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The Geography of Climate Change Litigation Part II: Narratives of *Massachusetts v. EPA*

Hari M. Osofsky*

I. INTRODUCTION

We are at a crucial juncture in our narratives of climate change and of international law. The recently released Fourth Intergovernmental Panel on Climate Change ("IPCC") Assessment makes clear not only that climate change is happening, but also that we have passed the point at which prevention is possible. The questions we now face are whether we will do enough to avoid the most catastrophic scenarios and how we should adapt to the changes that are coming.¹

Despite the growing public recognition—even by the 2007 Nobel Peace Prize Committee²—of the threat posed by anthropogenic climate change,

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nation-states are failing to respond to the problem adequately through the formal mechanisms of international law. The United States—the world’s largest greenhouse gas emitter—is not party to the Kyoto Protocol, and many of the state parties struggle to achieve meaningful implementation. As reinforced by the resolution at the end of the G8 Summit in June 2007, massive uncertainty exists about the future of international regulation of climate change after the current Kyoto commitments expire in 2012.

Climate change litigation is one of many civil society and governmental initiatives that have emerged in response to the lack of effective international environmental regulation. In Massachusetts v EPA, the US Supreme Court entered this policy dialogue for the first time, calling upon the US Environmental Protection Agency (“EPA”) to take climate change more seriously: “Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.” This opinion reinforces a growing public awareness of climate change as a problem that demands a stronger policy response.

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7 A recent poll taken in numerous countries shows a greater level of agreement about climate change as a serious threat than about whether expensive measures to address it are needed. See The Chicago Council on Global Affairs, Poll Finds Worldwide Agreement that Climate Change is a Threat, (Mar 2007), available online at <http://www.worldpublicopinion.org/pipa/pdf/mar07/CCGA+_ClimateChange_article.pdf> (visited Nov 17, 2007). See also Juliet Eilperin and Jon Cohen, Growing Number of Americans See Warming as Leading Threat, Wash Post A20 (Apr 20, 2007). For a comparative analysis of reactions of people in the United States to climate change and terrorism, see Cass Sunstein, On the Divergent American Reactions to Terrorism and Climate Change,
This increased interest in anthropogenic climate change occurs at a moment in which the US relationship with international law remains deeply contested. At the same time as pending climate change litigation influences transnational climate regulation, debates in the US over the status and boundaries of international law grow ever more intense. In the years since 9/11, the Bush Administration—with the assistance of a group of international legal academics—has worked to undermine core human rights protections, limit restraints on the use of force, and strengthen executive power. The push-back against these efforts has also been strong, which has led to an atmosphere of encampment in the international law and policy community.

The discourse about these two moments of crisis, however, has tended to intertwine them in only the most superficial sense. Those fighting for a stronger commitment to international law generally recognize a refusal to take climate change seriously enough as part of what they view as the Bush Administration’s problematic foreign policy. But, despite that acknowledgment, the mainstream international law debates have tended to focus heavily on “War on Terror”

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107 Colum L Rev 503 (2007) (exploring the stronger public reaction to terrorism as a threat and what would be required to develop greater concern about climate change).


issues. Before 2006, the significant discussions about climate change largely took place in fairly technical dialogues among environmental experts.

This balkanization is beginning to change, however, particularly with respect to the growing body of litigation over climate change. An ever-increasing number of suits and petitions that engage global climate change have been brought in a variety of subnational, national, and supranational fora around the world. As the US Supreme Court, leading newspapers, and law journals engage the issues raised by these suits, some of the most prominent voices in the battle over international law have begun to discuss their significance. For example, Eric Posner, one of the principle advocates for an expansive approach to executive power that significantly curtails rights protections in the War on Terror context, recently published a commentary that makes a normative argument against bringing human rights claims based on climate change under the Alien Tort Claims Act. Similarly, at a 2007 Yale Journal of International Law symposium exploring whether a “new” New Haven School is emerging, Dean Harold Hongju Koh, one of the leading defenders of the importance of international legal obligations, led off his questions on the panel he moderated by engaging the significance of Massachusetts v EPA.


14 For a summary of that panel discussion, which focused broadly on international legal theory, see Jessica Karbowski, YCS Applications of the New Haven School: Professional Scholarship, (Mar 11, 2007), available online at <http://www.opiniojuris.org/posts/1173668896.shtml> (visited Nov 17,
As debates over the appropriate role of climate change litigation in regulatory governance become more intertwined with the ongoing fight over the future of international law, a systematic examination of how it fits into that discourse is critical. This Article attempts to begin that conversation by examining the ways in which geographic assumptions about nation-states influence narratives about how this type of litigation fits into an understanding of international law. Using Massachusetts v EPA as an example, it argues that interrogating those assumptions and their implications allows for clarification of the significance of climate change litigation crucial to making progress on how to regulate anthropogenic greenhouse emissions and their effects.

More broadly, the Article uses the geography of climate change litigation in general, and of this case in particular, as a jumping-off point for more creative engagement of international legal dilemmas. This litigation raises core conceptual issues about the boundaries between domestic and international and between public and private. The story of this emerging transnational regulatory process will vary depending on base assumptions about what international law is and how it works. Moreover, as I have explored previously, the problem of greenhouse gas emissions is deeply intertwined with energy production and consumption and the complex state-corporate regulatory dynamics which govern that transnational industry. As examples from Iran's nuclear defiance to the threatened production stoppage in Alaska amply reveal, how law does

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2007). The comments regarding Massachusetts v EPA are included in notes taken by H. Osofsky, a panel participant (on file with the author).

15 A law and geography approach considers both the spaces of law (Geography in Law) and the way in which “law shapes physical conditions and legitimates spatiality” (Law in Geography). Jane Holder and Carolyn Harrison, Connecting Law and Geography, in Jane Holder and Carolyn Harrison, eds, Law and Geography 3, 3–5 (Oxford 2003). This dynamic relationship has been described in the following manner: “Our legal lives are constituted by shifting intersections of different and not necessarily coherently articulating legal orders associated with different scalar spaces. The relations between these different legal spaces is a dynamic and complex one, but it is a pressing and important subject of inquiry given the ways in which codes operative at various scales intermingle.” David Delaney, Richard T. Ford, and Nicholas Blomley, Preface: Where is Law, in Nicholas Blomley, David Delaney, and Richard T. Ford, eds, The Legal Geographies Reader xxi (Blackwell 2001).


18 See David Prosser, BP Battles to Keep Alaska Flowing as Oil Price Heads for Record, Independent 36 (Aug 14, 2006); Pam Radlak Russell, Southern Exposure: BP’s Corrosion Problems in Alaska Have Drawn
and should engage the energy industry is intimately intertwined with critical national security concerns. In Spring 2007, the UN Security Council debated these linkages in the context of climate change for the first time. This Article’s engagement of theoretical and normative questions thus aims to situate climate change litigation amid a complex of knotty legal and policy problems vexing the international legal community today.

This piece is the second in a trilogy of articles that I am writing on the geography of climate change litigation. The first piece in this series, The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance, explores the geography of these actions and the implications of its spaces for transnational regulatory governance. That article argues that mapping the ties to place of actors and claims in these actions reveals a three-dimensional geography of overlapping spaces that are simultaneously multiscalar, multibranch, and multiactor.

This Article builds upon that analysis by engaging the conceptual implications of its descriptive account. Namely, it argues that the way in which different theoretical approaches envision the geography of international law frames their accounts of climate change litigation. A full understanding of this litigation as part of transnational regulatory efforts requires simultaneous consideration of all of these perspectives.

Section II of the Article draws from law and geography scholarship in the local government context to create a taxonomy of theoretical approaches to international law. In particular, it focuses on Richard Ford’s analysis of the way in which law treats cities as a model for considering how legal theory conceptualizes of nation-states. This Section organizes theoretical approaches based on the extent to which they accept the Westphalian vision of consent

Attention to Oil Spills, But Officials Say Pipeline Regulations Are Tighter in Louisiana, Times Picayune 1 (Aug 20, 2006).


20 Osofsky, 83 Wash U L Q 1789 (cited in note 16).

21 The term “space” is central to the geography literature, and has been used in a variety of contexts. See, for example, David Harvey, Spaces of Capital: Towards a Critical Geography 369 (Routledge 2001) (elaborating on spaces of capital); Doreen Massey, For Space (Sage 2005) (providing a broad analysis of the concept of space in a globalizing world); Alexander B. Murphy, The Sovereign State System as Political Territorial Ideal: Historical and Contemporary Considerations, in Thomas J. Bierstecker and Cynthia Weber, eds, State Sovereignty as Social Contract 81, 107 (Cambridge 1996) (presenting space in an international economic context). Section II.B explores “space” in more depth.

22 Osofsky, 83 Wash U L Q at 1813–18 (cited in note 16).

among sovereign and equal nation-states constituting international law: (1) strict Westphalian; (2) modified Westphalian; (3) pluralist; and (4) critical. It argues that the farther one moves from the strict Westphalian model, the less one presumes that the nation-state is impenetrable and legitimate.

