability is weak. Trade sanctions, economic boycotts, or border carbon adjustment duties can produce real results among laggard countries, but may still be insufficient to force truly scalable low carbon conversions or may falter in the face of broader political, economic, and even geo-strategic considerations.

In the end, the artful wordsmithing of the Paris Agreement, however much it can be hailed as progress at the political level, has left the most significant (and most contentious) questions around climate policy unanswered: Where is the democratic support for the ambitious climate policies contemplated in Paris, what are the teeth, where is their legitimization, and will anyone ever get caught by them? Without satisfactory answers from political leaders accountable to national constituencies, it is fair to wonder

97 Article 2(1), Paris Agreement.

98 Article 4(2), Paris Agreement.

99 Article 2(1)(a), Paris Agreement.

100 Article 4(3), Paris Agreement. Cf. Article 31, Vienna Convention on the Law of Treaties.

101 Article 24, Paris Agreement.

102 Article 14, UNFCCC.

103 But see Section 3 of this article, below, regarding references to "best available science" in the Paris Agreement.

104 Bryan D. Jones & Frank R. Baumgartner, *The Politics of Attention: How Government Prioritizes Problems*, The University of Chicago Press, 2015.

105 The climate movement is supported by enormous academic and other brain power and runs a highly sophisticated influence campaign through its world-wide network. For a discussion of some of the strategies and tactics used by the movement, see generally Jarol B. Manheim, *Strategy in Information and Influence Campaigns: How Policy Advocates, Social Movements, Insurgent Groups, Corporations, Governments and Others Get What They Want*, New York: Routledge, 2011. For the psychology, see Robert B. Cialdini, *Influence: The Psychology of Persuasion*, New York: Harper Collins, 2007.

whether activism alone is sufficient to deliver on the promises of the Paris Agreement or whether, at the first sign of trouble, climate policies will relax to accommodate more immediately pressing economic or security needs.

3. Science in the Paris Agreement

A. Best Available Science

Acknowledging the importance of science to climate policies, the Paris Agreement stipulates that “an effective and progressive response to the urgent threat of climate change” should be based on “the best available scientific knowledge.”¹⁰⁶ The relation between the Paris Agreement and science, however, is somewhat ambiguous, which is a cause for some concern. On the one hand, the agreement’s framework establishes a science-based program for policy-making. On the other hand, the agreement could also be seen as an attempt to “settle” the scientific debate, which already is far removed from the level of robustness the public interest requires.¹⁰⁷ As discussed below, this tension may hamper the enactment of efficient and effective climate policies.

The term “best available scientific knowledge” or “best available science” is used in several places throughout the agreement. The parties should undertake emission reductions and achieve carbon-neutrality (zero net emissions¹⁰⁸) in the second half of this century in accordance with “best available science,” which appears to accommodate scientific progress.¹⁰⁹ Likewise, adaptation measures “should be based on and guided by the best

available science,” in addition to, “as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems.”¹¹⁰ With respect to adaptation, the parties should share “information, good practices, experiences and lessons learned, including, as appropriate, as these relate to science,”¹¹¹ and cooperate to strengthen “scientific knowledge on climate.” In conducting the “global stocktake,” the Conference of the Parties must take into account equity and the best available science.¹¹²

In analyzing the enormous volume of climate-related research, the Intergovernmental Panel on Climate Change (IPCC) has played a key role. To a substantial degree, international climate policy has been based on the IPCC’s assessment reports. The Paris Agreement does not define the concept of “best available science” with reference to the findings of the IPCC, however. So non-IPCC science is not excluded from competing for the label of “best available science.” Consistent with this openness, the COP-21 Decision refers to the IPCC reports as a non-exclusive source of input for the global stocktake.¹¹³ Nevertheless, it is to be expected that the IPCC will continue to play the lead role in supplying scientific advice to the policy-makers. As discussed below, the Paris Agreement calls on the IPCC to provide the scientific backup for the policy decision that has already been made.¹¹⁴ With the economic and financial stakes going up post-Paris, the IPCC will be even less able to avoid bias¹¹⁵ and resist the mounting political pressure.¹¹⁶

B. Temperature and Science

As in previous international climate accords, the Paris Agreement acknowledges that mankind is “the cause of

106 Recital, Paris Agreement.

107 It has long been recognized that climate science, to a substantial degree, is policy-led, which deprives the science of its “inherently self-correcting” character. Alan Longhurst, *Doubt and Certainty in Climate Science*, E-Book, Sept. 2015, p. 17. Sarewitz has noted that “[c]limate science served one main purpose: to advance [a top-down, coordinated, international emissions governance] regime.” D. Sarewitz, *Does climate change knowledge really matter?*, WIREs Climate Change, 2011. For a process-based explanation of the *politicization* of climate science, see Lucas Bergkamp, *Adjudicating scientific disputes in climate science: the limits of judicial competence and the risks of taking sides* (2015) 3 *Env. Liability*, pp. 80–102.

108 The parties aim to “undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.” Article 4(1), Paris Agreement.

109 Article 4(1), Paris Agreement. Gerrard has suggested that this provision, “when closely read, seems to call for the virtual end of fossil fuel use in this century unless there are major advances in carbon sequestration or air capture technology.” Michael B. Gerrard, *Legal Implications of the Paris Agreement for Fossil Fuels*, <http://blogs.law.columbia.edu/climatechange/2015/12/19/legal-implications-of-the-paris-agreement-for-fossil-fuels/#sthash.OSCkkkfc.dpuf>.

110 Article 7(5), Paris Agreement.

111 Article 7(7)(a), Paris Agreement.

112 Article 14(1), Paris Agreement.

113 COP-21 Decision, para 100.

114 Curry calls this “[t]he ‘policy cart’ (...) leading the scientific ‘horse.’” J. A. Curry, *Statement to the Committee on Science, Space and Technology of the United States House of Representatives’ Hearing on ‘The President’s U.N. Climate Pledge’* (Apr. 15, 2015). Darwall has argued that “bias in the IPCC is endemic.” Rupert Darwall, *The Age of Global Warming: A History*, London: Quartet Books, 2013, p. 348.

115 For instance, the IPCC is focused on anthropogenic emissions and forcings, and has not evenly reflected the body of climate science addressing natural climate variability. Alan Longhurst, *Doubt and Certainty in Climate Science*, E-Book, Sept. 2015, p. 14 (“there is no reason for experts in, say, solar influences on climate to be involved in the work of the IPCC and it is reasonable to think that this is likely to constrain their collective opinion to point in certain directions”).

116 As Silke Beck has observed, the IPCC leadership acts “in an overtly political manner while simultaneously claiming to be disengaged from politics.” She poses the rhetorical question “why the prevailing form of leadership [is] not openly challenged by participating scientists and governments.” Silke Beck, *Between Tribalism and Trust: The IPCC Under the ‘Public Microscope,’* *Nature and Culture* 7(2), Summer 2012: 151–73.

global warming.” This acknowledgment has been called “a victory for science.”¹¹⁷ But is it? Consistent with statements made in earlier decisions, the parties to the Paris Agreement seem to view the issue of climate change primarily in terms of limiting the global average temperature increase to “well below 2°C above pre-industrial levels.”¹¹⁸ Is this choice for a strong emphasis on temperature increase consistent with the agreement’s endorsement of science-based policy? In other words, while there is always an important role for science to play in climate policy, science itself is not sufficient to override national sovereignty as to policy choice. Good science can support good policy, but does not dictate it.¹¹⁹

Temperature increase is only one, early link in the putative causal chain of climate change: GHGs cause a heat entrapment effect, which likely contributes to global atmospheric temperature increase, which may result in climate change, which, in turn, may cause adverse impacts (in addition to positive impacts). Climate science is still evolving, however, and the causal chain is not fully understood. For instance, the issue of climate sensitivity and the extent of natural climate variability remain the subject of legitimate scientific debate and a lingering area of uncertainty. The benefits and costs of limited temperature increase, and their distribution over geographical areas and people, are poorly comprehended.¹²⁰ Under these circumstances, the downside of focusing solely on temperature increase is that neither the cost nor the benefits of the measures necessary to achieve this objective can be assessed. It would have made more sense for the agreement to establish dynamic objectives that can be adjusted as climate science and our understanding of costs and benefits of policy alternatives develop. In other words, the desire to limit the global average temperature increase is not necessarily science-based, and the “best available science,” once it has matured, may point in another direction.

