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Hari M. Osofsky

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Multiscalar Governance and Climate Change: Reflections on the Role of States and Cities at Copenhagen

HARI M. OSOFSKY[†]

I. INTRODUCTION: AGREEMENTS AMONG SUBNATIONAL GOVERNMENTS AT COPENHAGEN

As leaders of nation-states struggled to save the Copenhagen negotiations from total failure with the Copenhagen Accord,¹ the

[†]Associate Professor, Washington and Lee University School of Law; B.A., J.D., Yale University. I am grateful for being included in the thoughtful dialogue at the *Maryland Journal of International Law's* symposium on *Multilateralism and Global Law: Evolving Conceptions of International Law and Governance* and for the *Journal's* thoughtful editing. This Paper was greatly enhanced by the discussion at the symposium. I also would like to thank Brian Murchison for his insightful suggestions, which significantly improved the piece. As always, I tremendously appreciate the love, support, and patience of Josh, Oz, and Scarlet Gitelson.

1. See Conference of the Parties to the United Nations Framework Convention on Climate Change, Fifteenth Sess., Dec. 7–18, 2009, Copenhagen, Den., *Draft Decision -/CP.15: Proposal by the President, Copenhagen Accord*, U.N. Doc. FCCC/CP/2009/L.7 (Dec. 18, 2009) [hereinafter *Copenhagen Accord*], available at <http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf>. See also Arthur Max, *Obama Brokers a Climate Deal, Doesn't Satisfy All*, DAILY RECORD (Morristown, N.J.), Dec. 19, 2009, at 1, available at 2009 WLNR 25562965; Andrew C. Revkin & John M. Broder, *A Grudging Accord in Climate Talks*, N.Y. TIMES, Dec. 20, 2009, at A1, available at <http://www.nytimes.com/2009/12/20/science/earth/20accord.html>; Michael Gerrard, *The Heat Is On*, MARTEN LAW GROUP, Dec. 14, 2009, <http://copenhagenreport.com/articles/the-heat-is-on> [hereinafter *Gerrard, The Heat Is On*]; Michael Gerrard, *From Copenhagen, an Eye on the U.S. Senate*, MARTEN LAW GROUP, Dec. 15, 2009, <http://copenhagenreport.com/articles/20091215-eye-on-senate> [hereinafter *Gerrard, From Copenhagen, an Eye on the U.S. Senate*]; Michael Gerrard, *A Small Number of Huge Issues Are All That Remain*, MARTEN

leaders of many major states, provinces, and cities also meeting there found agreement much easier to achieve. Governor Arnold Schwarzenegger of California, United States; Premier Jean Charest of Quebec, Canada; Governor Emmanuel Eweta Uduaghan of Delta State, Nigeria; Environmental Minister Cherif Rahmani of Algeria; and President Jean Paul Huchon of Region Ile-de-France, France held a joint press conference on December 14, 2009 to announce that the Club of 20 Regions (R20) would launch in September 2010.² This coalition extends the Global Climate Solutions Declaration signed at the Governors' Climate Summit that Governor Schwarzenegger hosted in October 2009.³ Specifically, these governmental leaders plan to "[d]evelop a shared vision for global security and prosperity," "[p]ursue adaptation strategies to address current and future climate change," "[m]itigate greenhouse gas emissions," "[s]upport public-private partnerships and the use of finance mechanisms to address global warming," and "[p]romote technology transfer and capacity building agreements."⁴ Developed and developing country subnational leaders agreed upon these goals, which have much in common with the nation-states' voluntary commitments under the Copenhagen Accord, without the need for interventions like that of President Obama in the final hours of the meetings among nation-states.⁵

Mayors from around the world also achieved agreement at their Climate Summit for Mayors during the Copenhagen conference. More than fifty mayors from multiple nation-states, as well as some governors, signed the Copenhagen Climate Communiqué, which urged national action and highlighted the key role that cities play in

LAW GROUP, Dec. 16, 2009, <http://copenhagenreport.com/articles/20091216-huge-issues-remain> [hereinafter Gerrard, *A Small Number of Huge Issues Are All That Remain*]; Michael Gerrard, *Crunch Time*, MARTEN LAW GROUP, Dec. 17, 2009, <http://copenhagenreport.com/articles/20091217-crunch-time> [Gerrard, *Crunch Time*]; Michael Gerrard, *Michael Gerrard's Copenhagen Report: Sunday, December 20*, MARTEN LAW GROUP, Dec. 20, 2009, <http://copenhagenreport.com/node/158> [hereinafter Gerrard, *Michael Gerrard's Copenhagen Report*].

2. Press Release, Office of the Governor of California, Gov. Schwarzenegger Announces New Coalition of Subnational Leaders to Combat Climate Change (Dec. 14, 2009), <http://gov.ca.gov/press-release/14032/> [hereinafter Press Release].

3. Governors' Climate Summit, Los Angeles, Cal., Oct. 2, 2009, *Global Climate Solutions Declaration* (Oct. 2, 2009), available at <http://www.wisgov.state.wi.us/docview.asp?docid=15325>.