Section III analyzes how each of the approaches might narrate climate change litigation generally, and Massachusetts v EPA in particular. It shows how the varying conceptions of nation-states in those theories shape their account of this litigation's significance. In so doing, this Section contends that international legal theory generally shows greater willingness to disaggregate the nation-state than to question its legitimacy and explores the implications of that tendency for climate regulation.

Section IV considers how efforts to regulate emissions and impacts might incorporate the divergent narratives of climate change litigation presented in Section III. It explores the way in which the substantive, structural, and conceptual dialectics in international law constrain creative approaches to pressing transnational legal problems like climate change. Then, using Edward Soja's theory of "Thirdspace," which embraces the simultaneous acceptance of multiple narratives, the Section engages the possibilities for progress on both climate change regulation and the debate over international law. It illustrates what such a Thirdspace approach might look like by retelling the significance of Massachusetts v EPA.

The Article concludes by arguing that cross-cutting, multiscalar problems like climate change demand policy solutions that incorporate these different visions of international lawmaking. It suggests that law and geography approaches can help us break out of our usual conceptual boxes, and in so doing, open up new possibilities for addressing emissions and their impacts.

II. GEOGRAPHIC ASSUMPTIONS ABOUT THE NATION-STATE

Although climate change is often characterized as an international environmental problem, its relationship to law is far more complex. The recent Supreme Court decision in Massachusetts v EPA exemplifies these difficulties of categorization. This case focuses on the appropriateness of the EPA's denial of a petition requesting that it regulate motor vehicles' greenhouse gas emissions under Section 202(a)(1) of the Clean Air Act. As a formal matter, the case

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25 I am exploring the implications of this characterization and the dangers of "too big" arguments against climate regulation in Is Climate Change an "International" Legal Problem (draft manuscript on file with author).
26 Massachusetts v EPA, 127 S Ct at 1438.
involves domestic, federal-level environmental law. But closer examination reveals such a characterization as only a partial description of the case. Massachusetts v EPA, like other climate change litigation, raises core questions about transnational regulation of anthropogenic climate change and the nation-state at the center of these regulatory stories.

This Section provides background on Massachusetts v EPA and relevant geography literature to frame the more specific discussion of the rest of the Article. It begins by introducing the geography of Massachusetts v EPA. It then explores ways in which geography's interrogation of concepts of place, space, and scale might enhance an understanding of the case. Finally, it considers how Richard Ford’s use of the geography literature on space might enrich an understanding of international legal theory and its analysis of climate change litigation.

A. THE GEOGRAPHY OF MASSACHUSETTS v EPA

Massachusetts v EPA is one of many petitions and lawsuits engaging global climate change that have been filed around the world in subnational, national, and supranational fora. These legal actions tend to take two main approaches: (1) claims against governmental entities to force or constrain regulatory behavior and (2) claims against corporate emitters to limit emissions. In both forms, the cases serve as part of state-corporate regulatory dynamics around climate change.27

Massachusetts v EPA falls into the first category. As illustrated by the diagrams below, many different types of actors on multiple scales are actively involved in the litigation. The petitioners include twelve states, three cities, a US territory, and thirteen nongovernmental organizations.28


Petitioners in *Massachusetts v EPA*

The respondents are similarly diverse: the EPA, ten other states, and nineteen industry and utility groups have grouped themselves into three main categories: the Vehicle Intervenor Coalition,\(^{29}\) the CO\(_2\) Litigation Group,\(^{30}\) and the Utility Air Regulatory Group.\(^{31}\)

\(^{29}\) The Vehicle Intervenor Coalition includes four entities representing different types of companies involved in the automotive industry: the Alliance of Automobile Manufacturers (Auto Alliance), the National Automobile Dealers Association, the Engine Manufacturers Association, and the Truck Manufacturers Association. Joint Brief of Industry Intervenor-Respondents, *Massachusetts v EPA*, 415 F3d 50 (DC Cir 2005) (No 03-1361).

\(^{30}\) Id, *Disclosure Statement of CO\(_2\) Litigation Group* at 1 ("CO\(_2\) Litigation Group is an informal organization of trade associations and business organizations formed to fund and conduct litigation concerning potential regulation of carbon dioxide emissions.").

\(^{31}\) Id, *Disclosure Statement of UARG* at 1 (stating that the Utility Air Regulatory Group ("UARG") "is a not-for-profit trade association of individual electric generating companies and national trade..."
Respondents in *Massachusetts v EPA*

These petitioners and respondents span numerous geographic regions at several levels of governance. The state- and local-level governmental petitioners tend to be located towards the coasts, and the governmental respondents are mostly based in the middle of the country. The national-level governmental respondent, the EPA, is based in the national capital, but has ten regional offices located in major cities throughout the country. The nongovernmental entities also have a mix of local, state, national, and international ties.

The facts and legal claims in the case similarly grapple with far more than US federal law. The substantive and procedural arguments made by the petitioners rely upon national-level statutes to address a situation that occurs across spatial and temporal scales. Although as a formal matter the case revolves

associations that participates collectively in administrative proceedings, and in litigation arising from those proceedings, that affect electric generators under the Clean Air Act”.

32 EPA, *Organizational Structure*, (Aug 1, 2007), available online at <http://www.epa.gov/epahome/organization.htm> (visited Nov 17, 2007). I have described the geography of these three groups in more depth in Osofsky, 83 Wash U L Q at notes 189–92 and accompanying text (cited in note 16).

33 For an in-depth discussion of those ties, see Osofsky, 83 Wash U L Q at 1830–34 (cited in note 16).
around the EPA’s denial of a national-level rulemaking petition under a national-level law (the Clean Air Act), such regulatory action would be foundationally multiscalar. The EPA, in acting, would address emissions by vehicles in localities around the US that contribute to the supranational phenomenon of climate change, which in turn produces localized effects at a subnational level. In fact, much of the debate in the briefs, oral arguments, and the Supreme Court opinions focused on whether national-level and state-level regulation of climate change was appropriate. As I have argued elsewhere—and depict in the following diagrams—petitioners scaled down the problem, focusing on local emissions and impacts, while respondents scaled up, focusing on climate change as a global phenomenon.  

This unpacking of Massachusetts v EPA opens up foundational questions about both its geography and its role in the regulation of anthropogenic climate change. Where are emissions and impacts located? What role should national-level regulatory agencies play in regulating climate change? How should courts address contestation over the appropriate scale for regulation? To what extent should the broad range of interests and entities engaged in this case change the way in which we narrate its significance?

B. PLACE, SPACE, AND SCALE

The discipline of geography provides a helpful tool for engaging these questions and, in the process, for considering how an effective multiscalar regulatory regime governing climate change should be structured. Geography

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34 See Hari M. Osofsky, The Intersection of Scale, Science, and Law in Massachusetts v. EPA, 9 Or Rev Int'l L __ (forthcoming 2008). The scalar debates involve not only the spatial scope of the problem, but also debates over time. See id.
studies the way in which place, space, and scale interact over time. Although analyses of legal problems often engage concepts of “place,” “space,” and “scale,” they rarely acknowledge the rich literature in geography exploring what these ideas mean. In part, this deficit may stem from law professors’ lack of exposure to university-level geography, as many elite universities purged their geography departments in the mid-to-late twentieth century. This Section provides a brief introduction to that literature as a background for understanding the insights that a law and geography approach can bring to understanding the role of litigation—such as Massachusetts v EPA—in climate regulation.

1. The Dance Between Place and Space

In his foundational book, *Space and Place: The Perspective of Experience*, Yi-Fu Tuan explains that “[s]pace and place are basic components of the lived world; we take them for granted. When we think about them, however, they may assume unexpected meanings and raise questions we have not thought to ask.” He further explains:

In experience, the meaning of space often merges with that of place. “Space” is more abstract than “place.” What begins as undifferentiated space becomes place as we get to know it better and endow it with value. Architects talk about the spatial qualities of place; they can equally well speak of the locational (place) qualities of space. The ideas “space” and “place” require each other for definition. From the security and stability of place we are aware of the openness, freedom, and threat of space, and vice versa. Furthermore, if we think of space as that which allows movement, then place is pause; each pause in movement makes it possible for location to be transformed into place.

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35 I have analyzed this phenomenon in the context of the New Haven School of international law in Hari M. Osofsky, *A Law and Geography Perspective on the New Haven School*, 32 Yale J Intl L 421 (2007).