The draftsmen of the Paris Agreement did not stop at setting an objective of limiting the global average temperature increase to below 2°C, but also included a loosely worded ambition “to pursue efforts to limit the

temperature increase to 1.5°C above pre-industrial levels.”¹²¹ To bolster the pursuit of this even more ambitious policy objective, the COP calls on the Intergovernmental Panel on Climate Change (IPCC) “to provide a special report in 2018 on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways.”¹²² Note that the request does not explicitly include the impacts of measures to keep warming limited to 1.5°C. Since the policy objective has already been set, the agreement would appear to call on the IPCC to provide the scientific backup for a policy decision that has already been made. Despite the limited requests, this request provides the IPCC with an opportunity to assess not only the latest scientific insights, but also economic cost-benefit analyses of policy options. Reforms¹²³ should help the IPCC in producing an objective assessment of the relevant science, and dispelling the simplistic concept of a politically correct “climate science-policy package” requiring substantial emission reductions.¹²⁴

In short, although the Paris Agreement acknowledges the importance of science-based policy-making, it also sets policy objectives that are not necessarily science-based. By endorsing a specific limit on temperature increase, the agreement would seem to “settle,” or at least render moot, the scientific debates on issues such as climate sensitivity. Future IPCC reports will identify the impacts of a 1.5°C temperature increase to back up further ambitious climate policies, despite the lack of any analysis of the costs and benefits of both the objective and such policies. How the “best available science” could influence this pursuit is an

117 Roger Cox, We Must ‘Reply All’ to the Collective Action in Paris, <https://www.cigionline.org/blogs/global-rule-of-law/we-must-reply-all-collective-action-paris>. Paris Agreement a victory for climate science and ultimate defeat for fossil fuels, <http://www.theguardian.com/environment/planet-oz/2015/dec/12/paris-agreement-a-victory-for-climate-science-and-ultimate-defeat-for-fossil-fuels>.

118 Article 2(1)(a), Paris Agreement.

119 For a discussion of scientism, see Lucas Bergkamp & Jaap C. Hanekamp, Climate Change Litigation Against States: The Perils of Court-Made Climate Policies, *European Energy and Environmental Law Review*, 24, 2015, pp. 102–114.

120 Cf. Richard S. J. Tol, *The Costs and Benefits of EU Climate Policy For 2020*, Copenhagen, 2010, <http://www.copenhagenconsensus.com/publication/policy-report-costs-and-benefits-eu-climate-policy-2020>. Richard S. J. Tol, *Economic impacts of climate change*, University of Sussex, Working Paper Series No. 75-2015. Richard S. J. Tol, *Economic impacts of climate change: New evidence*, *Vox*, Sept. 17, 2015, <http://www.voxeu.org/article/economic-impacts-climate-change-new-evidence>.

121 Article 2(1), Paris Agreement.

122 COP-21 Decision, para 21.

123 In its independent review of the IPCC’s processes, the InterAcademy Council pointed to “the dangers of ‘group think’ or consensus building as a general proposition.” InterAcademy Council, *Climate Change Assessments: Review of the Processes and Procedures of the IPCC*. Amsterdam: InterAcademy Council, 2010. Carlo Carraro, Ottmar Edenhofer, Christian Flachsland, Charles Kolstad, Robert Stavins, and Robert Stowe, *The IPCC at a Crossroads: Opportunities for Reform*, *Science* Oct. 2, 2015, Vol. 350, No. 6256, pp. 34–35.

124 The climate movement demands absolute and undivided loyalty, in particular from scientists and even on issues other than climate change. See, e.g. Naomi Oreskes, There is a new form of climate denialism to look out for – so don’t celebrate yet, *The Guardian*, Dec. 16, 2015, <http://www.theguardian.com/commentisfree/2015/dec/16/new-form-climate-denialism-dont-celebrate-yet-cop-21>.

open question. It is, of course, no coincidence that the climate movement attempts to “own” the science, because science provides the necessary back-up and content for its ideology, and “factual propaganda work[s] better than (...) rhetoric” to win over the masses.¹²⁵ The result may well be, however, that the Paris Agreement will effectively render the UNFCCC a global temperature management organization immune to science, instead of a science-based international climate policy center.

4. Paris’ Influence on Climate Policy-Making

A. The Disparity Between Ambition and Obligation

In the preceding sections, we have seen that the Paris Agreement’s management approach involves a framework for decentralized, bottom-up national climate policy-making overseen by an international bureaucracy. As such, it imposes procedural and process requirements on the parties, not any substantive obligations. Nevertheless, the agreement also sets forth many generic substantive commitments and ambitious objectives, which may influence the interpretation of the parties’ procedural obligations and give them substantive content. Notably, the agreement acknowledges the urgency of addressing the climate change challenge, and endorses ambitious temperature-related objectives, the achievement of which might require drastic action by the national governments that ratify the agreement. The Paris Agreement is a diplomatic accomplishment that reflects diverging interests and perspectives. It constitutes a carefully drafted compromise that serves many masters, and allows each of them to emphasize only the aspects that he or she finds convenient. Indeed, to reach agreement in Paris, the negotiators had to satisfy several conflicting demands, which drove the negotiations to a very awkward, not so common denominator. Even if the agreement constitutes the *maximum* that was politically feasible, there is reason to be concerned about the historic deal, its implementation, and the potential for abuse.

125 Hannah Arendt, *The Origins of Totalitarianism* (1951), New Edition, New York: Harcourt, 1985, p. 269. The totalitarian regimes of the twentieth century also exploited ideologies that “can explain everything and every occurrence by deducing it from a single premise,” and therefore have “great political potentialities” (p. 468). Based on the logic of their ideas, ideologies “pretend to know the mysteries of the whole historical process—the secrets of the past, the intricacies of the present, the uncertainties of the future” (p. 469). No experience can teach anything because everything can be deduced from the ideological premise (p. 470). “Common sense trained in utilitarian thinking is helpless against this ideological supersense, since totalitarian regimes establish a functioning world of no-sense” (p. 458).

Although it is already hard enough to get the world to take action to limit the temperature increase to 3 or 4°C, in Paris, the parties committed to a common goal of holding the global average temperature increase to well below 2°C and to pursue efforts to limit it to 1.5°C.¹²⁶ Activists and public media have celebrated this increased ambition as a victory for the climate.¹²⁷ But the agreement does nothing to ensure that individual countries contribute to achieving this goal; it merely requires that they submit plans, which *should* become progressively more ambitious.¹²⁸ As formal sanctions are lacking, apparently, the hope is that diplomatic, political pressure, bullying, and intimidation by the climate movement, naming and shaming, and unilateral sanctions, such as trade sanctions or economic boycotts, will push countries to do their part.

But the effectiveness of these tools, to a substantial degree, hinges on clear criteria for assessment of individual action. As the agreement provides no mechanism or methodology for allocating the burdens that will likely be associated with meeting these objectives, the question arises how their realization will be ensured. Countries are free to put all of their faith in innovation, subsidies for renewable energy, carbon sinks, emission reduction, or any combination thereof. A global stocktaking procedure should give the parties some idea about where their collective efforts are heading, but there are no substantive criteria for assessing individual countries’ contributions towards the agreement’s objective. With its 20/20/20 policy mix¹²⁹ and the Emissions Trading Scheme,¹³⁰ the EU has sought to take the lead in the fight against climate change. But serious implications for the region’s competitiveness will only loom larger if, in the coming years, other parts of the world fail to pursue climate policy with the same vigor as the EU. Beyond the limited (and pre-existing) influence of peer pressure and other social norms, this is a problem the Paris Agreement has not, in substantive terms, fixed.