4. Press Release, *supra* note 2.

5. See Max, *supra* note 1; Revkin & Broder, *supra* note 1; Gerrard, *Michael Gerrard's Copenhagen Report*, *supra* note 1.

addressing climate change and the leadership that they have shown.⁶ Cities and other local governments from fifty-nine countries registered 3,232 climate targets in the Copenhagen City Climate Catalogue, which is a global effort connected with the Copenhagen meetings to compile targets and achievements by localities on climate change.⁷

Although none of these agreements includes states, provinces, and localities that wish to move as slowly as or more slowly than national governments on greenhouse gas emissions, these leader smaller-scale governments make decisions which impact significant quantities of emissions. The Communiqué indicates that the signatory cities represent more than half the world's population and that urban areas produce up to seventy-five percent of global greenhouse gas emissions.⁸ Governor Schwarznegger's press release notes more broadly that the "UN Development Program estimates that up to 80 percent of the pollution-cutting policies that will meet a new international commitment will happen at the subnational level, making this partnership critically important to meeting post-Kyoto commitments."⁹ Moreover, as of February 2010, 1,017 U.S. mayors have agreed to meet or exceed Kyoto Protocol¹⁰ targets, and the 877 European cities that have signed the Covenant of Mayors have committed to targets that go beyond the European Union's 2020 goals.¹¹

6. The Copenhagen Climate Summit for Mayors, Copenhagen, Den., Dec. 14–17, 2009, *Cities Act: Copenhagen Climate Communiqué* (Dec. 16, 2009) [hereinafter *Communiqué*], available at <http://www.kk.dk/Nyheder/2009/December/~media/B5A397DC695C409983462723E31C995E.ashx>.

7. The City Climate Catalogue, The City Climate Catalogue, Copenhagen City Climate Catalogue—List of Commitments, <http://www.climate-catalogue.org/index.php?id=6870> (last visited Mar. 21, 2010).

8. *Communiqué*, *supra* note 6.

9. Press Release, *supra* note 2.

10. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148, 37 I.L.M. 22 [hereinafter *Kyoto Protocol*].

11. The United States Conference of Mayors, Mayors Climate Protections Center – Mayors Leading the Way on Climate Protection, <http://www.usmayors.org/climateprotection/revise/> (last visited Mar. 21, 2010); European Commission Energy, Covenant of Mayors, http://www.eumayors.eu/mm/staging/library/CoM_text_layouted/Texte_Convention_EN.pdf (last visited Mar. 21, 2010). For additional examples of transnational efforts among subnational governments, see Local Government Climate Roadmap, Climate Roadmap—About the Roadmap, <http://www.iclei.org/index.php?id=9639> (last visited Mar. 21, 2010); ICLEI Global,

This Paper asks how these agreements among subnational governments, which occurred in a parallel but formally separate fashion from the Copenhagen Accord, should fit into assessments of the way forward from the Copenhagen conference. It draws from my previous law and geography work to argue that different approaches to international legal theory, with their varying views on nation-states, shape the possible narratives of these subnational efforts and of the extent to which they should be integrated into the formal treaty processes on climate change. The Paper's scope is quite narrow to allow thoughtful treatment of this conceptual issue. It does not try to provide a comprehensive treatment of the Copenhagen negotiations, U.S. federal policy, subnational efforts to address climate change, or the mechanics of subnational integration. Rather, it focuses on different theoretical approaches' narratives of the parallel and separate efforts as a way in which to focus on the foundational questions of global governance that are the topic of this Volume. It argues that an exploration of these partially conflicting theoretical perspectives assists in efforts to move forward towards more effective transnational climate governance.

The Paper begins in Part II by sketching the context in which these subnational developments take place. In so doing, the Part examines the state of international treaty negotiations and also the example of regulatory efforts within one of the world's most important emitters, the United States. Part III then considers the legal status of these efforts as a matter of domestic and international law, with an emphasis on the gap between their formal and informal significance at an international level. It examines how different theoretical approaches to conceptualizing international lawmaking might narrate the current legal significance and potential future role of these subnational efforts. Part IV then draws from these narratives to examine where opportunities lie for greater integration of these efforts with those by nation-states at an international level. The Paper concludes by reflecting on the broader significance of this example for conceptualizing multilateralism and global law.

II. SUBNATIONAL COPENHAGEN AGREEMENTS IN CONTEXT

The agreements among subnational entities at Copenhagen, in

recognition of the core international legal role of nation-states, included calls for national governments to reach agreement and to acknowledge the importance of smaller-scale governments in climate change regulation. The Copenhagen Climate Communiqué, for example, was framed as a message from cities to nation-states. The Communiqué opened by stating:

We, the mayors and governors of the world's leading cities, have joined together in Copenhagen in December 2009, at the Copenhagen Climate Summit for Mayors to send a strong and united message to national governments: seal the deal in Copenhagen and acknowledge internationally the pivotal role of cities in fighting climate change.¹²

After detailing the local climate strategies and the need for national recognition of and support for them, the Communiqué closed: “We are prepared to collaborate, innovate and try even harder. Our message to national governments is simple: agree on ambitious targets and start reducing now—and be confident that if cities are engaged, empowered and given the right resources we will deliver on our commitments.”¹³

Despite this clear message from smaller-scale governments, the focus in negotiations among nation-states at Copenhagen largely centered on whether they could agree with one another enough to move ahead. With the United States at last constructively reengaged in the international treaty process on climate change, hopes were high that meaningful progress could be achieved at the Copenhagen negotiations in December 2009. However, negotiations did not go as smoothly as hoped, and a last minute intervention by President Obama helped save the meeting from failure but resulted only in nations making progress on a few specific issues and taking note of the Copenhagen Accord—which primarily laid out next steps, including nations making more specific commitments pursuant to the Accord by January 31, 2010.¹⁴

12. Communiqué, *supra* note 6.

13. *Id.*

14. See Copenhagen Accord, *supra* note 1, paras. 4–5; Max, *supra* note 1; Revkin & Broder, *supra* note 1; Gerrard, *Michael Gerrard's Copenhagen Report*, *supra* note 1; Guarav Singh, *China, India, Brazil Commit to Meet Copenhagen Accord Deadline*, BLOOMBERG, Jan. 25, 2010, <http://www.bloomberg.com/apps/news?pid=20601090&sid=alXpNdEdnAV4>; *India, China Won't Sign Copenhagen*