36 Id at 430-32 (detailing this history).

37 Yi-Fu Tuan, *Space and Place: The Perspective of Experience* 3 (Minnesota 1977).

38 See id at 6. See also John A. Agnew and James S. Duncan, *Introduction*, in John A. Agnew and James S. Duncan, eds, *The Power of Place: Bringing Together Geographical and Sociological Imaginations* 1, 1 (Unwin Hyman 1989); Helen Couclelis, *Location, Place, Region, and Space*, in Ronald F. Abler, Melvin G. Marcus, and Judy M. Olson, eds, *Geography’s Inner Worlds: Persuasive Themes in Contemporary American Geography* 215, 215 (Rutgers 1992). Accord Michael R. Curry, *On Space and Spatial Practice in Contemporary Geography*, in Carville Earle, Kent Mathewson, and Martin S. Kenzer, eds, *Concepts in Human Geography* 3, 3 (Rowman & Littlefield 1996) (“When first confronted with the literature on the nature of space, the new student finds a bewildering set of apparent alternatives. There is real space and perceived space, there is phenomenal space and behavioral space, there is ideal space and material space. Within the confines of this group of broader and contrasting conceptions, there appear to be another set of related contrasts, of place, region, site, location, locale, and situation …”).
More recent scholarly literature has explored numerous aspects of the concept of "space" in a globalizing world.  

At the core of many of these analyses is a recognition of both place and space as social constructs. Places are not simply points on a spatial grid, but rather interact with a range of socio-cultural and political legal spaces. For example, physically distant world cities may be closer in social space than proximate segregated neighborhoods. In order to understand how people relate to places and problems, we need to unpack the various intersecting spaces that they inhabit.  

This richer conception of place and space has particular salience for an exploration of climate change litigation because the actors and claims represent a complex web of interconnections. The above description of Massachusetts v EPA—repeated in multiple permutations in the various cases taking place in different types of legal fora around the world—reinforces the value of more nuanced analysis. The issue of where emissions and impacts are located becomes both a physical and conceptual issue; the "where" of climate change occurs at that intersection of place and space that Yi-Fu Tuan describes. On the one hand, those emissions and impacts actually occur in specific, physical places. As a matter of law, however, we define those places in a range of ways that—as discussed in more depth in Section III—create intersecting spaces for addressing climate change. Understanding the ways in which these suits tie to physical, social, and legal spaces helps to reveal their formal and informal significance.  

2. The Complexities of Scale  

The concept of "scale" has received similar interrogation in the geography literature. Debates have raged among geographers over foundational issues, such as what the term scale means. Neil Brenner, for example, has summarized the
various definitions provided for scale in recent geography scholarship: (1) “a nested hierarchy of bounded spaces of differing size;” (2) “the level of geographical resolution at which a given phenomenon is thought of, acted on or studied;” (3) “the geographical organizer and expression of collective social action;” and (4) “the geographical resolution of contradictory processes of competition and cooperation.” Although geographers generally tend to agree that scale can best be understood as socially constructed, significant disputes exist over not just an appropriate definition of the term, but the implications of each framing for addressing complex cross-cutting problems like climate change. Moreover, geographers have begun to engage the way in which their analyses of scale might interact with discussions in other disciplines. Nathan Sayre, for example, has compared the approaches of geographers with those of ecologists.

More specifically, regarding the nexus of international legal theory with Massachusetts v EPA, questions about how national courts and agencies—and the many other governmental and nongovernmental entities involved in the case—should fit into the regulatory landscape depends on how one defines the nation-state as both a space and a scale. Regulatory narratives based in nation-state centrality, such as those of Sections III.A and III.B, look quite different from the more pluralist ones described in Section III.C and the critical ones in Section III.D. Moreover, as I have analyzed in other contexts, socio-legal stories vary based on whether one characterizes the nation-state as enclosed, permeable, or enmeshed.

A thicker conception of scale, which grounds questions of the appropriate level at which to address climate change in a socio-legal context, has important practical implications for how we might approach climate governance issues. At its core, climate change is a multiscalar problem. Emissions and impacts tie to the most individual and global levels and everything in between. Although law is organized into relatively rigid levels of governance—with tensions over how to
resolve jurisdictional overlap—problems like climate change demand solutions with cross-cutting notions of scale.  

C. PROBLEMS OF OPAQUE/TRANSPARENT GOVERNMENTAL SPACES

Although a law and geography approach to *Massachusetts v EPA* opens a wide range of issues regarding place, space, and scale, this Article focuses on a particular set of concerns in depth. Namely, building from Richard Ford’s work in a local government context, it groups international legal theory by how it views nation-state spaces and considers the implications of such a grouping for the regulatory role of climate change litigation. In so doing, it attempts to bridge the theory-practice divide by demonstrating that how we choose to conceptualize of nation-states as spaces foundationally impacts the approach we might take to climate policy.

Richard Ford of Stanford Law School has played a critical role in establishing law and geography as an important interdisciplinary interchange. In one of his earliest law and geography pieces, *The Boundaries of Race: Political Geography in Legal Analysis*, Ford explores the way in which legal conceptions of cities serve to reify the status quo in ways that reinforce racial segregation. He begins by describing the way in which cities are legally structured; he explains that the law treats cities as simultaneously (1) opaque, defined as impenetrable, and (2) transparent, defined as presumptively legitimate. More specifically, Ford uses the term “opaque” to mean that the law does not explore the internal

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decisionmaking of cities. He explains that cities are viewed as having an initial period of organic development after which law discovers them. As such, they are treated as autonomous political entities: "We cannot 'see inside' the political space to perceive the social institutions that define and comprise it."\(^{50}\)

Ford further argues that the law simultaneously treats cities as "transparent," by which he means that the legitimacy of their authority is not questioned. He notes that the law views localities "as mere subdivisions, the inconsequential and administratively necessary agents of centralized power."\(^{51}\) The applicable legal doctrines assume that this supposedly transparent power structure should be treated as irrelevant, and thus these doctrines fail to explore the consequences of this presumed legitimacy.\(^ {52}\)

In Ford's view, these legal conceptions of cities create barriers for efforts to eliminate racial segregation. The law continuously oscillates between the two views of the city in a manner that avoids fundamental engagement with the way in which legal choices reinforce patterns of segregation. By failing to examine the social institutions inside localities and by treating them as mere agents, the law does not see the ways in which communities make decisions that separate racial groups. These dual legal conceptions of local government thus maintain and reinforce racially identified social spaces.\(^ {53}\)

D. NARRATING NATION-STATE SPACES

The analysis that Ford provides regarding cities translates readily into the international law context. Theories of international and transnational law vary in the extent to which they view the political geography of nation-state as opaque and/or transparent, as defined by Ford. These spatial conceptions roughly track these theories' assumptions about the centrality of the nation-state. Namely, theories that valorize the role of the nation-state in international lawmaking—in other words, Westphalian models—also tend to treat it as more impenetrable and legitimate.

At one end of the spectrum, a strict Westphalian approach envisions the nation-state similarly to the city in Ford's model. Namely, the nation-state's power is treated as transparent—whether from divine authority embodied in the king or through popular sovereignty into an elected leader—and therefore irrelevant. This model does not question the extent to which the nation-state structure actually comports with those values, and therefore should be the basis

\(^{50}\) Id at 1858.
\(^{51}\) Id at 1877.
\(^{52}\) Id.
\(^{53}\) Id at 1886–1918.
for an international legal order. This legitimation of the nation-state as the central axiom of the international legal system is reinforced by the simultaneously opaque way in which the Westphalian model views the state; the nation-state is an impenetrable unit upon whose consent international law rests.\textsuperscript{54}

At the other end of the spectrum, critical conceptions of nation-state spaces treat them as neither opaque nor transparent. These accounts—which draw from Critical Race Theory, LatCrit theory, Third World Approaches to International Law, New Approaches to International Law, feminist theory, etc.—argue against the legitimacy of the nation-state (altogether for some, as currently constructed for others). They decry as illegitimate the colonialism and conquest that shaped the modern map, and examine the subordination that underlies the international legal system.\textsuperscript{55}

Between those two poles lies much of contemporary international legal theory. Most of the scholars engaged in the debate over international law described in the introduction range from what I term a modified Westphalian approach to a pluralist one. In modified Westphalian visions, the centrality of the nation-state is not fundamentally challenged, but the processes by which nation-states consent and obey are interrogated. Power is still relatively transparent because of that presumption of centrality, but the state is far less opaque.

In a further move away from Westphalia, a growing number of scholars provide a more pluralist vision of international lawmaking that questions the centrality of the nation-state. They argue for recognition of the significance of the other types of decisionmaking that occur, and the multiplicity of interconnections that individuals have.\textsuperscript{56} Their work often builds on or reacts to

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the scholarship of the New Haven School, which has described law as “a process of authoritative decision by which members of a community clarify and secure their common interests” and has “noted the importance of locating any particular process of authoritative decision in its larger context of community and effective power processes, and observed that humankind today lives in a whole hierarchy of interpenetrating communities, from the local to the global.”

These pluralist perspectives do not abandon the nation-state, but by viewing it as less central, penetrate the opaque and transparent spaces of the Westphalian vision.

Of course, most theories do not fit neatly into one of these four boxes. Anne-Marie Slaughter’s conception of “a new world order,” for instance, involves a three-dimensional model of transgovernmental relationships that form the infrastructure of global governance. Her first premise, however, makes clear that the model has not entirely abandoned the state centrality of the modified Westphalians: “The state is not the only actor in the international system, but it is still the most important actor.”