B. The Implications for Politics and Constitutional Government

i. Setting Governments up for Failure

A truly remarkable aspect of the Paris Agreement is that it demands from the signatory states that they acknowledge

126 Article 2(1), Paris Agreement.

127 Avi Lewis and Rajiv Sicora, *Why Most Of What You Think You Know About The Paris Climate Deal Is Wrong: An Annotated News Story*, Dec. 18, 2015, <http://theleap.thischangeseverything.org/why-most-of-what-you-think-you-know-about-the-paris-climate-deal-is-wrong-an-annotated-news-story-2/>.

128 Article 4(2) and (3), Paris Agreement.

129 Europe 2020 targets, http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/targets/index_en.htm.

130 The EU Emissions Trading System (EU ETS), http://ec.europa.eu/clima/policies/ets/index_en.htm.

explicitly that their efforts are inadequate. One of the recitals to the decision states that the Conference of the Parties “[e]mphasiz[es] with serious concern the urgent need to address the significant gap between the aggregate effect of Parties’ mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent with holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”¹³¹ More specifically, the COP had to concede that “the estimated aggregate greenhouse gas emission levels in 2025 and 2030 resulting from the intended nationally determined contributions do not fall within least-cost 2°C scenarios but rather lead to a projected level of 55 gigatonnes in 2030.” Therefore, “much greater emission reduction efforts will be required than those associated with the intended nationally determined contributions in order to hold the increase in the global average temperature to below 2°C by reducing emissions to 40 gigatonnes.”¹³² Such greater emission reduction efforts would have to be secured through the agreement’s decentral, flexible management process, but there are no criteria to assess states’ efforts. Thus, with the Paris Agreement, the climate movement obtained a concession from the international community of states that the concept of national government has failed, while not enabling it ever to resolve the issue of climate change. This concession is much more than merely symbolic: It confirms the asserted failure of traditional, territorial government and paves the way for international governance by the climate movement (also called a “movement of movements”).¹³³

So, with the Paris Agreement, the world’s governments face exactly the same collective action problem that they faced before Paris. Paris did increase the risks of conflicts, however, by setting the expectations higher. As Cox put it, the accord “legitimizes countries in perpetuating inadequate climate policies and (...) thereby contravening the universal goal of safeguarding humanity from dangerous climate change.”¹³⁴ By failing to close or even widening the gap

between ambition and obligation, however, the Paris Agreement creates a serious problem for government, leaving a void to be filled by non-governmental actors.¹³⁵ While it lays out a battlefield for the climate movement for decades to come,¹³⁶ it places governments in an unattractive position, weakens them, and exposes them to the real risk of failure.¹³⁷ The void COP-21 has created provides climate activists with bold official statements to support their claims,¹³⁸ while it does nothing to resolve the collective action problem. As Coglianesse observes, “[c]ountries’ bottom-up pledges will indeed likely generate

135 Commenting on the gap between what is scientifically necessary and what the COP-21 has delivered, Klein said “we know the deal is not enough to keep us safe. The good news is, we have a movement that is ready to fill the vacuum left by our leaders and to push them so hard to change the dynamics that the next time they get together we have a way better deal.” Naomi Klein, *The Paris Climate Deal Will Not Save Us*, <http://www.thenation.com/article/the-paris-climate-deal-will-not-save-us/>.

136 William Sweet, *Paris climate agreement charts global climate action for decades to come*, Dec. 12, 2015, <http://fusion.net/story/244460/paris-climate-agreement-finalized/>. Responding to the Paris Agreement’s failure, Lukacs has laid out his vision for the new movement of movements as follows: “The first task is to never let the richest governments forget their rhetoric. Did you say 1.5 degrees? Repeat it back to them as they return to licensing the mines, mega-dams, and monocultures that will render even their paltry emission targets impossible - and then back it up with action. The second is already underway: the transformation of the climate movement itself. (...) They are being woven into a movement of movements, prompting action with the right incentive: the promise of changed lives, instead of an unchanged climate. In France, more than a hundred organizations – labour unions, faith groups, green groups – united in an unprecedented manner behind the slogan that calls for such bold integrated solutions: ‘system change, not climate change.’” Martin Lukacs, *Claim no easy victories. Paris was a failure, but a climate justice movement is rising*, <http://www.theguardian.com/environment/true-north/2015/dec/15/claim-no-easy-victories-paris-was-a-failure-but-a-climate-justice-movement-is-rising>.

137 This, of course, is in the interest of the climate movement. It may explain also why climate activists support ineffective and inefficient solutions to climate change, such as wind power, rather than effective ones, such as nuclear power. Once the problem of climate change is solved, the greatest opportunity ever to launch the project of social justice-based global governance will be gone; climate change must stay around as an existential threat at least until this project is firmly in place. Cf. the concept of global governmentality, a form of global governance that depends on the regulatory role filled by civil society, Ronnie D. Lipschutz & Carina Mackendry, *Social Movements and Global Civil Society*, in: John S. Dryzek, Richard B. Norgaard, David Schlosberg (eds.), *The Oxford Handbook of Climate Change and Society*, Oxford University Press, 2011, Chapter 25. For a discussion of global climate government, see Section 4.B.iv below.

138 As Lewis and Sicora note, “countless movements around the world are already leading the way. (...) Every week, these movements are racking up new victories, building pressure from below for governments to take the kind of ambitious action that the crisis—and the science—demands.” Avi Lewis and Rajiv Sicora, *Why Most Of What You Think You Know About The Paris Climate Deal Is Wrong: An Annotated News Story*, Dec. 18, 2015, <http://theleap.thischangeseverything.org/why-most-of-what-you-think-you-know-about-the-paris-climate-deal-is-wrong-an-annotated-news-story-2/>.

131 Recital, COP-21 Decision.

132 COP-21 Decision, para 17.

133 As Lewis argues, the agreement “will establish the institutional framework for a global coalition of 190+ foreign leaders, legions of UN bureaucrats, scores of green pressure groups, and hundreds of corporate rent-seekers.” Marlo Lewis, *Paris Agreement: Recycled “Process” Socialism*, Jan. 3, 2016, <http://www.globalwarming.org/2016/01/03/paris-agreement-recycled-process-socialism/>.

134 Roger Cox, *We Must ‘Reply All’ to the Collective Action in Paris*, <https://www.cigionline.org/blogs/global-rule-of-law/we-must-reply-all-collective-action-paris>.

additional attention to promoting energy efficiency and finding better sources of renewable energy. But the kind of substantial commitment needed to produce still more significant emissions reductions will be hard to sustain over the longer term. Absent some pivotal breakthroughs in energy technology, the going will only get tougher.”¹³⁹ So what will happen if countries, despite all pressure applied by the UNFCCC secretariat, pro-climate governments, and the climate movement, are unable to meet the Paris Agreement’s collective targets?

This probably is the most significant issue arising under the Paris Agreement, and it is not an exclusively legal issue. There would not seem to be a legitimate reason for any government to agree to the inclusion of ambitious collective objectives without any mechanism or methodology for assigning individual obligations for contributing to achieving such objectives (not even if it genuinely believed them to be in the common interest and also in its own interest¹⁴⁰), except, maybe, if it thought that it will be in a better position to manage (or avoid) the burdens associated with such obligations and, thus, to improve its competitive position. There is a further complication, however, as countries are represented in Paris by their executives, or some part thereof. It is conceivable that a country’s executive government does not agree with the legislature over climate policy-making; the United States is a case in point. Under pressure from the legislature, such country’s executive may not be able to agree to binding substantive commitments, but it can agree to non-binding, ostensibly solely procedural obligations.

ii. Accept Legal Uncertainty, Reject Paris Agreement, or Be Creative

As discussed in Section 2.B, above, however, the Paris Agreement’s ambitious, non-binding substantive requirements and objectives may, as a matter of law, influence the interpretation and construction of the procedural obligations imposed on individual countries. To executives that are supportive of more ambitious climate action, this would be a welcome twist to the Paris Agreement’s actual outcomes. Legislatures and executives that do not support ambitious climate action or measures

beyond the country’s willingness to adopt them, however, may feel they are not getting the deal they agreed to. In ratifying the Paris Agreement, they may have relied on its apparent substantively non-binding character; the Obama administration has portrayed the agreement as non-binding to avoid Congressional approval,¹⁴¹ and, insofar as the agreement can be said to impose obligations, such obligations are either already part of existing agreements or fall within the scope of executive power.¹⁴²