Although much drama transpired in the intervening month, the key nation-state players all made their January 31, 2010 submissions under the Accord. However, the commitments generally take the form of countries promising to take significant steps only if other countries do so, and the United States additionally tied its pledge to whether climate change legislation passes.¹⁵ As a recent World Resources Institute report explains, the good news is that the Annex I parties' (the major developed countries) commitments represent substantial progress beyond previous commitments, but the bad news is that they fall well short of the reductions that the Intergovernmental Panel on Climate Change (IPCC) says are needed to stabilize global concentrations of carbon dioxide at levels which would minimize the most serious risks of climate change.¹⁶

For the purposes of considering the relationship between the national and subnational efforts at Copenhagen, however, the Accord and the submissions under it reinforce the separateness of these subnational calls for action from formal international lawmaking. The Accord, which is an agreement among nation-states, does not reference subnational efforts.¹⁷ Similarly, the submissions by nation-states pursuant to the Accord are brief statements of national emissions goals. For example, the United States' submission uses a base year of 2005 to set an emissions reduction target "[i]n the range of 17%, in conformity with anticipated U.S. energy and climate legislation, recognizing that the final target will be reported to the Secretariat in light of enacted legislation."¹⁸ This exclusion of the subnational efforts is certainly legally appropriate since the formal structure of the treaty negotiations, as discussed in more depth in Part III, treats nation-states as the primary subjects and objects of

Accord, HINDU, Jan. 23, 2010, at 1, available at <http://beta.thehindu.com/news/national/article93870.ece?homepage=true>.

15. See United Nations Framework Convention on Climate Change, Information Provided by Parties to the Convention Relating to the Accord, <http://unfccc.int/home/items/5262.php> (last visited Mar. 21, 2010).

16. See Kelly Levin & Rob Bradley, *Comparability of Annex I Emission Reduction Pledges* 21 (World Res. Inst., Working Paper, 2010), available at http://pdf.wri.org/working_papers/comparability_of_annex1_emission_reduction_pledges_2010-02-01.pdf.

17. See Copenhagen Accord, *supra* note 1.

18. United Nations Framework Convention on Climate Change, *U.S. Submission in Accordance with Copenhagen Accord*, Jan. 28, 2010, available at http://unfccc.int/files/meetings/application/pdf/unitedstatescphaccord_app.1.pdf (citation omitted).

international law.¹⁹ However, it gives little sense of how these significant efforts by states, provinces, and cities might fit into international efforts by nation-states to address climate change.

A look within the United States, one of the critical nation-states in these international negotiations, presents further perspective on the crucial role that subnational governments are playing beyond these international meetings in pushing national agendas forward and in making individual policy decisions, both of which have formal international legal relevance only when their nation-state acts. The United States has long struggled to achieve comprehensive national action on climate change, especially through its legislative branch. While it has a host of general federal environmental statutes, which are increasingly being applied to the problem of climate change,²⁰ and has taken a few specific legislative steps on climate change,²¹ comprehensive statutory efforts to address climate change have repeatedly failed over the years.²² The U.S. Senate also passed a

19. *See infra* Part III.

20. In the context of motor vehicle greenhouse gas emissions, see, for example, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards (Apr. 1, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600 and 49 C.F.R. pts. 531, 533, 537, 538) [hereinafter Final Rule], available at <http://www.epa.gov/otaq/climate/regulations/ldv-ghg-final-rule.pdf>, which brings together regulatory processes under the Clean Air Act of 1963, 42 U.S.C. §§ 7401–7671q (2006), and the Energy Policy and Conservation Act, 49 U.S.C. §§ 32901–32916 (2006).

21. *See, e.g.*, Global Climate Protection Act of 1987, 15 U.S.C. § 2901 (2006); National Climate Program Act, 15 U.S.C. §§ 2901–07 (2006).

22. The American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009), has passed the House, but an analogue passing the Senate appears unlikely. The Lieberman–Warner Climate Security Act of 2008, S. 3036, 110th Cong. (2008), which was a substitute amendment to America’s Climate Security Act of 2007, S. 2191, 110th Cong. (2007) and America’s Climate Security Act of 2007, S. 2191, 110th Cong. (2007), both made it out of committee but never reached a vote. Many other bills died in committee. *See, e.g.*, Climate Stewardship Act of 2003, S. 139, 108th Cong. (2003); Climate Stewardship Act of 2004, H.R. 4067, 108th Cong. (2004); Climate Stewardship Act of 2005, H.R. 759, 109th Cong. (2005); Climate Stewardship Act of 2005, S. 342, 109th Cong. (2005); Climate Stewardship and Innovation Act of 2005, S. 1151, 109th Cong. (2005); New Apollo Energy Act of 2005, H.R. 2828, 109th Cong. (2005); Keep America Competitive Global Warming Policy Act of 2006, H.R. 5049, 109th Cong. (2006); Clean Air Planning Act of 2006, S. 2724, 109th Cong. (2006); Safe Climate Act of 2006, H.R. 5642, 109th Cong. (2006); Global Warming Reduction Act of 2006, S. 4039, 109th Cong. (2006); Climate Stewardship and Innovation Act of 2007, S. 280, 110th Cong. (2007); Global Warming Pollution Reduction Act, S. 309, 110th Cong. (2007); Electric Utility Cap and Trade Act of 2007, S. 317, 110th Cong. (2007); Climate Stewardship Act of 2007, H.R. 620, 110th Cong. (2007); Global

resolution during the initial Kyoto Protocol negotiations under President Clinton which made it clear that ratification would be impossible, even before President Bush explicitly announced that he would not continue any efforts towards ratification.²³ Although the Obama Administration has made significant progress through regulation under existing statutes and financial incentives under the American Recovery and Reinvestment Act of 2009 (ARRA),²⁴ broader legislative progress remains slow in the United States.²⁵