Similarly, Balakrishnan Rajagopal’s article, The Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India, takes an approach that is arguably both pluralist and critical.

Although individual theories may have more than one category into which they belong, the taxonomy still provides a helpful mechanism for exploring the implications of how we narrate climate change litigation. Categorizing international legal theory based on these assumptions changes the lens through which these theories are viewed. For example, international legal theory is often grouped by whether it views states as making decisions based on norms or out of self-interest. By focusing instead on the contours of nation-state spaces, this

58 Anne-Marie Slaughter, A New World Order 18–23 (Princeton 2004).
59 Id at 18.
61 For an argument that the intersection of international relations and international law can be subdivided into interest-based and norm-based approaches, see Oona A. Hathaway and Harold Hongju Koh, eds, Foundations of International Law and Politics 26–204 (Foundation 2005).
taxonomy provides a mechanism for understanding how regulatory models might vary based on the geographic assumptions that underlie them. 62

Through their different conceptions of state spaces, each of these four approaches to international legal theory would articulate the significance of Massachusetts v EPA—and climate change litigation in general—differently. An engagement of these stories illuminates how a law and geography perspective might help map existing streams of international legal theory and, in the process, enhance our understanding of them and their perspective on phenomena that we use them to explain.

III. A LAW AND GEOGRAPHY TAXONOMY OF INTERNATIONAL LEGAL THEORY

The Sections that follow—organized around these four main views of the nation-state—focus on one central question: How might a narrative from each theoretical perspective explain the way in which the US Supreme Court’s decision in Massachusetts v EPA, and climate change litigation more broadly, form part of the international legal regime regarding climate change? Exploring varying answers to this question helps to lay the groundwork for Section IV’s focus on underlying normative dilemmas about the appropriate role for climate change litigation in transnational regulatory governance and on what it means to navigate the multiplicity of scales and actors that this litigation entails. 63

A. STRICT WESTPHALIAN SPACES

In a strict Westphalian approach, nation-states are the primary subjects and objects of international law, and their consent undergirds the international legal order. The two main building blocks of public international law, treaties and customary international law, are constructed by nation-states and derive their binding force from the decisions of those states. 64 These sovereign equals cede specific authority to the international community through their consent, and the

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62 The aim of this grouping is to portray a theoretical landscape. Although this Section attempts to group leading theories as accurately as possible, these groupings are my choices, rather than those of the authors of those theories. I am open to the notion that those authors might choose to recategorize themselves, or that a particular theory could arguably have some characteristics of more than one group.


64 See Brownlie, Principles of Public International Law at 3–29, 287–88 (cited in note 54).
general legal principles that they recognize in their domestic legal systems help to fill the gaps in that formal legal structure.  

As noted above, strict Westphalian spaces closely replicate the dialectical relationship of opaqueness and transparency that Ford describes in the local government context. The Westphalian nation-state is impenetrable; the only relevant question is whether or not it, as a unit, has consented. The internal processes through which it derives consent and the formal and informal participation of—often nonstate—actors in those processes are only relevant to the extent that they help to answer the question of consent.

At the same time, the international legal community treats states as transparent. If they meet the criteria for statehood—which do not delve into legitimacy of a state's current legal order but only its stability and effectiveness—they have formal rights to participate in international lawmaking as sovereign equals. Moreover, although states at times choose not to recognize each others' governments for political reasons, such nonrecognition is rare and does not go to the underlying question of statehood.

A narrative of climate change litigation from this perspective would look quite different from the modified Westphalian one which I provided in *The Geography of Climate Change Litigation*. First, the only cases that would be viewed as having international legal relevance are those that involve supranational obligations. The cases which invoke subnational or national law—which include all of the subnational-level cases as well as the national-level ones brought thus far within the United States—occur within the black box of the nation-state. The involvement of transnational actors in the litigation and the factual focus on a supranational problem would not change their status. *Massachusetts v EPA*, as a formal matter, focuses entirely on federal law. As such, it would only be relevant to this story through its impact on the US national approach to formal international climate law despite the complex multiscalar geography of the cases' actors and claims.

Moreover, the cluster of other federal and state court cases around the world with which *Massachusetts v EPA* interacts would have a similarly limited role. They would matter in terms of international law through their influence on national participation in treaty and customary international law. For example,

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65 See id.
66 See id.
67 See id at 69–83.
68 See id at 85–101.
German and Nigerian national-level courts' consideration of regional treaties in climate change cases, discussed in detail in *The Geography of Climate Change Litigation*, would have relevance to international law primarily through helping to establish how the nation-state views its obligations under those treaties.\(^7^0\)

Second, the climate petitions invoking supranational law, while "counting" more than *Massachusetts v EPA*, would have international legal relevance in a thin way. The key issue for the strict Westphalian is not how these cases play into broader transnational regulatory dynamics, but how they interact with state consent. The supranational tribunals might clarify, for example, what a state’s obligations are under treaties it has consented to, and whether or not it is meeting those obligations appropriately.\(^7^1\)

Moreover, in the strictest Westphalian approach, the petition processes in the supranational cases likely would be viewed as problematic, since they give status to individuals vis-à-vis sovereign states.\(^7^2\) Only the “public” nation-states belong in the international legal discourse and not the “private” individuals and organizations that have brought petitions to the Inter-American Commission on Human Rights (“Inter-Am CHR”) and the World Heritage Commission.\(^7^3\)

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The strict Westphalian narrative thus would consider the ways in which actors and claims connect to places only as they relate to the obligations of nation-states. Place matters as territory, and falls inside or outside of the boundaries of a particular state, which is treated as enclosed. The spaces that matter are nation-state spaces, and climate change litigation forms part of an international law dialogue through its interaction with those spaces. The subnational spaces, branches of government, and multiple participating public and private actors—represented in the three-dimensional geographic model introduced in The Geography of Climate Change Litigation—are relevant only insofar as they are instrumental in influencing nation-state spaces; they do not form part of the formal map. Massachusetts v EPA is an important decision as a matter of international law only if US interaction with treaties and customary international law changes as a result.

B. MODIFIED WESTPHALIAN SPACES

Contemporary international legal theory almost never hews to the strictures of that very confining strict Westphalian vision. In fact, many of the leading theoretical approaches—even ones that vigorously disagree with one another—would be characterized most accurately as presenting modified Westphalian models. For example, Jack Goldsmith and Eric Posner present a perspective on international law that contrasts greatly with that of Harold Koh, but both approaches agree upon the central formal role of the nation-state (the Westphalian move) while looking inside nation-state decisionmaking (the modification).

Despite the conceptual and political diversity within this category, modified Westphalian approaches share foundational commonalities in how they view the

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spaces of international law. The nation-state's internal spaces are far less opaque than in a strict Westphalian construction. Harold Koh's theory of transnational legal process, for example, explains states' compliance with rules of international law as resulting from an obedience born of norm internalization; that internalization process happens through state and nonstate actors interacting in a variety of domestic and international fora. Although the nation-state's consent—to the norm itself and to compliance with it—ultimately grounds international law, the space in which that consent happens is no longer impenetrable. Additional public and private actors form part of the Westphalian lawmaking process, and that changes how the states themselves should be viewed.

The transparency of the strict Westphalian vision largely remains in the modified Westphalian theories, however. These theories still presume the centrality of the nation-state for international law and do not dismantle fundamentally the consent-based architecture of the international legal system. They argue about the extent to which international law matters and its appropriate boundaries, but they assume that this type of law—whatever its import and however disaggregated the process by which it is made—is constituted, at least formally, through consensual agreements between equal sovereigns.

The Geography of Climate Change Litigation provides an example of a modified Westphalian narrative of climate change litigation. Through analyzing the ties to place in cases at multiple levels of governance, the article portrays a disaggregated vision of international decisionmaking that intertwines a multiplicity of decisionmakers at different scales; the state is thus far less opaque than in the strict Westphalian view. However, that article views the nation-state—particularly in its regulatory relationship with multinational corporations—as at the core of this transnational dialogue. While the account does not treat state authority as presumptively justified, it acknowledges its centrality and chooses not to focus on legitimacy questions. In so doing, it provides a relatively transparent vision of the nation-state's role in the international legal system.

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76 See Koh, 22 Berkeley J Intl L at 339 (cited in note 75).

77 See, for example, Goldsmith and Posner, The Limits of International Law at 4–5 (cited in note 10); Slaughter, A New World Order at 1–35 (cited in note 58); Koh, 22 Berkeley J Intl L at 338–39 (cited in note 75).

78 See Osofsky, 83 Wash U L Q at 1813–1818 (cited in note 16). This disaggregated model has structural similarities to, but conceptual differences from, the one presented by Anne-Marie Slaughter in A New World Order (cited in note 58). See Osofsky, 83 Wash U L Q at 1814 n 85 (cited in note 16).
Although the details of why these cases matter would vary greatly across the range of modified Westphalian theories, all accounts would likely share two basic characteristics with the above narrative. First, they would acknowledge these cases as relevant to the international legal process of regulating climate change. Whether operating from the perspective that states make decisions normatively or based on self-interest, these theories recognize the relevance of looking inside why states do what they do. Their narrative of these cases—from subnational to supranational—would view these suits and petitions as intertwined with more formal international lawmaking.