Parties cannot easily deal with the uncertainty around the Paris Agreement’s substantive obligations when they ratify, since the agreement does not permit reservations.¹⁴³ As a result, they have to accept this uncertainty, or, if they do not want to be exposed, they have to refuse to ratify the agreement or employ some other device aimed at avoiding unforeseeable legal effects. Ratifying states could make “pseudo-reservations,” ratify conditionally (*e.g.*, under the condition that only specifically identified provisions are binding), issue an “interpretative declaration”¹⁴⁴ spelling out their interpretation of the agreement, or adopt specific legislation ratifying the agreement and simultaneously limiting its potential adverse legal consequences under national and international law. Importantly, to assess the risks associated with the agreement’s uncertain substantive legal force a country should look not only at the political

141 Kerry: Climate deal lacks penalties because of US Congress, <http://video.foxnews.com/v/4659760615001/kerry-climate-deal-lacks-penalties-because-of-us-congress/#sp=show-clips> Note, however, that Obama has called it a “strong agreement.” Obama: Climate agreement ‘best chance we have’ to save the planet, <http://edition.cnn.com/2015/12/12/world/global-climate-change-conference-vote/>.

142 Obama: Climate agreement ‘best chance we have’ to save the planet, <http://edition.cnn.com/2015/12/12/world/global-climate-change-conference-vote/> It has been argued that the Paris Agreement’s “core purpose” is “to establish the multi-decade framework for a global political pressure campaign (...) directed chiefly at those who oppose EPA’s unlawful Clean Power Plan and other elements of the President’s climate agenda.” Marlo Lewis, Paris Agreement Is a Real Tiger: Lock and Load, <http://www.globalwarming.org/2015/12/27/paris-agreement-is-a-real-tiger-lock-and-load/>.

143 Article 27, Paris Agreement. A “reservation” is “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” Article 2(1)(d), Vienna Convention on the Law of Treaties, May 23, 1969, UN Treaty Series, Vol. 1155, 1-18232, 1980, pp. 331–512.

144 An “interpretative declaration” is a “unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.” Conditional interpretative declarations are subject to the rules applicable to reservations, but are not themselves reservations. International Law Commission, Guide to Practice on Reservations to Treaties 2011, adopted by the ILC at its 63rd Session (A/66/10), Yearbook of the International Law Commission, 2011, Vol. II, Part Two.

139 Cary Coglianese, When Management-Based Regulation Goes Global, <http://www.regblog.org/2015/12/23/coglianese-when-management-based-regulation-goes-global/>. Cf. Stephen Eule, UPDATE: Mind the Gap: The Obama Administration’s International Climate Pledge Doesn’t Add Up, Aug. 10, 2015, <http://www.energyxxi.org/mind-gap-obama-administrations-international-climate-pledge-doesnt-add>.

140 This seems to be President Obama’s inclination. Benny Peiser, Obama the Unilateral Climate Warrior, Wall Street Journal, Dec. 21, 2015.

risks but also at the legal risks of the activists¹⁴⁵ and judiciary inserting themselves into climate policy-making.

iii. Climate Activists and the Judiciary

Under the political agenda established by the Paris Agreement, environmental groups will take on the role of enforcers.¹⁴⁶ Indeed, if governments do not deliver, the judiciary seems poised to be dragged further into climate policy-making. If the collective efforts appear to fall short of achieving the Paris Agreement's objectives, climate action group or executive governments supporting ambitious action will likely seek the help of the courts. As the headline of an article in *Politico* put it, "[n]ext stop for Paris climate deal: the courts. First came the agreement. Now comes the litigation."¹⁴⁷ Depending on admissibility and standing requirements, they could turn to the international courts or the national courts. Whether the courts will be inclined to grant the relief sought, depends on a number of factors, including the applicable laws, the relevant facts, the legal traditions, and the acceptability of judicial activism.

The Paris Agreement provides support to such cases in several ways. First, by failing to close or even widening the gap between what should have been agreed (ambition) and what was agreed (obligation), the parties to the Paris Agreement have set themselves up for political failure. Political failure, in turn, will fuel claims that the political process is broken or dysfunctional and that only the judiciary can save us now. To lure the courts into activist mode, climate change activists have already suggested that "there is only one democratic institution left (...) that can force the state to take the necessary climate action: the judiciary."¹⁴⁸ Second, the agreement recognizes explicitly "the urgent threat of climate change" as well as "the need for an effective and progressive response."¹⁴⁹ If no such

response is produced by governments,¹⁵⁰ courts may feel pressure to provide it. Third, the agreement includes many substantive provisions that are not addressed to the parties, but could be deemed to impose a collective responsibility that should be "read into" the parties' chiefly procedural obligations. Fourth, the accounting and reporting obligations imposed on the parties will supply climate activists with potential documentary "evidence" that they could use to build their cases.¹⁵¹

Even before the conclusion of the Paris Agreement, calls have been made on the judiciary to take charge of the problem of climate change. At the international level, a prominent international lawyer proposed that the International Court of Justice rule on climate science so that the scientific disputes in this area can be settled.¹⁵² At the national level, a Dutch group has already won a victory in court over its government's climate policy,¹⁵³ and is now invoking the Paris deal to get the government to drop its appeal.¹⁵⁴ Although these kinds of law suits are dubious,¹⁵⁵ it has proven possible to persuade courts that climate change is such an urgent and existential problem that they should involve themselves in climate policy-making.

The Paris Agreement supplies climate activists with new ammunition.¹⁵⁶ "Even if countries are willing to accept this

145 For an analysis of these issues from U.S. perspective, see Marlo Lewis, *Paris Agreement Is a Real Tiger: Lock and Load*, <http://www.globalwarming.org/2015/12/27/paris-agreement-is-a-real-tiger-lock-and-load/>.

146 Samantha Page, *No, The Paris Climate Agreement Isn't Binding. Here's Why That Doesn't Matter*, Dec. 14, 2015, [http://thinkprogress.org/climate/2015/12/14/3731715/paris-agreement-is-an-actual-agreement](http://thinkprogress.org/climate/2015/12/14/3731715/paris-agreement-is-an-actual-agreement.). (If a country is missing its [submitted] targets, "domestic constituencies will be mobilizing to force government action (...) That's going to be the primary mover of emissions reductions worldwide.")

147 Sara Stefanini, *Next stop for Paris climate deal: the courts*, *Politico*, Jan. 13, 2016, <http://www.politico.eu/article/paris-climate-urgenda-courts-lawsuits-cop21/>.

148 R. Cox, *Revolutie met recht*, Stichting Planet Prosperity Foundation, 2011, p. 288.

149 As *The Economist* has observed, the Paris Agreement "marks an unprecedented political recognition of the risks of climate change." <http://www.economist.com/news/international/21683990-paris-agreement-climate-change-talks>.

150 Mann points out that "[t]he Paris agreement gets us roughly halfway to where we need to be." Michael E. Mann, *The Power of Paris: Climate Challenge Remains, But Now We're on the Right Path*, http://www.huffingtonpost.com/michael-e-mann/paris-climate-change_b_8799764.html.

151 Paris' reporting requirements "could help to fuel lawsuits by providing data to back up claims." According to ClientEarth, this information "can help with actually coordinating evidence of whether or not governments are complying with targets, and whether a case can be launched." Sara Stefanini, *Next stop for Paris climate deal: the courts*, *Politico*, Jan. 13, 2016, <http://www.politico.eu/article/paris-climate-urgenda-courts-lawsuits-cop21/>.

152 Philippe Sands, *Climate change and the rule of law: adjudicating the future in international law* Lecture, UK Supreme Court (Sept. 17, 2015). For a response, see Lucas Bergkamp, *Adjudicating scientific disputes in climate science: the limits of judicial competence and the risks of taking sides* (2015) 3 *Env. Liability*, pp. 80–102.