In that domestic context, some states and localities have been major drivers of federal regulation and have shown leadership in their own efforts, while others have pushed in the other direction. For example, the Obama Administration's new National Plan to regulate motor vehicle greenhouse gas emissions emerged in part from California, together with a group of other states, pushing for a waiver under the Clean Air Act²⁶ to allow those subnational entities to exceed national standards.²⁷ Moreover, states advocated on both sides

Warming Reduction Act of 2007, S. 485, 110th Cong. (2007); Safe Climate Act of 2007, H.R. 1590, 110th Cong. (2007); Clean Air Planning Act of 2007, S. 1177, 110th Cong. (2007); Low Carbon Economy Act of 2007, S. 1766, 110th Cong. (2007); Climate Stewardship and Economic Security Act of 2007, H.R. 4226, 110th Cong. (2007); Climate MATTERS Act of 2008, H.R. 6316, 110th Cong. (2008); Carbon Leakage Prevention Act, H.R. 7146, 110th Cong. (2008).

23. S. Res. 98, 105th Cong. (1997); *George Bush's Global Warming Speech: The US President Unveils his Clear Skies and Global Climate Change Initiatives at the National Oceanic and Atmospheric Administration, Silver Spring, Maryland*, GUARDIAN, Feb. 14, 2002, <http://www.guardian.co.uk/environment/2002/feb/14/us-news.globalwarming>.

24. Pub. L. No. 111-5, 123 Stat. 115 (codified in scattered sections of the U.S.C.).

25. For an in depth discussion of these issues, see Hari M. Osofsky, *Diagonal Federalism and Climate Change: Implications for the Obama Administration* (Feb. 3, 2010) (unpublished manuscript, on file with the Maryland Journal of International Law).

26. Pub. L. No. 88-206, 77 Stat. 392 (codified as amended in scattered sections of 42 U.S.C.).

27. See Final Rule, *supra* note 20; The White House, Presidential Memorandum—EPA Waiver—State of California Request for Waiver Under 42 U.S.C. 7543(b), the Clean Air Act, Jan. 26, 2009, http://www.whitehouse.gov/the_press_office/Presidential_Memorandum_EPA_Waiver/; Press Release, United States Environmental Protection Agency, EPA Grants California GHG Waiver (June 30, 2009), available at <http://yosemite.epa.gov/opa/advpress.nsf/bd4379a92ceeeac8525735900400c27/5e448236de5fb369852575e500568e1b!OpenDocument>; Remarks at the Nat'l Archives & Records Admin., Remarks on National Fuel Efficiency Standards, Daily Comp. Pres. Doc., 2009 DCPD No. 00377 (May 19, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900377.pdf>; Letter from Stephen L. Johnson, Adm'r U.S. Envtl. Prot. Agency, to Arnold

in the U.S. Supreme Court case *Massachusetts v. EPA*,²⁸ which has thus far resulted in an endangerment finding by the Obama Administration's Environmental Protection Agency (EPA) and joint rulemaking by the EPA and Department of Transportation after many months of inaction by the Bush Administration's EPA.²⁹ The Obama Administration has also established a public-private leadership partnership that includes states and localities on energy efficiency issues.³⁰ In addition to all of these interactions, as discussed in depth in the scholarly literature and in statements by policymakers, a wide range of localities and states are using the land use planning and environmental regulatory authority to decrease their emissions from energy production and consumption and from transportation.³¹

U.S. localities and states are thus simultaneously joining domestic and international partnerships, participating in a complex national regulatory process, and making their own smaller scale regulatory decisions. None of these actions has formal international legal significance. In fact, that lack of formal significance likely makes agreement easier to achieve. The cities, states, and provinces are committing to actions within their authority. They are bound to follow these agreements through their normative commitments and the public pressure which accompanies them rather than by any accompanying international legal mechanism. But formally relevant or not, this panoply of subnational efforts raises issues about the regulatory role that these smaller-scale entities play in overall transnational efforts to address climate change. Specifically, this state of affairs provides the basis for the theoretical inquiry of Part III: namely, how should these efforts figure, if at all, into a narrative of

Schwarzenegger, Governor of Cal. (Dec. 19, 2007), *available at* http://ag.ca.gov/cms_attachments/press/pdfs/n1514_epa-letter.pdf; *Petition for Review of Decision of the United States Environmental Protection Agency, State of California v. United States Environmental Protection Agency*, No. 08-70011 (9th Cir. Jan. 2, 2008), *available at* http://ag.ca.gov/cms_attachments/press/pdfs/n1514_epapetition-1.pdf.

28. 549 U.S. 497 (2007).

29. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66494 (to be codified at 40 C.F.R. pt. 1); Final Rule, *supra* note 20; John M. Broder, *Greenhouse Gases Imperil Health, EPA Announces*, N.Y. TIMES, Dec. 8, 2009, at A18, *available at* <http://www.nytimes.com/2009/12/08/science/earth/08epa.html>.

30. *See* United States Environmental Protection Agency, Leadership Group, <http://www.epa.gov/cleanenergy/energy-programs/napee/leadership.html> (last visited Mar. 21, 2010).

31. *See infra* note 34 and accompanying text.

international lawmaking on climate change?