From a modified Westphalian perspective, the narrative of Massachusetts v EPA likely would have more texture than the strict Westphalian account provides. A transnational legal process scholar, for instance, might view the case as helping to internalize norms around regulation of greenhouse gas emissions.\(^2\) Even if the EPA does not change its fundamental regulatory stance in response, modified Westphalians would treat the opinion as relevant in shaping overall US policy in a myriad of formal and informal ways.

Such an account differs subtly from that of strict Westphalians. The formal category of international law remains the same in both accounts, but the modified Westphalians deconstruct the ways in which that formal law is constituted. They find more relevance in issues beyond state consent, and in the process treat Massachusetts v EPA and other domestic climate change litigation as more significant. Although as a substantive matter the US Supreme Court focused on the federal-level Clean Air Act, modified Westphalians might view the decision as a landmark moment in the dialogue over multiscalar regulation of climate change in the United States and explore the myriad of subtle ways in which it influences the formal international legal discourse.

Second, because of their commonalities with strict Westphalians, modified Westphalians likely would not engage these cases as fundamental challenges to the international order. Certainly, Goldsmith and Posner embrace a far more limited conception of the boundaries and roles of international law than does Koh.\(^8\) But even they acknowledge international law as a “real phenomenon”\(^8\) and justify state centrality on the basis that “international law addresses itself to states, and for the most part, not to individuals or other entities such as governments.”\(^8\) These cases might be part of a narrative of climate change in which the nation-state is less opaque, but they would be situated within the transparent power of the nation-state. An account of Massachusetts v EPA, for

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\(^{79}\) See Koh, 22 Berkeley J Intl L (cited in note 75) (describing transnational legal process).

\(^{80}\) See id at 339.

\(^{81}\) Goldsmith and Posner, The Limits of International Law at 225 (cited in note 10).

\(^{82}\) Id at 5.
instance, would be unlikely to challenge the legitimacy of the US Supreme Court’s authority to decide it. The case may influence multiscalar climate law and policy, but it occurs under the sovereign authority of the US government.

Eric Posner’s argument against human rights suits targeting major corporate emitters under the Alien Tort Claims Act similarly exemplifies this characteristic of modified Westphalian approaches. *Climate Change and International Human Rights Litigation: A Critical Appraisal* describes climate change litigation as arising from the limitations of the international legal regime regarding climate change. The piece frames Posner’s opposition to these human rights suits by arguing against US courts attempting to dictate climate change policy to “Australia, Ecuador, Sweden, and Chad.” In so doing, he acknowledges the suits as influencing and drawing from international and transnational legal regimes, but finds them problematic precisely because of his valuation of nation-state sovereignty as at the core of international law. Whether or not his piece accurately depicts the costs and benefits of such litigation, it reflects a particular conception of the international legal order.

For modified Westphalians, the interconnections of actors and claims to a wide range of places would have relevance beyond their role in the territorial delineation of nation-states, which allows this account to engage the many spaces with which climate change litigation interacts. Interest-based approaches, which view international law as being driven by state interests, might consider the many places invoked through the actors and their claims in *Massachusetts v EPA* to be part of formulating US interests regarding climate change. Alternatively, theories asserting that states make decisions based on internalized norms might describe a process of norm development across places and scales. The multiplicity of ties in these cases would not undermine the Westphalian presumption in these accounts, but rather would help to penetrate the opaque nation-state and reveal public and private spaces within it relevant to the international legal discourse over climate change.

C. Pluralist Spaces

Pluralist approaches part ways with modified Westphalian ones primarily by centering the nation-state. They argue for a theory of international law in which the formalized acts between sovereign consenting states are no longer the

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84 See id at 1925.
85 For a selection of interest-based approaches, see Hathaway and Koh, *Foundations of International Law and Politics* at 26–110 (cited in note 61).
86 For a selection of norm-based approaches, see id at 111–204.
primary behavior that constitutes international lawmaking. Since McDougal and Lasswell’s initial portrayal of a pluralist vision of international law, both New Haven School scholars and others—such as Robert Ahdieh, Diane Marie Amann, Elena Baylis, Paul Berman, William Burke-White, Mark Drumbl, Janet Koven Levit, Sally Engle Merry, Ralf Michaels, Balakrishnan Rajagopal, and Jan Koven Levit,99—have further explored the contours of what is typically termed “global legal pluralism.”

Although a true pluralist approach would view the state as merely one lawmaker among many, those that I include as “pluralist” international legal theorists generally do acknowledge the state as particularly important. This acknowledgement constitutes a demotion of the state from the pedestal it occupies in the various Westphalian approaches, but the line between approaches that I am characterizing as modified Westphalian and those that I am characterizing as pluralist is often quite fine. Levit’s conceptualization of “bottom-up lawmaking,” for example, recognizes its commonalities with both transnational legal process and transgovernmentalism, but distinguishes them because of their greater focus on states.100 Similarly, as noted above, it is

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87 See, for example, McDougal and Lasswell, 53 Am J Intl L (cited in note 57); McDougal, Lasswell, and Reisman, 19 J Legal Educ (cited in note 57); Myres S. McDougal, Harold D. Lasswell, and W. Michael Reisman, Theories About International Law: Prologue to a Configurative Jurisprudence, 8 Va J Intl L 188 (1968).
89 Diane Marie Amann, Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone, 29 Pepp L Rev 167 (2001); Diane Marie Amann, Abu Graib, 153 U Pa L Rev 2085 (2005).
90 Elena A. Baylis, Parallel Courts in Post-Conflict Kosovo, 32 Yale J Intl L 1 (2007).
91 Berman, 80 S Cal L Rev (cited in note 56).
94 Levit, 30 Yale J Intl L (cited in note 56).
95 Sally Engle Merry, International Law and Sociolegal Scholarship: Towards a Spatial Global Legal Pluralism, 41 Stud in L Pol & Socy ___ (forthcoming 2007).
97 See Rajagopal, 18 Leiden J Intl L at 345 (cited in note 60).
99 I have argued, however, that “multiscalar legal pluralism” would be a more appropriate label. See id.
100 See Levit, 30 Yale J Intl L at 181–82 (cited in note 56).
ambiguous which of the two approaches best captures Anne-Marie Slaughter's work.\textsuperscript{101}

With respect to nation-state opaqueness, pluralists share much in common with modified Westphalian scholars. Their accounts consider the ways in which actors other than nation-states create norms and legal rules, and the interactions among all of the relevant actors. In pluralists' descriptions and explications, international lawmaking moves beyond the opaque Westphalian notion of state consent to a nuanced dance among multiple normative communities.\textsuperscript{102}

The bigger divergence comes through an examination of transparency. The pluralists' questioning of the presumption of nation-state centrality also undermines the transparency underlying the Westphalian model of the international legal system. The normative Westphalian justification of the international legal system rests on the presumption that consent by sovereign equals drives the system. Just as the city is viewed as transparent and irrelevant because it is an administrative unit of the state,\textsuperscript{103} international law's legitimacy flows transparently from the centrality of the nation-state. If state authority no longer forms the core through which international norms and law are justified, the multidimensional version of international lawmaking that emerges no longer gains legitimacy through the ostensibly transparent authority of the nation-state.

A pluralist narrative of climate change litigation would thus resemble the modified Westphalian one in its acceptance of this litigation as relevant to the story of international regulation of greenhouse gas emissions and their impacts. These cases interact with and are part of norm formation, and they help to drive what states view as in their interest. Because decisionmaking does not simply rest inside the opaque state, climate change litigation can be analyzed as part of the process of international lawmaking. \textit{Massachusetts v EPA,} and the many constituencies interested in it, thus remain part of the push and pull that develops state norms and interests.

The pluralist account would differ from the Westphalian one, however, in the status it would give to this litigation as lawmaking. As I have explored in depth in \textit{Climate Change Litigation as Pluralist Legal Dialogue?}, this approach might treat subnational and national cases, as well as the informal import of

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\textsuperscript{102} See Berman, 80 S Cal L Rev (cited in note 56); see also Levi, 30 Yale J Intl L at 173, 175–94 (cited in note 56). This concept builds on the “interpenetrating communities” described by the New Haven School. Lasswell and McDougal, \textit{Jurisprudence for a Free Society} at xxi (cited in note 57).