153 L. Bergkamp, *A Dutch Court's 'Revolutionary' Climate Policy Judgment: The Perversion of Judicial Power, the State's Duties of Care, and Science*, *Journal for European Environmental & Planning Law*, Vol. 12, Issue 3–4, 2015, pp. 241–63.

154 *Klimaatbeleid moet om na Parijs*, <http://www.trouw.nl/tr/nl/37601/Klimaatop-Parijs-2015/article/detail/4207179/2015/12/14/Klimaatbeleid-moet-om-na-Parijs.dhtml>.

155 L. Bergkamp, *A Dutch Court's 'Revolutionary' Climate Policy Judgment: The Perversion of Judicial Power, the State's Duties of Care, and Science*. Under totalitarian regimes, as Arendt argues, "the difference between ends and means evaporates." Hannah Arendt, *The Origins of Totalitarianism* (1951), New Edition, New York: Harcourt, 1985, p. 249.

156 Burleson notes euphemistically that "[c]limate cooperation 'by all Parties and nonParty stakeholders, including civil society, the private sector, financial institutions, cities and other subnational authorities, local communities and indigenous peoples,' are helping ratchet up ambition and implementation of mitigation, adaptation, support, technology sharing, and the myriad other elements of the evolving global climate response." Elizabeth Burleson, *Paris Agreement and Consensus to Address Climate Challenge*, *ASIL INSIGHT*, Jan. 1, 2016.

lack of concrete and enforceable emissions reductions from each other,” one climate action advocate has argued, “it does not follow that their citizens have to.” Referring to court judgments in the Netherlands, Pakistan and the U.S., he explains that national law may well entail a legal obligation on states to bring national climate policy into line with the (well below) two-degree objective established under international law. Accordingly, the Paris Agreement would stand for the proposition that “states are under an individual obligation to pursue effective climate policy, regardless of what other countries do or fail to do.”¹⁵⁷ In a similar vein, the Executive Director of Columbia University’s Center for Climate Change Law considers failure to take adequate climate action illegal, and warns that “if governments can’t set a course, courts may have to do it for them.”¹⁵⁸ ClientEarth’s lawyers have opined that “[i]t is hard to imagine that courts will fail to provide any relief for damages caused by climate change.”¹⁵⁹ Obviously, climate policy-making by judges would involve enormous problems of legitimacy and effectiveness. As the Paris Agreement is silent on substantive legal obligations, courts will have no objective standard for assigning individual burdens and identifying any related individual obligations, however, and thus will have to resort to their own preferences and subjective values.¹⁶⁰ Judges are also handicapped in addressing the burden-sharing aspects of climate policies. Unlike executive governments, they are unable to put pressure on other countries to cause them to adopt appropriate measures to fight climate change; they can rely only on the hope that setting an example will inspire their colleagues in other countries to follow.

iv. New Modes of Governance and World Government

Despite these obvious problems, the trend towards judicial involvement in climate policy-making has been justified with reference to a “new mode of governance.”¹⁶¹ Such a new mode no longer involves a linear, hierarchical model of law- and policy-making, but is portrayed as building on

direct democracy through public participation in a polycentric, non-hierarchical, open, more accountable and more legitimate process of norm production;¹⁶² in this new governance model, courts could legitimately respond to complaints by private parties about government failure in policy-making based on open norms from a variety of sources.¹⁶³ The justification of any such new governance, however, is not derived solely from positive law, but gives weight to other sources, such as academic theories, in particular global justice and climate justice theories,¹⁶⁴ even where they conflict with existing laws. As such, new modes of climate governance are at risk of being inconsistent with constitutional government and the rule of law. Specifically, where such models relativize the hierarchy of the sources of law and celebrate polycentrism and open, holistic, or “bottom-up” theories of adjudication, they can easily violate constitutional law, which generally impose a strict hierarchy and does not entertain polycentrism and holism. Where new governance encourages and rewards public participation,¹⁶⁵ it gives power to activist groups to the detriment of the “silent majority,” whose more tempered views on the subject are simply not articulated with the same zeal, even if they are more popular and reasonable.¹⁶⁶ Indeed, most people rely solely on their representatives in the system of government, which in today’s climate policy-making environment would appear to place them at a

162 According to the International Institute of Administrative Sciences, “[g]overnance refers to the process whereby elements in society wield power and authority and influence and enact policies and decisions concerning public life and economic and social development. Governance is a broader notion than government. Governance involves interaction between these formal institutions and those of civil society.” Quoted in: Thomas G. Weiss. *Thinking about Global Governance: Why People and Ideas Matter*. New York: Routledge, 2011, Chapter 9. Cf. Ralf-Eckhard Türke, *Governance: Systemic Foundation and Framework*. Heidelberg: Physica-Verlag, 2008. Henrik Enroth, *Governance: The art of governing after governmentality*, *European Journal of Social Theory* 2014, Vol. 17(1), pp. 60–76. Leo Hubert (ed.), *The Integrity of Governance: What it Is, What we Know, What is Done and Where to Go*. Basingstoke: Palgrave Macmillan, 2014.

163 Rob van Gestel & Marc Loth, *Urgenda: roekeloze rechtspraak of rechtsvinding 3.0?*, NJB nr. 37, 2015, pp. 2598–605. For another viewpoint, see Lucas Bergkamp, *Rechtsvinding in de moderne rechtsstaat*, NJB 2016, pp. 193–194.

164 See, for instance, <http://www.osloprinciples.org/principles/> and <http://globaljustice.macmillan.yale.edu/oslo-principles-global-climate-change-obligations>.

165 Cf. Stijn Smismans, *New modes of governance and the participatory myth*, *West European Politics*, 31(5), 2009, pp. 874–95. Eva G. Heidbreder, *Governance in the European Union: A Policy Analysis of the Attempts to Raise Legitimacy through Civil Society Participation*. *Journal of Comparative Policy Analysis*, 2014, pp. 1–19.

166 In resolving “constructive ambiguity,” as Berger and Luckmann put it, “[h]e who has the bigger stick has the better chance of imposing his definitions of reality.” Peter L. Berger & Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*, Penguin, 1966, p. 127.

157 Roger Cox, *We Must ‘Reply All’ to the Collective Action in Paris*, <https://www.cigionline.org/blogs/global-rule-of-law/we-must-reply-all-collective-action-paris>.

158 Michael Burger, *Failure to Take Climate Action Is Not Only Morally Wrong, It’s Illegal*, Nov. 30, 2015, <http://blogs.law.columbia.edu/climatechange/2015/11/30/failure-to-take-climate-action-is-not-only-morally-wrong-its-illegal/>.

159 J. Thornton & H. Covington, *Climate change before the court*, *Nature Geoscience*, 2015, doi:10.1038/ngeo2612.

160 Lucas Bergkamp & Jaap C. Hanekamp, *Climate Change Litigation Against States: The Perils of Court-Made Climate Policies*, *European Energy and Environmental Law Review*, 24, 2015, pp. 102–114.

161 As O’Keefe has aptly observed, “[b]eyond the broader agenda of saving the planet, is the goal to expand global governance.” William O’Keefe, *The Trojan Horse in Paris*, Dec. 7, 2015, <http://economics21.org/commentary/trojan-horse-paris>.

significant disadvantage. If new governance enables the will of a minority to prevail over the will of the silent majority, it may result in a tyranny of a minority.¹⁶⁷

It is not a coincidence that the climate movement pushes multi-level, non-hierarchical governance at the international level. Given the nature of the problem, climate change ‘naturally’ belongs to the international area. Nobody therefore should be surprised that the movement focuses a substantial amount of its resources on the international climate process, where it finds an ally in the IPCC secretariat. The international arena offers a particularly attractive opportunity to the climate movement, since there is no world government, no world constitution, and, thus, a void to fill.¹⁶⁸ At the international level, there is no democracy to speak of, and international politics are conducted far away from democratic oversight by national parliaments and popular scrutiny by the media. Moreover, climate change is an issue that people in the Western hemisphere, if adequately indoctrinated,¹⁶⁹ care about, not to save the planet, but in their own self-interest.¹⁷⁰ As climate change is a highly complex scientific and technical issue, national democratic oversight mechanisms of Western democracies are bound to accomplish even less.