III. THE LEGAL SIGNIFICANCE OF TRANSNATIONAL AGREEMENTS AMONG SUBNATIONAL ENTITIES: COMPETING THEORETICAL NARRATIVES

In a formal sense, these agreements among states and cities have no international legal relevance. Their capacity to act is grounded largely in state and local governmental authority, and their agreements lack the binding character of treaties or customary international law among nation-states. Mayors and governors could participate in the formal negotiations of the Conference of the Parties (COP) only as members of national delegations, and none of the agreements among them figured directly into the Copenhagen Accord. Because nation-states are the primary subjects and objects of international law, these very productive meetings were merely sideshows to the main event of treaty negotiations. Moreover, this basic structure is unlikely to change. While scholars can envision more inclusive governance models, cities, states, and provinces will not realistically be given seats at the table during the next meeting of the COP, and making such a scheme work would be daunting as a practical matter.³²

Yet ending the story here seems incomplete. These coalitions of subnational governments, even if they include only the cities, states, and provinces that want more stringent regulation—and not the many others which do not—represent a great deal of emissions. Their members also will have to deal with significant adaptation challenges in the coming years. Especially in the current international environment, in which the Copenhagen meeting reinforced that simply having a more responsive United States participating will not solve climate governance challenges, these subnational efforts represent important steps forward which have practical import.

Scholars have tried to capture this intuition through a variety of approaches. Recent publications, including some of my own, have

32. Gavin Newsom discussed these issues in response to a question I posed to him at a conference following his keynote address. Gavin Newsom, Mayor of San Francisco, Remarks following his Keynote Address at the University of California Hastings College of the Law Conference: Surviving Climate Change: Adaptation and Innovation (Apr. 4, 2008) (notes on file with author). For an exposition of nation-states as the core legal actors under international law, see IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 287–88 (6th ed. 2003).

used variations on network theory, transnational legal process, international relations theory, and legal pluralism to describe these transnational coalitions.³³ Others have detailed planning efforts by cities and discussed their contribution in more traditional subnational terms.³⁴ Still others, generally focused largely on U.S. domestic policy, have included these local efforts as part of broader cooperative federalism models.³⁵ Not all of the literature views these subnational efforts as valuable; numerous scholars have raised

33. My work on these issues includes Hari M. Osofsky, *Is Climate Change "International"?: Litigation's Diagonal Regulatory Role*, 49 VA. J. INT'L L. 585 (2009) [hereinafter Osofsky, *Climate Change "International"?*]; Hari M. Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue?*, 26A STAN. ENVTL. L.J. 181 (2007) [hereinafter Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue?*]; Hari M. Osofsky, *Local Approaches to Transnational Corporate Responsibility: Mapping the Role of Subnational Climate Change Litigation*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 143 (2007) [hereinafter Osofsky, *Local Approaches to Transnational Corporate Responsibility*]; Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks?: Local Climate Change Coalitions*, 8 CHI. J. INT'L L. 409 (2008). See also Carolyn Kousky & Stephen H. Schneider, *Global Climate Policy: Will Cities Lead the Way?*, 3 CLIMATE POL'Y 1, 11 (2003); Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393, 402–05 (2007); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1627–33 (2006); Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAS)*, 50 ARIZ. L. REV. 709 (2008); Katherine Trisolini & Jonathan Zasloff, *Cities, Land Use, and the Global Commons: Genesis and the Urban Politics of Climate Change*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES (William C.G. Burns & Hari M. Osofsky eds., 2009).

34. E.g., Alice Kaswan, *Climate Change, Consumption, and Cities*, 36 FORDHAM URB. L.J. 253, 280–83 (2009); Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN ST. ENVTL. L. REV. 15 (2004).

35. BARRY G. RABE, STATEHOUSE AND GREENHOUSE: THE EMERGING POLITICS OF AMERICAN CLIMATE CHANGE POLICY 1–37 (2004); Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799 (2008); Alice Kaswan, *The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?*, 42 U.S.F. L. REV. 39 (2007); Barry G. Rabe, *North American Federalism and Climate Change Policy: American State and Canadian Provincial Policy Development*, 14 WIDENER L. J. 121, 128–51 (2004); WILLIAM ANDREEN ET AL., CTR. FOR PROGRESSIVE REFORM, COOPERATIVE FEDERALISM AND CLIMATE CHANGE: WHY FEDERAL, STATE, AND LOCAL GOVERNMENTS MUST CONTINUE TO PARTNER (2008), available at http://progressiveregulation.org/articles/Cooperative_Federalism_and_Climate_Change.pdf.

concerns about leakage and lack of uniformity arising from initiatives by cities and states.³⁶

This Part contributes to this dialogue by considering how different perspectives on international law might influence the narrative of the international legal significance of these subnational efforts. In my previous work on the geography of climate change litigation, I argue that international legal theory could be categorized based on the extent to which it views the nation-state as impenetrable and legitimate, and that these different categories of theory would have variant narratives of the international legal significance of *Massachusetts v. EPA*.³⁷ Specifically, I grouped international legal theory into four main categories which have salience for an understanding of these subnational coalitions' efforts: strict Westphalian, modified Westphalian, pluralist, and critical.³⁸ Strict Westphalians focus on the nation-state as the primary subject and object of international law and only consider nation-state behavior in narrating international lawmaking.³⁹ Modified Westphalians maintain the centrality of the nation-state but recognize a wide range of actors as relevant to the international lawmaking process.⁴⁰ Pluralists decenter the nation-state and argue that the international lawmaking narrative should include as meaningful a broader set of activities and actors.⁴¹ Critical international legal scholars question the legitimacy

36. E.g., Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PENN. L. REV. 1961, 1962 (2007) (claiming that "subnational state-level action is not the best way to combat global climate change").

37. See Hari M Osofsky, *The Geography of Climate Change Litigation Part II: Narratives of Massachusetts v. EPA*, 8 CHI. J. INT'L L. 573 (2008).

38. *Id.* at 578–79.

39. For an exposition of that model, see *id.* at 588–89; BROWNLIE, *supra* note 32; Michael J. Kelly, *Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver"—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT'L L. & FOREIGN AFF. 361, 382 (2005).