\textsuperscript{103} See Ford, 107 Harv L Rev at 1877 (cited in note 23).
supranational petitions, as part of a hybrid model of international lawmaking.\textsuperscript{104} For the pluralist, litigation is important not only as part of the state decisionmaking process, but also as a lawmaking process in its own right. The tribunals, and the actors engaging with them, are part of crafting the international legal response to climate change. California, as a petitioner and respondent in \textit{Massachusetts v EPA} and other related cases—and as a creator of state climate policy and major force in the development of national legislation—contributes to the international regulation of climate change.\textsuperscript{105}

The many ties to place running through climate change litigation would enter the pluralist narrative through “multiple ports.”\textsuperscript{106} At the simplest level, looking at how tribunals, litigants, and claims connect to places helps to define the spaces occupied by the normative communities relevant to the lawmaking dialogue. More foundationally, these normative communities help to construct people’s sense of identity, which in turn shapes those communities; both normative communities and identities have complex relationships with multiple places.\textsuperscript{107} In such pluralist accounts, \textit{Massachusetts v EPA} would play a transformative role because of the many communities that interact through the case. A geographic approach thus provides an important tool for pluralists to use in identifying and understanding the public and private spaces included in their hybrid international lawmaking narrative.

\section*{D. CRITICAL SPACES}

Critical approaches represent the final move away from Westphalian presumptions. These theories do not simply reject the centering of the state, but rather question the legitimacy of the nation-state structure on which the international legal system rests. They criticize the supposed neutrality of the Westphalian spaces and explore the ways in which colonialism, racism, sexism, and subordination underlie them. These approaches vary widely in the substance of their particular critique, and what solutions—if any—they propose. But they

\textsuperscript{104} See Osofsky, 26A Stan Envir L J & 43A Stan J Ind L (cited in note 69).

\textsuperscript{105} See id.

\textsuperscript{106} Judith Resnik used this conception of multiple ports of entry in her recent article, arguing that norms are often absorbed through informal mechanisms and then incorporated as constitutive parts of domestic identity. See Judith Resnik, \textit{Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry}, 115 Yale L J 1564 (2006).

\textsuperscript{107} For an exploration of the complex dynamics between normative communities and identity in an immigration context, see Audrey Singer, Susan W. Hardwick, and Caroline Brettell, eds, \textit{Suburban Immigrant Gateways: Immigration and Incorporation in New U.S. Metropolitan Destinations} (Brookings Institution 2008) (draft manuscript on file with author).
share in common a strong skepticism of even modified Westphalian visions of the international legal system.\textsuperscript{108}

As noted above, critical approaches attack both the opacity and the transparency of the Westphalian vision. For these scholars, the opaqueness problem goes beyond the multiplicity of relevant actors that dominate the modified Westphalian and pluralist conceptions. Their critiques look inside the spaces formed by these institutions and demonstrate the problematic social dynamics that infuse them. They argue that international law, born from these institutions and dynamics, is fundamentally flawed.\textsuperscript{109}

Like the pluralist theories, the critical approaches’ dismantling of the Westphalian vision does not end with penetrating the opaque state. But they go much further in their attack on transparency than the pluralists do. For critical approaches, states are not simply one actor among others. Rather, these theories question the legitimacy of the axiomatic state sovereignty and equality on which the international legal system is supposedly built; they demonstrate inequalities within states and among states and critique the whole Westphalian enterprise as a legitimization of colonial practices that subordinate indigenous and minority populations. They argue that the dominating spaces for nation-states served to erase unjustly the territorial claims of original inhabitants.\textsuperscript{110}

Just as the lines between strict and modified Westphalians or between modified Westphalians and pluralists are often blurry, critical scholars at times draw from modified Westphalian and pluralist approaches. They might, for example, accept the modified Westphalian account as an accurate depiction, but view it as highly problematic. Or, they might look to pluralist decentering to provide narratives of power that dance between formal and informal lawmaking.\textsuperscript{111} The crucial point in delineating this category, as with the others, is not to deny overlap, but to illuminate another conception of nation-state spaces.

For these scholars, a narrative of climate change litigation might focus on the problematic power relationships that necessitate these actions and the fundamental structural limitations on what they can achieve. To the extent that this litigation is an effort to force governmental regulatory behavior, it is stuck operating within the current and problematic confines of state sovereignty. Although the adjudication sometimes provides a mechanism for subordinated

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\textsuperscript{108} See note 55 and accompanying text.

\textsuperscript{109} See id.

\textsuperscript{110} See id.

\textsuperscript{111} For a helpful account of discourse among Third World Approaches to International Law ("TWAIL") scholars about how to treat the nation-state's role in lawmaking, see Antony Anghie and B.S. Chimmi, \textit{Third World Approaches to International Law and Individual Responsibility in Internal Conflicts}, 2 Chinese J Intl L 77 (2003).
groups to voice their complaints, its ability to provide meaningful redress is constrained by the foundational flaws in the systems attempting to provide such redress.\(^{112}\)

For example, the victory for those pressing for greater climate regulation in \textit{Massachusetts v EPA} might be described by critical scholars as infused with problematic power dynamics. They might argue that the relevant institutions remain embedded in colonialism, imperialism, and conquest. In particular, they might claim that the case was brought in an institutional structure, the US federal courts, which is dominated and created by Western elites. As the recent IPCC report highlights, the problem of climate change is steeped in inequality with respect to emissions, physical distribution of impacts, and the ability to mitigate and to adapt.\(^{113}\) A critical account might argue that the decisionmakers in \textit{Massachusetts v EPA} are positioned to avoid the worst impacts of climate change; in that context, Justice Scalia could comment in a jocular fashion during oral argument that he does not want to deal with the problem.\(^{114}\) From such a perspective, the decision might encourage incremental progress in climate policy, but does not address fundamental inequities regarding who the emitters and victims are.

Critical scholars similarly might argue that the Inuit’s petition to the Inter-Am CHR claiming that US climate change policy violates their rights demonstrates systematic flaws in avenues for redress. The Inuit use the language of international human rights—a Western, developed country construct—to attempt to gain redress.\(^{115}\) The body to which they are petitioning was constructed by nation-states that devastated their indigenous populations.\(^{116}\) In any case, the United States has demonstrated in its response to recommendations by the Commission in previous cases that it would have been highly unlikely to change its behavior even if the Commission had been more amenable to the Inuit petition.\(^{117}\) Critical scholars might claim that the petition

\(^{112}\) I plan to engage these complexities as part of my analysis in Hari M. Osofsky, \textit{Contextualizing Climate Injustice} (draft manuscript on file with author).


\(^{114}\) Transcript of Oral Argument at 22–23, \textit{Massachusetts v EPA}, 127 S Ct 1438 (No. 05-1120), 2006 WL 3431932.

\(^{115}\) See \textit{Inuit Petition} (cited in note 71).


\(^{117}\) See, for example, Case 11.140, Inter-Am CHR 113/01 (2001); \textit{Response of the Government of The United States to October 10, 2002 Report No 53/02 Case No 11.140 (Mary And Carrie Dann)}, available online at <http://www.cidh.org/Respuestas/USA.11140.htm> (visited Nov 17, 2007).
thus cannot achieve meaningful redress because it functions in an illegitimate system. The Westphalian concern of the private actor being given an official role in the public nation-state system is supplanted by more foundational difficulties.

An examination of the relationship among place, space, and time provides a powerful tool for this type of analysis. For instance, Sherene Razack’s anthology, *Race, Space, and the Law: Unmapping a White Settler Society*, uses a law and geography approach to explore “how the constitution of spaces reproduces racial hierarchies [through an examination of] the spatial and legal practices required in the making and maintaining of a white settler society.”\(^\text{118}\) As part of that exploration, the book describes the way in which the delineation of territory, and corresponding conceptions of empty space, helped to undergird colonial subordination.\(^\text{119}\) By considering the spaces created by legal conceptions of ties over time from a critical perspective, these scholarly approaches gain additional fuel for their attack on Westphalia and its vision of public international law. Climate change litigation, with its myriad of places and spaces, would lend itself to such accounts.

**E. Reflections on Theorizing State Spaces**

The above narratives and their divergent geographies of international law lead to further difficulties for fitting climate change litigation within a coherent conception of transnational regulatory governance. Namely, the moves away from the strict Westphalian model focus more on opacity than transparency. The latter three theoretical approaches all disaggregate state consent to varying degrees, but only the deconstructed approaches foundationally challenge whether international law should be based on the nation-state.\(^\text{120}\)

To some extent this lack of parallelism may reflect a practical impulse. Without nation-state legitimacy, the entire international order threatens to collapse. Although liberal internationalists are troubled by the ongoing legacies of racism and colonialism, the international legal order helps to constrain and punish human beings’ Hobbesian impulses. The modified Westphalian and pluralist spaces that lie in the middle, by providing a nuanced account that blurs strict Westphalian boundaries, at least to some extent represent a hope that the nation-state can become more legitimate. Through recognizing the intermingling of public and private and of domestic and international, they perhaps can reconstruct an international system that has more room for justice and fairness.


\(^{119}\) See id at 3.