In this space, the climate movement finds fertile soil

for its ideas for new modes of international governance,¹⁷¹ and, in the end, world government.¹⁷² According to Pogge, a leading philosopher and a driving force behind the Oslo Principles on Global Climate Change Obligations,¹⁷³ in order to realize “a peaceful and ecologically sound future” the world needs “supranational institutions and organizations that limit the sovereignty rights of states more severely than is the current practice.”¹⁷⁴ As he does not think that the dominant powers will attempt to impose these limitations before it is too late, the salvation can come only if “at least a large majority of the states participating in these institutions and organizations are stable democracies, which presupposes, in turn, that their citizens are assured they can meet their basic needs and can attain a decent level of education and social position.”¹⁷⁵ Rejecting the traditional concept of national sovereignty, Pogge thus advocates a “multi-layered scheme in which ultimate political authority is vertically dispersed,” *i.e.*, nation states retain ultimate political authority only in some areas with a world government exercising “central coercive mechanisms of law enforcement” in other areas.¹⁷⁶ Through these moves, the issue of climate change has been linked not only to international governance, but also to other “global justice” concerns, and, conversely, climate change is also used to advance the activists’ global government and justice agendas.¹⁷⁷

In this line of thinking, the actual design, implementation, and workings of a world government, in particular the mechanisms for control of the obvious risks associated with any such dominant power, are viewed as issues that can be sorted out chiefly in practice and through experience; it would be more important to make a start. But how any such government could ever operate under a set of rules that even remotely responds to democratic

167 Benjamin G. Bishin, *Tyranny of the Minority: The Subconstituency Politics Theory of Representation*, Philadelphia: Temple University Press, 2009.

168 For an overview of the main theories supporting some form of world government, see Catherine Lu, *World Government*, Jul. 2, 2012, Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/world-government/>.

169 To obtain popular support for climate action, the European Union’s and United States’ strategy has been to make repeated, scientifically unfounded claims that climate change exposes individuals and their families to great and immediate threats, here and now, such as diseases and extreme weather events. Lucas Bergkamp, *Informed Consent to Climate Policy-Making* (forthcoming). For example, without empirical evidence, Obama suggests that there are links between climate change and disease, such as asthma, and between climate change and extreme weather events, such as hurricanes. See Lucas Bergkamp, *Adjudicating scientific disputes in climate science: the limits of judicial competence and the risks of taking sides* (2015) 3 *Env. Liability*, pp. 80–102. The Paris Agreement itself refers to “the urgent threat of climate change” (Recital, Paris Agreement) and the COP-21 Decision posits that “climate change represents an urgent and potentially irreversible threat to human societies and the planet” (COP-21 Decision, Recital), although no such urgency has been demonstrated. The thinking may be that such propaganda will result in “a functioning reality, to build up (...) a society whose members act and react according to the rules of a fictitious world.” Hannah Arendt, *The Origins of Totalitarianism* (1951), New Edition, New York: Harcourt, 1985, p. 364.

170 It is important for a global movement to arouse “the masses’ furious interest in the so-called ‘suprastate powers.’” Hannah Arendt, *The Origins of Totalitarianism* (1951), New Edition, New York: Harcourt, 1985, p. 258.

171 For a discussion of global governance in which “civil society” plays the role of regulator, see Ronnie D. Lipschutz & Carina Mackendry, *Social Movements and Global Civil Society*, in: John S. Dryzek, Richard B. Norgaard, David Schlosberg (eds.), *The Oxford Handbook of Climate Change and Society*, Oxford University Press, 2011, Chapter 25.

172 James A. Yunker, *The Idea of World Government: From Ancient Times to the Twenty-first Century*, Taylor & Francis, 2011.

173 Oslo Principles on Global Climate Change Obligations, <http://globaljustice.macmillan.yale.edu/news/oslo-principles-global-climate-change-obligations>.

174 Thomas W. Pogge, *World Poverty and Human Rights*, 2nd edn, Oxford: Polity Press, 2008, p. 219.

175 Thomas W. Pogge, *World Poverty and Human Rights*, 2nd edn, Oxford: Polity Press, 2008, pp. 219–20.

176 Thomas W. Pogge, *Kant’s Vision of a Just World Order*, in: T. E. Hill (ed.), *The Blackwell Guide to Kant’s Ethics*, Blackwell, 2009, pp. 196–208, at 205–206.

177 Unlike the party behind it, the movement “must not have any ‘definite, closely determined goals.’” Hannah Arendt, *The Origins of Totalitarianism* (1951), New Edition, New York: Harcourt, 1985, p. 259.

controls is entirely unclear. Once such a government acquires any real power, how could its expansion and dominance be prevented?¹⁷⁸ The underlying assumption that democracies will support a world government is naïve and premature.¹⁷⁹ In the real world, if we are to have some of world of government, it would have to be imposed by a global hegemony. Global hegemony, however, is not feasible (save for the unlikely event of worldwide military superiority).¹⁸⁰ As the European Union's experience has demonstrated, even regional supranational government in an area with a common culture has great difficulty in addressing, let alone resolving, issues of "democratic deficit."¹⁸¹ In any event, the performance of international bodies such as the United Nations¹⁸² and the UNFCC secretariat, which has chosen the side of the climate movement, does not bode well for any world government.

In the mind of climate activists, new modes of international governance are a first step towards world government. And, along with other efforts such as the Oslo Principles on Global Climate Change Obligations, the Paris Agreement could be the beginning of multi-level, non-hierarchical governance driven by the international climate movement.¹⁸³ The victims, however, will likely be the world's nation states and democracies. International climate governance would impinge on national sovereignty and democratic process. New governance's promise of "direct democracy" and bottom-up, non-authoritarian decision-making would involve an unauthorized transfer of decision-making power to an activist movement,¹⁸⁴ and thus is inconsistent with the idea of representative democracy, since the activists that are able to participate in the decision-

making, at best, represent only members of the specific groups they are authorized to represent, while elected politicians represent the people and have an official mandate to speak on behalf of some part of the public.¹⁸⁵ Moreover, this new climate governance would result in every citizen having to engage all the time in decision-making processes to ensure his or her interests are adequately protected (or to appoint agents to do so for them), thereby removing vast numbers of citizens from productive labor and imposing huge opportunity costs on society.

Where new governance encourages unelected and unaccountable judges to assume control over public policy-making (or condones them doing so), it undermines both the separation of powers doctrine, which has assigned law- and policy-making to the legislature, and the rule of law, which requires that all government officials respect the law and avoid overstepping their authority.¹⁸⁶ Given the pervasiveness of climate change and its asserted impacts on health, immigration, the poor and vulnerable, and social justice, virtually any significant policy issue can be addressed under the guise of managing the average global temperature increase as required by the Paris Agreement. Consequently, the new climate governance movement, led by the UNFCC secretariat,¹⁸⁷ may well work towards the replacement of the capitalist model by a novel social justice-based model beyond traditional democratic controls.¹⁸⁸ Indeed, it is troubling how closely this verges on what Berlin described

The Climate Movement Into An Everyone Movement, Dec. 14, 2015, <http://thinkprogress.org/climate/2015/12/14/3731402/paris-climate-agreement-movement-is-power/>. Lewis argues that "both conservative gloating and green grouching about the treaty being 'toothless' overlook what matters most in climate policy: politics." Marlo Lewis, Paris Agreement: Recycled "Process" Socialism, Jan. 3, 2016, <http://www.globalwarming.org/2016/01/03/paris-agreement-recycled-process-socialism/>.

185 According to Arendt, the emergence of the main totalitarian regimes in the twentieth century was driven by popular movements that had contempt for law, were anti-parliamentarian, and sought to replace the political parties. Hannah Arendt, *The Origins of Totalitarianism* (1951), New Edition, New York: Harcourt, 1985.

186 Our system of admittedly imperfect representative democracy is not only legitimate as it is laid down in the constitution and positive law, it is also superior to the so-called active citizenship of civil society groups on empirical grounds. Cf. Frank Furedi, *Politics of Fear: Beyond Left and Right*. London: Continuum, 2005, p. 115.