40. See Osofsky, *supra* note 37, at 589–90. For examples of the diverse conceptual approaches that arguably fall into the category of modified Westphalian scholarship, compare JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) with ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 18–23 (2004) and Harold Hongju Koh, *Jefferson Memorial Lecture: Transnational Legal Process After September 11th*, 22 BERKELEY J. INT'L L. 337, 339 (2004).

41. See Osofsky, *supra* note 37, at 589–90. For examples of pluralist approaches to international law, see HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* xxi (1992); Richard A. Falk, *Casting the Spell: The New Haven School of International*

of the international legal system and focus on the problematic power dynamics that underlie lawmaking processes.⁴² These four types of conceptual approaches would view the subnational climate change efforts' international legal relevance differently; exploring each approach's potential narrative of their relevance provides a tool for understanding the significance of these agreements better.

Strict Westphalians would view agreements among subnational units as irrelevant to international law except for their contribution to national efforts. Their story would begin and end with the treaty efforts to address climate change and view side meetings among cities, states, and provinces as lacking international legal import. They would recognize that these entities represent a large percentage of global emissions but would view their efforts as helping nation-states meet pledges under the Kyoto Protocol or Copenhagen Accord. In so doing, they would valorize the formal account with which this Part begins and reject intuitions that there is more to the story.⁴³

Modified Westphalians would retain the central focus on nation-states participating in a treaty-making process as the primary international law account regarding climate change. However, they would consider the subnational efforts as a relevant part of the story of how these treaties are made. For instance, transnational legal process scholars might focus on the way in which subnational coalitions contribute to a norm internalization process that they view

Law, 104 YALE L.J. 1991 (1995); Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959); Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decisions*, 19 J. LEGAL EDUC. 253 (1967); W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101 (1981); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Janet Koven Levit, *A Bottom-Up Approach to International Law Making: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125 (2005).

42. See Osofsky, *supra* note 37, at 589 (citation omitted). For examples of critical international legal scholarship, see BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003); Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827 (2000); David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 476–500 (2000); Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective*, 43 OSGOODE HALL L. J. 171 (2005).

43. For a discussion of strict Westphalian conceptual approaches, see Osofsky, *supra* note 37, at 591–94; Kelly, *supra* note 39, at 364–94.

as undergirding international law; these coalitions and their individual members participate in processes of “interaction, interpretation, and internalization” which help to establish transnational climate change norms and put pressure on nation-states to codify commitments in line with these norms in the treaty-making process.⁴⁴ These accounts thus bring the subnational coalitions into the international lawmaking story in ways beyond their domestic relevance but still focus on the ultimate international law as the formal treaty agreement reached.

Pluralists would view these subnational coalitions as having a greater role in the international lawmaking process than would modified Westphalians.⁴⁵ For example, Myres McDougal and Harold Lasswell, who pioneered the New Haven School approach upon which many conceptions of global legal pluralism build, defined law as “a process of authoritative decision by which the members of a community clarify and secure their common interests.”⁴⁶ The agreements by subnational coalitions arguably would count as international lawmaking under such an approach, as the governments participating are sovereigns making decisions together to regulate greenhouse gas emissions which they have the power to implement in their local contexts. The subnational governments make authoritative decisions about their individual approaches to land use planning and transportation and articulated their common interests in these documents produced at the Conference. Although this articulation is not formally binding—the subnational governments would not suffer legal consequences from walking away—this process of clarifying and stating their common interests by the subnational governments would likely be adequate to form part of lawmaking in a pluralist account. The nation-states’ Copenhagen Accord and the subnational efforts thus would each be pieces of overall transnational lawmaking on climate change.

Critical international legal scholars would ground their narrative of the significance of these subnational agreements in foundational concerns about the legitimacy of the international legal system and

44. For an exposition of transnational legal process, see Koh, *supra* note 40, at 339.

45. For an exploration of a pluralist perspective on California as an international lawmaker in the context of climate change litigation, see Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue?*, *supra* note 33, at 196–208.

46. LASSWELL & MCDUGAL, *supra* note 41, at xxi.

the nation-state sovereignty which undergirds this. They likely would view the unequal distribution of emissions and impacts as grounded in the same inequality and post-colonial legacy that makes the international legal order problematic. Critical scholars would probably question the Copenhagen Accord, both because they view it as grounded in consent among unequal and often illegitimate sovereigns and because of its limited ability to address the problem of climate change even under the current legal order. They might view the subnational agreements as an example of why the international order is insufficiently inclusive or be skeptical of those agreements for some of the same reasons they question those of the nation-state.⁴⁷

As I note in my previous work, scholarship often does not fall neatly into one of these four categories but rather lies at the border between them or has elements of more than one category.⁴⁸ For example, the line between many modified Westphalian accounts and pluralist accounts is often quite thin. Both sets of scholars would recognize the formal lawmaking between nation-states in the Copenhagen negotiations and Accord and would treat the subnational agreements as having some relevance to the international lawmaking stories. Some theories at the border are difficult to fully categorize because modified Westphalian's partial decentering of the nation-state and recognition of other actors bleed into pluralists' fuller decentering and treatment of a wider range of behavior as part of lawmaking.⁴⁹ The key distinction for purposes of this analysis, however one chooses to characterize any particular approach, is that pluralists are more likely to treat the subnational agreements as having independent international lawmaking relevance beyond their

47. For examples of critical accounts of international law, see RAJAGOPAL, *supra* note 42; Gordon, *supra* note 42; Kennedy, *supra* note 42, at 476–500; Okafor, *supra* note 42.