\(^{120}\) See Sections III.A–III.D.
Whichever version of international law one prefers, these narratives provide a dilemma for resolving the regulatory role of climate change litigation: each account has some validity, and yet they are not particularly compatible with one another. At a formal level, the Westphalian story has important descriptive value, especially with modifications that explain the construction of nation-state decisionmaking; the body of rules that we term “international law” is constructed through specified mechanisms of nation-state consent. However, the pluralist narrative seems to capture elements of international lawmaking likely to be left out of the Westphalian account, and critical perspectives highlight issues of inequality that are harder to capture adequately when one’s starting point is the nation-state. These multiple views of the nation-state, and their accompanying explanations of the regulatory role of *Massachusetts v. EPA*, thus open up hard questions about how to move forward in understanding these cases.

IV. RE-ENVISIONING TRANSNATIONAL REGULATORY GOVERNANCE?

The challenge posed for the resulting climate change narrative is not simply whether divergent perspectives can be interwoven. Rather, the more foundational question is whether an appropriate and effective model of transnational regulatory governance of climate change can emerge that acknowledges the concerns of each of these narratives.

The Section that follows attempts to engage this issue. It begins by looking at the ways in which the substantive, structural, and conceptual dialectics of international law limit our approaches to problems like climate change. It then explores the possibilities for a “Thirdspace” approach—one which acknowledges the simultaneous validity of these conflicting narratives—to help move the discourse beyond balkanized categories. In so doing, it attempts to create a model for thinking about this litigation as part of transnational regulation of climate change that incorporates these multiple visions of the nation-state’s role. It argues that such conceptual approaches are critical to moving the discourse over climate change—and international law more broadly—forward at a very practical level.

A. BEYOND DIALECTICAL RELATIONSHIPS

Our conversations about both international law and climate change are constrained by the available boxes for discourse and the dialectical relationships that we create around them. This difficulty infuses the way in which we write and teach about law and poses barriers to cross-cutting work. Although the
disciplinary matrix and the subdividing of law help to ameliorate the information overload that threatens to overwhelm efforts to understand problems, it also limits our ability to address issues like climate change that cannot be contained effectively by any one of the existing categories. Similarly, when we scale law distinctly, from local to international, it aids orderly governance, but creates vexing difficulties—of which federalism debates are only the tip of the iceberg—regarding how to address issues across levels. Most fundamentally, once we become entrenched in the patterns created through those boxes, we risk losing track of the assumptions that underlie them.

This Section highlights three types of dialectics that limit our narratives: (1) substantive ones that invoke disciplinary boundaries and divisions within the law such as environment/human rights and law/science; (2) structural ones that order the international legal system, such as public/private and subnational/national/supranational; and (3) conceptual ones that constrain our analysis of how law, politics, and power interact in the international legal system such as the opaque/transparent dynamic that Ford describes. The law’s

121 For discussion of the inclusion of law and of geography in the modern disciplinary matrix, see Alexander B. Murphy, Geography’s Place in Higher Education in the United States, 31 J Geog in Higher Educ 121, 122 (2007); Osofsky, 32 Yale J Intl L at 421 (cited in note 35). For broader histories of the disciplines that include the period of disciplinary construction, see Paul P. Abrahams, Academic Geography in America: An Overview, 3 Rev in Am Hist 4645 (1975); Robert Stevens, Law School: Legal Education in America from the 1830s to the 1980s 264 (North Carolina 1983).


123 I plan to explore these issues in depth in Hari M. Osofsky, Scales of Law: Rethinking Climate Change and the War on Terror (draft manuscript on file with author); Osofsky, Is Climate Change an “International” Legal Problem (cited in note 25).

124 See Osofsky, Scales of Law (cited in note 123); Osofsky, Is Climate Change an “International” Legal Problem (cited in note 25).

treatment of these dialectics has evolved over time, and the next chapter of international law needs to reengage them as an integrating tool.

1. Substantive Dialectics

In which box does climate change litigation belong? This is a question that we were forced to confront at the University of Oregon School of Law as I prepared to teach a seminar on the subject for the first time. At first blush, this question seems relatively simple to answer, as most people will readily categorize it as international environmental law. It was not difficult to persuade my colleagues that such a course should count towards both the environmental and international certificates.

However, such a categorization has a fundamental accuracy problem: none of the lawsuits or petitions actually involves international environmental law. The international and regional petitions allege violations of human rights or threats to world heritage as the primary basis for their claims.\textsuperscript{126} The national-level suits, especially in the United States, mostly involve efforts to force regulatory behavior through a combination of federal administrative and environmental law or to change corporate behavior through tort law, more specifically public nuisance. The state court disputes follow the same basic pattern as the federal ones, but unsurprisingly, focus on subnational law.\textsuperscript{127} So, is my class about human rights law? World Heritage law? “Domestic” environmental law? Administrative law? Tort law?

Moreover, as I have explored elsewhere, any one of these legal categories only captures a piece of what actually matters about this litigation. One can tell an accurate narrative of human rights violations based on climate change; the Inuit and Nigerian petitioners do so quite powerfully. But such a characterization is doomed to be partial. Climate change, like so many other problems, fits into more than one box, and no legal category is capable of providing a container that captures it fully.\textsuperscript{128}

As if locating climate change within law was not hard enough, one does not have to be an expert in the subject to realize that it involves many other disciplines. Justice Scalia’s remark during oral argument in Massachusetts v EPA, referenced in the above discussion of critical approaches, exemplifies judicial acknowledgement of the cross-cutting nature of the problem: “I told you before

\textsuperscript{126} See Inuit Petition (cited in note 71); Belize Petition (cited in note 73); Peru Petition (cited in note 73); Nepal Petition (cited in note 73); Australia Petition (cited in note 73); Canada Petition (cited in note 73).

\textsuperscript{127} For a detailing of these suits, see Ososky, 83 Wash U L Q (cited in note 16).

\textsuperscript{128} For a discussion of this problem in the broader environmental rights context, see Hari M. Ososky, Learning from Environmental Justice: A New Model for International Environmental Rights, 24 Stan Envir L J 71 (2005).
I'm not a scientist. That's why I don't want to deal with global warming, to tell you the truth.”

Holly Doremus has provided powerful analysis of the “scientization” of politics in the context of natural resource regulation, arguing that both sides of environmental debates can use science as a tool. Her approach is easily applicable to the climate change context, as she herself has noted.

Climate change does not, however, simply concern law and science, which is itself a category that includes many other disciplines. Rather, it involves complex interactions across multiple disciplines. As noted above, if one applies geographic and ecological analyses of scale, for example, the arguments in Massachusetts v EPA can be understood as scaling up and scaling down how this intersection of science and law should be analyzed. The petitioners pushing for greater regulation scale down—noting specific local impacts and the feasibility of federal regulation—while the respondents scale up, claiming that its supranational dimensions made the EPA's decision not to regulate appropriate.

An approach in which we have to either put climate change in a substantive box or view it as a dialogue among boxes thus has fundamental limitations. Understanding climate change demands a multidisciplinary approach. For instance, this Section's analysis has not yet mentioned anthropology, biology, geology, political science, psychology, or sociology, just to name a few of the disciplines beyond law and geography that would have helpful and distinct perspectives on climate change litigation's significance. Furthermore, this discussion of climate change easily could be extended to many of the problems


131 Doremus provides a passage from a memorandum by Frank Luntz on climate change as an example of the defensive approach. See Doremus, 32 Ecol L Q at 255 (cited in note 130):

The most important principle in any discussion of global warming is your commitment to sound science. Americans unanimously believe all environmental rules and regulations should be based on sound science and common sense. Similarly, our confidence in the ability of science and technology to solve our nation's ills is second to none. Both perceptions will work in your favor if properly cultivated.


132 See Osofsky, 9 Or Rev Intl L ___ (cited in note 34).
that international law scholars regularly analyze. For example, the raging debates over torture or enemy combatants, as well as private law dilemmas over how Yahoo! should handle its ties to multiple places, involve many areas of law and other disciplines.

2. Structural Dialects

These difficulties are not simply substantive, however. They go to the very heart of the units that we use to structure the international legal system. More binaries abound in unhelpful ways. Is climate change a domestic or international problem? If domestic, is it state or federal? Is it public or private? The problem with these questions is not simply that they all demand a “both/and” rather than an “either/or” answer if one were to address them meaningfully. More fundamentally, each of the questions includes assumptions about what international law is and how we structure it.

A brief examination of scale in the above-described four approaches is instructive. If we assume Brenner’s second definition of scale as the level of governance, how should we envision international law? As illustrated by the following diagrams, multiple possibilities exist:

Westphalian Models?

![Diagram](image)

133 For an example of recent discussion of these issues, see Symposium: War, Terrorism, and Torture: Limits on Presidential Power in the 21st Century, 81 Ind L. J. 1139 (2006).


135 I have asked these questions in the context of the Massachusetts v EPA case. See Osofsky, 9 Or R Int'l L ___ (cited in note 34).