187 The UNFCCC's executive secretary has declared openly that climate policy pursues the more general goal of changing "the economic development model that has been reigning for at least 150 years." U.N. Official Reveals Real Reason Behind Warming Scare, <http://news.investors.com/ibd-editorials/021015-738779-climate-change-scare-tool-to-destroy-capitalism.htm>.

188 Lukacs notes that the "economic system's drive for endless profits and extraction wasn't up for debate in Paris, but it may be soon." Martin Lukacs, Claim no easy victories. Paris was a failure, but a climate justice movement is rising, <http://www.theguardian.com/environment/true-north/2015/dec/15/claim-no-easy-victories-paris-was-a-failure-but-a-climate-justice-movement-is-rising>.

178 As Arendt has observed, once the twentieth century totalitarian movements rose to power, they developed entirely new political institutions and destroyed all social, legal and political traditions. Hannah Arendt, *The Origins of Totalitarianism* (1951), New Edition, New York: Harcourt, 1985.

179 John J. Mearsheimer, Back to the Future: Instability in Europe after the Cold War, *International Security*, 1990, Vol. 15, No. 1, pp. 5–56.

180 "Rhetoric aside, we are not moving toward a hierarchic international system, which would effectively mean some kind of world government. In fact, anarchy looks like it will be with us for a long time." John J. Mearsheimer, *The Tragedy of Great Power Politics*, New York: Norton, 2001.

181 Andreas Follesdal & Simon Hix, Why there is a democratic deficit in the EU: a response to Majone and Moravcsik, *European Governance Papers* (EUROGOV), March 2005, No. C-05-02.

182 For an overview of the various strands of criticism, see Criticism of the United Nations, https://en.wikipedia.org/wiki/Criticism_of_the_United_Nations.

183 Along with other efforts such as the Oslo Principles on Global Climate Change Obligations, the Paris Agreement could be the beginning of multi-level, non-hierarchical governance driven by the international climate movement.

184 Cf. UN Secretary-General Ban Ki-moon's statements, who called the climate movement "a huge trend" and said "[n]obody can go against this wave." Cited in: Natasha Geiling, How Paris Turned

as the definition of a totalitarian society: One that places one goal so far above the others that anything can be sacrificed in its pursuit.¹⁸⁹

Therefore, where the Paris Agreement results in the establishment of a new mode of climate governance in which activists and courts can play more prominent roles, it threatens constitutional government and the rule of law in representative democracies. But it does not do so explicitly and openly; rather, it employs silence and subterfuge. With the Paris Agreement, the parties, while stating a common ambition, intended to reinforce national sovereignty and national democratic process, as opposed to international dictates.¹⁹⁰ They have not realized, however, that by including practically unattainable objectives and onerous, but ostensibly non-binding substantive requirements in the Paris Agreement, the IPCC leaders, international climate diplomats, and their draftsmen have greatly increased the risk of government failure, and created conditions for a shift of power to the climate movement, judges, and the international level, and, thus, for the establishment of new climate governance. Before ratifying the Paris Agreement, and in any event as the UNFCCC process continues into the future, governments, industry, and civil society should carefully consider this problematic dynamic. It is fair to say that, for a complex problem like climate change, representative democracy has thus far not produced anything resembling the “sustainable solutions” advocated by the climate activists. But that does not disqualify democratically elected political leaders with concerns about the costs and effectiveness of climate policies from the policy-making arena and it certainly does not create an unrestrained pretext for “civil society” and the courts to substitute their judgment for that of the public’s. NGOs and the judicial system have a role in climate policy-making, but no issue—and certainly no crisis—can be invoked to override representative democracy and the separation of powers if the rule of law is to persist.¹⁹¹

5. Conclusions

Politicians and other commentators have said much about the Paris Agreement. Many of their statements either mischaracterize the deal or focus on insignificant aspects.¹⁹² A key feature of the agreement, the failure to close the gap between ambition and obligation, and its legal and extrajudicial consequences, have, by and large, gone unnoticed. This gap is destined to become the Paris Agreement’s Trojan horse, because, under the guise of direct democracy in a system of multi-level, non-hierarchical governance, it grants not only credibility but also de facto authority to climate activists, thus posing a threat to constitutional government and representative democracy.

As discussed in this article, much of the Paris Agreement repeats existing agreements, employs the same abstract language as previous agreements, and does not introduce any new concepts or thinking. Although there is little novelty to be found in the agreement, it may have serious implications for climate policy-making. With respect to mitigation, the key component of the agreement, it establishes an international framework for decentralized climate policy-making by states, which should aim to achieve an ambitious collective objective of limiting global average temperature increase to well below 2°C or even 1.5°C. But the agreement does not set any mechanism, methodology or criteria for assigning individual mitigation obligations to party states. Indeed, it does not impose any significant substantive obligations on the parties, and, from a legal, as opposed to political or moral, viewpoint, it seems to be virtually non-binding.

From a legal and policy perspective, the Paris Agreement could be viewed as a clear signal that climate policy-making is the prerogative of national governments and legislatures, not some unaccountable international body. By rejecting binding substantive requirements and merely articulating or confirming political aspirations, the

189 I. Berlin, *Two Concepts of Liberty* (1958), in: Isaiah Berlin, *Four Essays on Liberty*. Oxford: Oxford University Press, 1969. Under totalitarian regimes, as Arendt argues, “there are no general principles which simple reason can understand,” and “the difference between ends and means evaporates.” Hannah Arendt, *The Origins of Totalitarianism* (1951), New Edition, New York: Harcourt, 1985, p. 244.

190 Cf. According to Viñuales, the Paris Agreement is “a realistic instrument and, because of its imperfection, one that is much closer to the human topography than its falsely ambitious predecessor signed in Kyoto.” Jorge E. Viñuales, *The Paris Climate Agreement: An Initial Examination*, C-EENRG Working Papers, no. 6, Dec. 15, 2015.

191 Increasingly, climate activists appear willing to suspend or set aside democracy to solve the climate problem. Cf. David Shearman & Joseph Wayne Smith, *The Climate Change Challenge and the*

Failure of Democracy, Greenwood Press, 2007 (arguing that in order to halt or even slow the disastrous process of climate change we must choose between liberal democracy and a form of authoritarian government by experts). James Lovelock, *The Vanishing Face of Gaia: A Final Warning*, Penguin, 2010 (arguing that survival may require the suspension of democratic government). For a discussion of the risks of such proposals, see Karl R. Popper, *Utopia and Violence*, *World Affairs*, Vol. 149, No. 1, Summer 1986, pp. 3–9.

192 For an argument that mainstream media reporting on the Paris Agreement is misleading, see Avi Lewis and Rajiv Sicora, *Why Most Of What You Think You Know About The Paris Climate Deal Is Wrong: An Annotated News Story*, Dec. 18, 2015, <http://theleap.thischangeseverything.org/why-most-of-what-you-think-you-know-about-the-paris-climate-deal-is-wrong-an-annotated-news-story-2/>.

parties to the Paris Agreement may well think they have wrested back leadership on climate action from other actors,¹⁹³ while allowing space for private initiatives. In a similar vein, maybe the Paris Agreement should be viewed as a mechanism to buy more time, although the parties were politically not able to admit as much. During this delay, the science will develop further, the urgency of climate action will become clearer, and the extent of the political support for ambitious measures should become visible. There is more than meets the eye upon first reading and analysis, however.

An analysis of the agreement's relation with science shows ambiguity. On the one hand, at several points, chiefly in relation to designing and implementing climate policies, the agreement refers to the best available science. On the other hand, it also sets forth objectives that focus solely on limiting global temperature increase, even though the scientific debate on the relative importance of such increase is still ongoing, and no cost-benefit test applies to the selection of policies from a pool of options. As a result, the Paris Agreement may require measures that are inefficient and ineffective in preventing climate-related damage. Given the agreement's strong focus on temperature, national policy-making may be distorted, and it remains to be seen to what extent the best available science can be invoked to correct the temperature-bias in designing climate policies. Thus, the agreement, while sending unambiguous signals that climate change will remain a pre-eminent policy issue for decades to come, serves to allow ambiguity to fester in terms of just what all that attention will produce, politically, policy-wise, and legally.