48. See Osofsky, *supra* note 37.

49. For example, Anne-Marie Slaughter's "new world order" presents a view of global governance grounded in a three-dimensional model of transgovernmental relationships that form the infrastructure of global governance. SLAUGHTER, *supra* note 40, at 19–23. Slaughter's approach treats the state as one actor among many but as the most important of those many actors. *Id.* at 18–19. Her theory thus has elements of a modified Westphalian approach and elements of a pluralist one. I have categorized her theory as more of a modified Westphalian one because of her exposition of state centrality, but one could argue this point the other way based on her recognition of the critical roles of a wide range of actors. Osofsky, *supra* note 37, at 590.

contribution to national efforts.⁵⁰

These nuances, which reveal international legal theory as existing along a spectrum of ideas in a complex fashion, do not undermine this Part's central point. Whether a critical approach has pluralist elements or a modified Westphalian account decenters the nation-state significantly, these theoretical categories represent different ways of understanding international lawmaking which result in varying narratives of the significance of subnational climate agreements. These divergent stories raise both conceptual and practical issues with which Part IV grapples. Namely, how should these different views about the international legal significance of cities, states, and provinces from around the world collaborating on climate change influence how formal international lawmaking might incorporate them?

IV. OPPORTUNITIES FOR GREATER INTEGRATION OF THE SUBNATIONAL INTO INTERNATIONAL LAWMAKING

The four narratives articulated in Part III represent very different ways of addressing the tension between the formal exclusion of and the significant informal activity by subnational governments at Copenhagen. These narratives likely would translate into varying perspectives on whether and how subnational efforts should be further integrated into the treaty-making process in the future. This Part lays out these different options through the lenses of the four approaches to framing international law and then explores possibilities for resolving their conflicting narratives.

The strict Westphalians would probably oppose any sort of formal integration of subnational entities into the treaty process, as such a modification would violate their sense of nation-states as the primary subjects and objects of international law. As noted in Part III, they regard cities, states, and provinces as important mainly for their contribution to the nation-state's internal decisionmaking and compliance. Given that, they would probably regard as appropriate the current state of affairs in which subnational governments have an extensive formal domestic role but a more limited international one. For example, they would view U.S. localities and states as appropriately participating in a U.S. legal process grounded in its federalist system of government and these entities' participation in

50. Osofsky, *supra* note 37, at 590–91.

transnational coalitions as an informal process that should be treated as separate from the real international lawmaking. Strict Westphalians would likely vary in the extent to which they view the coalitions as a benign development or as potentially disruptive to the main event of nation-state negotiations. But whether or not they have concerns about all of this subnational activity, they would agree that international law does and should rest upon formal agreements among nation-states and that dynamics among other actors should be treated separately.⁵¹

Modified Westphalians would generally be more open to reform of the international legal decisionmaking processes than would strict Westphalians. Although they would regard the decisions among nation-states as the critical international lawmaking moment, their acceptance of the ways in which a wide range of actors contribute to that lawmaking process might make them more disposed to a system in which the formal role of subnational actors is increased. In particular, modified Westphalians would likely be particularly drawn to reforms in which these actors are given a greater participatory role in the predecision period.⁵² Such reforms might include, for example, creating forums in which the subnational coalitions could meet directly with the nation-states involved in negotiations or putting provisions into formal agreements that acknowledge the subnational role in climate change regulation. These reforms would not give subnational governments a true seat at the table in negotiations among nation-states, as they would likely be treated as one stakeholder among many and they would not be part of the ultimate decisionmaking moment, but they would ensure a greater interconnection than took place at Copenhagen.

Pluralists probably would be more open to changing the ultimate decisionmaking moment than would modified Westphalians. While pluralists might be drawn to the above-described reforms as acknowledging the many actors involved formally and informally in international lawmaking better than the current process, their decentering of the nation-state means that they view the moment at which countries bind themselves based on sovereign and equal

51. For a discussion of strict Westphalian conceptual approaches, see Osofsky, *supra* note 37, at 591–94; Kelly, *supra* note 39, at 364–94.

52. For a discussion of modified Westphalian conceptual approaches, see Osofsky, *supra* note 37, at 594–97; SLAUGHTER, *supra* note 40; Koh *supra* note 40; GOLDSMITH & POSNER, *supra* note 40.

consent to be less sacrosanct than do either strict or modified Westphalians. As a result, some pluralists might be interested in exploring more significant reform in which nonnation-state actors might be allowed to participate formally in international agreements on climate change.⁵³ Such agreements with substate and potentially even nonstate key stakeholders, such as corporations and nongovernmental organizations, might supplement or supplant the treaties currently being crafted under the auspices of the United Nations Framework Convention on Climate Change.⁵⁴ The crafting of these agreements would raise complex logistical and equity issues, and pluralists might disagree on the most appropriate way to identify and incorporate key stakeholders. Whatever their nuances, though, these agreements likely would be structured to create cross-cutting mitigation and adaptation strategies which would include a mix of binding and voluntary commitments for the many types of entities involved.

Finally, critical scholars might view the above-mentioned reforms as an improvement upon the status quo but would still question the fundamental structure of the international legal system. They likely would want this greater inclusion of key stakeholders to be part of a broader deconstruction and reconstruction of the entire international legal system to create a more just and equitable structure of law. Their concern would be that these sorts of reforms, whether the more incremental ones described under the modified Westphalian approach or the more radical ones described under the pluralist approach, would not change the system sufficiently to address its basic illegitimacy. Many of them would regard rethinking of decisionmaking structures within the current system as fundamentally limited by the problems of equity and legitimacy that plague the system as a whole. Critical legal scholars thus would want a major overhaul of the international legal system with these questions addressed in the process of reconstitution.⁵⁵

53. For a discussion of modified Westphalian conceptual approaches, see Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue?*, *supra* note 22, at 588–89; Kelly, *supra* note 32; BROWNLIE, *supra* note 33; Osofsky, *supra* note 39.

54. See United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC NO. 102–38, 1771 U.N.T.S. 107, available at http://untreaty.un.org/English/notpubl/unfccc_eng.pdf.

55. For examples of critical accounts of international law, see RAJAGOPAL, *supra* note 42; Gordon, *supra* note 26; Kennedy, *supra* note 42; Okafor, *supra* note

These differences among potential models raise a fundamental concern about how greater integration of subnational actors might proceed as a practical matter. The models' basic views of international law vary so greatly that a synthesis which includes all of them would be extremely difficult. Those crafting the next generation of international lawmaking on climate change cannot simultaneously leave processes as they are, create predecisional inclusion only, change the decisionmaking process on this issue, and reconstitute the international legal system. To move forward, then, two main options exist. First, the key decisionmakers could choose one of the four options as superior and then work to operationalize it. Second, they could try to acknowledge the validity embodied in each model and try to move forward in a way that accepts each of them.

The first option is quite straightforward and comports well with how policymaking often proceeds. If decisionmakers view these different narratives as alternate paths forward, they can simply choose a path and engage the practical complexities that follow. They thus might look at how subnational entities might be included more fully at the next COP under the modified Westphalian model or instead consider what COP alternative they might create in line with the pluralist model. In taking the first option, then, decisionmakers are accepting a particular vision of international law and exploring its consequences.

The second option is harder to envision. I began to explore what such an approach might look like in the *Massachusetts v. EPA* context by drawing from Edward Soja's notion of "thirdspace."⁵⁶ Soja envisions thirdspace as one in which we can view places from every angle and also respect what is unseen and cannot be understood.⁵⁷ He further introduces the idea of "thirthing" as an approach that moves beyond dialectical synthesis of thesis-antithesis-synthesis to introduce an "other than" option which disorders, deconstructs, and tentatively reconstitutes the many existing options to create something that is "both similar and strikingly different."⁵⁸

42.

56. Osofsky, *supra* note 37, at 604–19. *See generally* EDWARD W. SOJA, THIRDSPEACE: JOURNEYS TO LOS ANGELES AND OTHER REAL-AND-IMAGINED PLACES (1996).

57. *Id.* at 56

58. *Id.* at 60–61.

An application of Soja's approach to the four options posed above would require a simultaneous acceptance of each of their truths despite the conflicts among them and then a moving forward based on such an acceptance. In practical terms, that might mean exploring those four options in depth and creating possible approaches to operationalizing each of them. However, rather than taking these four options as alternate paths, the way forward might draw from more than one of them, not to create a neat synthesis of approaches but rather to create a new approach that embraces these conflicting narratives. For example, maybe key decisionmakers should leave the COP process as it is but also create an alternative process to it. Or maybe they should reform the COP process and create an alternative process to it. "Thirling" essentially presents an option in which decisionmakers do not have to focus on resolving the conflict among the four narratives but can learn from each of them by embracing their differences.

To some extent, the ambiguities at the boundaries of these narratives and of how to categorize scholarship already create potential Thirdspace. These complexities reinforce the difficulty and potential inappropriateness of trying to balkanize these approaches as distinct options. But major differences still exist among these four main approaches to conceptualizing the role of subnational actors and their agreements. Constructing a workable Thirdspace approach would require somehow allowing meaningful divergence to remain, which is often a difficult task in practical policymaking.

Whether policymakers and scholars decide to move forward by choosing a conceptual approach to international law and exploring its practical implications or by continuing to explore the benefits and limitations of the paths that each conceptual approach might provide, these narratives help to reframe the discourse about and possibilities for subnational participation in transnational climate governance. This rethinking is critical as the traditional international law processes struggle to address the problem of climate change adequately, and subnational entities continue to collaborate transnationally outside of formal lawmaking processes. Whether or not key decisionmakers ultimately return to the current approach to addressing subnational participation—which treats these coalitions' agreements as irrelevant to the formal international law story—as the best one, the urgency of the problem demands creative conceptualization followed by a translation of those ideas into

practical options.

V. CONCLUDING REFLECTIONS ON THE ROLE OF THE SUBNATIONAL IN MULTILATERALISM AND GLOBAL LAW

This Paper's reflections on the role of transnational agreements among subnational actors at Copenhagen form part of this project of rethinking and, in the process, raise broader issues for the concepts of "multilateralism" and "global law" that are the focus of this volume. Specifically, these parallel activities among actors not traditionally treated as international lawmakers push the boundaries of conventional notions of what both terms mean. Multilateralism and global law typically would involve relations among multiple nation-states. Climate change governance certainly involves those traditional relationships, but it also includes smaller-scale actors behaving transnationally. Whether or not one accepts a narrative in which those smaller-scale actors should be integrated more into formal international legal efforts, these subnational agreements at least potentially represent a broader notion of the actors involved in multilateralism and a more multiscalar notion of global law.

These issues open further research questions about how to operationalize these theories regarding a more inclusive international legal order which I plan to address in future work. Namely, if formal international legal processes to address climate change choose to incorporate these subnational agreements more directly, what would be the best mechanisms for doing so? Can subnational actors play a constructive role in negotiations which are currently so mired in complex dynamics among a large number of nation-state actors that some key national governments are meeting in other, smaller international venues? If these additional actors can and should be brought in, what should be their substantive and procedural role? To what extent should we adjust our notions of formal international law to include them and to what extent would their informal integration be more effective? These questions lack easy answers but are critical to any version of more effective, multiscalar transnational approaches to climate change. I plan to try to answer them in future scholarship through examining more inclusive international treaty-making models in other substantive contexts and considering to what extent they are effective and could be translated into the climate change governance. Such models, if able to be implemented in a constructive, practical fashion, represent expanded understandings of

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both multilateralism and global governance which may allow the international legal community to address complex multipolar, multiscalar problems like climate change more accurately and effectively.