And then, perhaps most importantly, there is a deeper, hidden level of uncertainty associated with the Paris Agreement. Reflecting strong climate advocacy and sophisticated strategy, the agreement fails to close (or even widens) the gap between what should be done and what has been agreed. It demands that nation states admit that their efforts are inadequate, while setting them up for failure, thus changing the political environment in which climate policy is made. The ambition–obligation disparity creates a large arena for climate activism at international and national levels, effectuating a transfer of power, or at least of influence, that is inconsistent with the fundamental principles of constitutional government. Countries are subject to the forces of regulatory competition, and have incentives to do as little as possible or at least to lag behind. Despite widespread activism, the lack of any mechanism

to overcome the ambition-obligation disparity therefore will likely result in a failure to reach the collective targets. While the state parties may think they will have to go back to the negotiation table once that has happened, the reality may be different.

If the collective efforts appear to fall short of achieving the Paris Agreement's objectives, the judiciary is likely to be dragged into climate policy-making. Climate action groups or executive governments supporting ambitious action will charge the body politic with impotence, declare "government failure," and seek the help of the courts to get governments to "do the right thing." To support their claims, they can invoke several features of the Paris Agreement, including its recognition of the need for urgent action to fight dangerous climate change, its high goals, its ambitious substantive provisions, and the parties' admissions of impotence, all of which can be cited to give content to the parties' procedural obligations. Thus, climate policy lawsuits against governments to force them to adopt stronger emission reduction policies are not necessarily prevented by the absence of binding emission reduction obligations or targets in the Paris Agreement. Experience thus far has shown that courts concerned about the government's failure to address climate change adequately are willing to entertain such law suits and order governments to step up their climate policies, even though such orders are legally doubtful.

In demanding that the signatories concede that their efforts are inadequate, the Paris Agreement paves the way for the new international climate governance. Its implicit reliance on political activism by the climate movement and the related non-hierarchical governance by the courts—a direct result of efforts to ensure the participation of the United States and other major-emitting Parties—reflects the steep price the international community has had to pay to claim victory at COP 21.¹⁹⁴ At its most fundamental level, this constitutes a threat to constitutional government, the rule of law, and representative democracy. It risks an unconstitutional usurpation of power by activist groups and unelected and unaccountable judges that could undermine legislative power and the role of positive law in deciding legal disputes. This risk of subversion is not well understood by politicians and governments. If this risk materializes, the non-binding parts of the agreement, which were the least haggled over, will turn out to be the most influential "legal" provisions. And, unlike executive governments,

193 Cf. L. Bergkamp, The EU should wrest back leadership on climate change from the courts, <http://www.euractiv.com/sections/sustainable-dev/eu-should-wrest-back-leadership-climate-change-courts-317135>.

194 Cf. Ben Webster, A 'miracle' fuelled by fear of humiliation on world stage, *The Times*, Dec 14, 2015: 9. J. Schwartz, Climate Advocates See Need for Continued Activism, *New York Times*, Dec 14, 2015, http://www.nytimes.com/2015/12/15/science/climate-advocates-see-need-for-continued-activism.html?_r=0.

judges have no way of ensuring that other nations do their fair share; they can rely only on their colleagues' enlightened thinking, which may not be as generalized as they might hope.

Irrespective of whether these features are parts of some intentional design,¹⁹⁵ the Paris Agreement thus may turn out to be a Trojan horse. Ambiguous references to science, which is at risk of being politicized in any event, do not remedy this deficiency. The tying of climate change to social justice objectives has created the even trickier problem that the realization of social justice is likely to conflict with the fight against climate change; idealistic climate justice structurally over-promises and under-delivers. In the real world, climate justice is to justice what climate science is to science.¹⁹⁶ The ideas of the climate change movement are appealing in part because they promise a new, better, more just world. To win over the masses, however, the movement cannot do without propaganda about the existential threats posed by climate change. The hype around the Paris Agreement has given the movement's propaganda machine new momentum. It saturates the people, stigmatizes skeptics,¹⁹⁷ and makes it easy to mock, suppress,¹⁹⁸ and even prosecute¹⁹⁹ dissent. While it does

little to reduce the threats it impresses upon the people, it creates risks of a different kind: Although it operates under principles of law,²⁰⁰ it threatens our constitutional arrangements, including the separation of powers. In deciding on ratification, countries should consider not only the need for international coordination of climate policy, but also the protection of their constitutions, representative democracy, and the rule of law. Specifically, once they agree to the Paris Agreement's high collective ambition and ambitious substantive requirements, countries need to be mindful of the risks of activists and the judiciary taking over when it becomes clear that the world will not deliver.

Nations should protect themselves against these threats.²⁰¹ After all, signing away control over climate policy to unaccountable and unelected actors is not in the public interest. Nor is it, under even the most optimistic of circumstances, a viable path to rational, effective and sustainable climate policies. Indeed, the future of representative democracy may be at stake. Climate policy-making should not be left to the UNFCCC secretariat, the climate movement and the judiciary. Now is the time for national legislatures to assert and defend their prerogatives.

195 Delingpole has claimed that climate change is an ideological battle, not a scientific one, and that the environmental movement wants to rule, not save, the world. James Delingpole, *Watermelons: The Green Movement's True Colors*, New York: Publius Books, 2011.

196 Adapted from Groucho Marx, https://en.wikiquote.org/wiki/Talk:Groucho_Marx.

197 President Obama refers to people who criticize his climate ideology as "the flat earth society." Obama: No time for a meeting of the Flat Earth Society, <http://www.bbc.com/news/world-us-canada-23057369>. There is website listing "deniers" ("Find the deniers near you—and call them out today.") According to Darwall, "[i]n framing the argument on global warming in terms of scientific truth versus the false consciousness promoted by special interests, proponents of the idea of global warming inadvertently proclaim their adherence to a pseudo-science." Rupert Darwall, *The Age of Global Warming: A History*, London: Quartet Books, 2013, p. 347.

198 The movement emphasizes that 97% or more of climate scientists endorse the position that humans are causing global warming, relying on studies such as J. Cook and others, *Quantifying the consensus on anthropogenic global warming in the scientific literature* (2013) 8(2) *Environmental Research Letters* 024024 <http://iopscience.iop.org/article/10.1088/1748-9326/8/2/024024>. Cook's claim has been rebutted by R. S. J. Tol, *Quantifying the consensus on anthropogenic global warming in the literature: A re-analysis*, *Energy Policy*, Volume 73, October 2014, pages 701–705. See also his op-ed in *The Guardian*, <http://www.theguardian.com/environment/blog/2014/jun/06/97-consensus-global-warming>. For a critical discussion of the claim of scientific consensus and its relevance, see Lucas Bergkamp, *Adjudicating scientific disputes in climate science: the limits of judicial competence and the risks of taking sides* (2015) 3 *Env. Liability*, pp. 80–102.

199 For an overview of attempts to prosecute dissent, see Steven T. Corneliusen, *Climatologist Judith Curry calls attention to a new kind of attack on climate denial*, *Physics Today*, Jan. 8, 2016, <http://scitation.aip.org/content/aip/magazine/physicstoday/news/10.1063/PT.5.8158>. A recent paper published in an *ethics journal*

(*sic!*) argues that climate denialism should be prohibited by law. Trygve Lavik, *Climate change denial, freedom of speech and global justice*, *Nordic Journal of Applied Ethics* (2015), pp. 1–16, http://www.ntnu.no/ojs/index.php/etik_k_i_praksis/article/view/1923/1928 (calling for "a statutory ban on climate denialism").

200 As Arendt has aptly observed, totalitarian government "operates neither without the guidance of law, nor is it arbitrary, for it claims to obey strictly and unequivocally those laws of Nature (...) from which all positive laws have always been supposed to spring." Hannah Arendt, *The Origins of Totalitarianism* (1951), New Edition, New York: Harcourt, 1985, p. 461.

201 In Section 4.B.ii above, we suggest some ways in which nations can protect themselves when considering ratification of the Paris Agreement.