136 For a discussion of “both/and also logic,” see Soja, Thirdspace at 5 (cited in note 39).

137 See Brenner, New State Spaces at 9 (cited in note 43).
A Pluralist Model?

Should we view scale hierarchically, as the diagrams of Westphalian models attempt to visually represent? If we do, should we order the hierarchy based on geographic extent (the supranational belongs on top), formal power (the nation-state belongs on top), or effective power (unclear which level might belong on top)? How tall and wide should we make each piece of the hierarchy? Or, if one eschews hierarchy and envisions a hybrid process of international lawmaking, at what point—if ever—does one stop adding ovals? Are those ovals enclosed containers, as depicted in the above diagram of a pluralist model, or are they more fluid, intersecting with one another? If more fluid, what are the limits to that fluidity? And I have not even included a diagram for the critical approaches because so many possibilities abound for how one might reconstruct after deconstruction, and it is not clear how any of them might be acceptable given the inequalities of power and resources that critical accounts of international law highlight.

These questions are not simply romps through law and geography theory, but actually have real world implications, as the context of climate change reveals. Which version of international law one chooses—assuming one has to pick a theoretical box—fundamentally restructures the narrative of what matters in ways that might have policy implications. The more one moves away from strict Westphalia, for example, the less plausible it is to envision solving climate change with a treaty between nation-states, even if such a treaty were politically feasible.\(^\text{138}\) In addition, an argument emerges that such a treaty regime must

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\(^{138}\) Beyond the problems of the lack of US and Australian participation in Kyoto and the unlikelihood of many countries who are parties meeting their Kyoto obligations, the treaty—if fully implemented—would only slow the rate of anthropogenic climate change. See Korppoo, Karas, and Grubb, eds, *Russia and the Kyoto Protocol* (cited in note 4) (exploring the issues facing Russia); Nigoff, 18 Georgetown Int'l Envr L Rev 249 (cited in note 4) (critiquing the current CDM approach). For a technical analysis of the Kyoto Protocol, see Freestone and Streek, eds,
somehow engage the range of actors that matter—both nongovernmental and
subnational—more directly than through their contribution to the nation-state’s
position and regulatory power.  

3. Conceptual Dialectics

These substantive and structural problems frame the conceptual dialectics
that constrain current discourse and also point towards the move beyond
dialectical analysis that forms the focus of the next section of this Article. In
particular, the opaque/transparent dialectic that Ford unpacks and that serves as
the frame of Sections II and III of this Article exemplifies the conceptual
problem and the need for “both/and” solutions.

To do so, this Section pushes deeper into what “opaque” and
“transparent” mean. Edward Soja, who also participated at that 1996 symposium
that Richard Ford organized, provides the following account of opaque and
transparent spaces in Postmodern Geographies: The Reassertion of Space in Critical Social
Theory:

The “illusion of opaqueness” reifies space, inducing a myopia that sees only
a superficial materiality, concretized forms susceptible to little else but
measurement and phenomenal description: fixed, dead, and undialectical:
the Cartesian cartography of spatial science. Alternatively, the “illusion of
transparency” dematerializes space into pure ideation and representation, an
intuitive way of thinking that equally prevents us from seeing the social
construction of affective geographies, the concretization of social relations
embedded in spatiality, an interpretation of space as a “concrete
abstraction” a social hieroglyphic similar to Marx’s conceptualization of the
commodity form. Philosophers and geographers have tended to bounce
back and forth between these two distorting illusions for centuries,
dualistically obscuring from view the power-filled and problematic making
of geographies, the enveloping and instrumental spatialization of society.

This quote captures quite well not only the conceptual problems facing
Westphalia, but also the more fundamental issue of the constrained boxes that
law gives us to work with when we want to solve problems. We divide the world

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Legal Aspects of Implementing the Kyoto Protocol Mechanisms (cited in note 4). Although innovative, the
Asia-Pacific Partnership on Clean Development and Climate is nonbinding. For a description of
the meeting establishing the partnership, as well as reactions to it, see Fiona Harvey, FT Report–
(Jan 14, 2006); Nigel Wilson and Andrew Trounson, Critics Rain Scorn on Climate Summit, The
Australian 33 (Jan 14, 2006); Catherine Brahic, Asia-Pacific Pact Members Launch Clean Energy Fund,
Sci & Dev Network (Jan 13, 2006), available online at <http://www.scidev.net/News/index.cfm?
fuseaction=readNews&itemid=2591&language=1> (visited Nov 17, 2007).

139 I have made this argument in Climate Change as Pluralist Legal Dialogue?, 26A Stan Envir L J 181 &
43A Stan J Ind L 181 (cited in note 69).

140 See Symposium, 48 Stan L Rev (cited in note 48) and accompanying text.

141 Soja, Postmodern Geographies at 7 (cited in note 39).
into neat Cartesian units—the nation-states—and then use them as the centerpoint of our international law model. Moreover, once we create that model, the nation-state becomes an abstraction; we ignore the foundational differences between the United States and Zambia because they are both “sovereign” and “equal.” Once we begin to acknowledge the limitations of that model, however, hard questions arise: how much should we look inside those maps, organize them differently, change their scale? How should the recognition of these issues affect our international law story?

The fight between the liberal internationalists and the neorealists with which this piece began highlights why the answers to these questions matter in a very practical sense. Posner and Goldsmith ground their rational-choice-based theory on a set of explicit assumptions that other scholars, like Paul Berman in his review of their book, have challenged. In particular, they assume—among other things—that states have definable, national-level interests and should act based on those interests. These assumptions are outcome determinative and reflect a particular view of how we should map the nation-state. The national level becomes a hierarchically superior scale and the nation-state serves as merely a container holding interests. With this geographical perspective, a very limited story of international law quite naturally results. Posner and Goldsmith do not have to be particularly troubled by Massachusetts v EPA because it is a domestic environmental law case.

A similar approach undergirds Posner’s normative concerns about allowing human rights claims against corporations based on climate change under the Alien Tort Claims Act. In Climate Change and International Human Rights Litigation: A Critical Appraisal, Posner not only makes explicit assumptions about how such litigation might focus on corporations, but also, in his analysis of the costs and benefits, makes implicit assumptions about where this litigation takes place and how law and policy interact around it. Although dismantling these assumptions and situating his normative arguments in a broader context is beyond the scope of this piece, a brief note is in order about Posner’s geographic assumptions.

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143 See Berman, 84 Tex L Rev 1265 (cited in note 10).

144 See Osofsky, Contextualizing Climate Injustice (cited in note 112).
In order for his argument to have cogency, one has to map the world in a way in which one envisions US court decisions as developing “green-house gas policy for Australia, Ecuador, Sweden, and Chad”\textsuperscript{145} in a range of problematic ways that he describes. The boxes into which Posner places litigation and the nation-state frame a worldview in which one tells a story of human rights claims about climate change in US courts as creating unfair outcomes for “poor people today.”\textsuperscript{146}

Because I disagree with Posner’s implicit and explicit assumptions and his resultant conclusions, it is tempting to argue against his narrative—as I plan to do elsewhere—as one that is out of step with the realities of climate change regulation.\textsuperscript{147} But such a rejection would miss the central point that I am making here about the dangers of our conceptual dialectics. Namely, if we are simply fighting for whose story—of international law more broadly or of regulation of anthropogenic climate change in particular—wins the day, we miss the way in which our dialectical structures and approaches constrain us. There is simply not that much room for synthesis between Harold Koh and Jack Goldsmith, who debated each other in Spring 2007 at Yale Law School.\textsuperscript{148} Accepting a world in which one encamps and fights for one’s vision of law and policy—arguably an important normative move in the current moment—risks silencing discourse and eliminating nuance. This dilemma frames the final question that this Article poses: can and should one create “Thirdspace” approaches to understanding the role of climate change litigation and of international law more broadly?

B. “THIRDSPACE” APPROACHES TO INTERNATIONAL LAW AND CLIMATE CHANGE LITIGATION?

In his book \textit{Thirdspace: Journeys to Los Angeles and Other Real-and-Imagined Places}, Edward Soja introduces Thirdspace as

the space where all places are, capable of being seen from every angle, each standing clear; but also a secret and conjectured object, filled with illusions and allusions, a space that is common to all of us yet never able to be completely seen and understood, an “unimaginable universe,” or as Lefèbvre would put it, “the most general of products.”\textsuperscript{149}

Soja does not simply leave the reader with this space that somehow contains all binaries, however. He goes on to explain that

\begin{itemize}
\item \textsuperscript{145} Posner, 155 U Pa L Rev at 1939 (cited in note 13).
\item \textsuperscript{146} Id at 1944.
\item \textsuperscript{147} See Osofsky, \textit{Contextualizing Climate Injustice} (cited in note 112).
\item \textsuperscript{149} Soja, \textit{Thirdspace} at 56 (cited in note 39).
\end{itemize}
[t]hirding-as-Othering is much more than a dialectical synthesis à la Hegel or Marx, which is too predicated on the completeness and temporal sequencing of thesis/antithesis/synthesis. Thirding introduces a critical “other than” choice that speaks and critiques through its otherness. That is to say, it does not derive simply from an additive combination of its binary antecedents but rather from a disordering, deconstruction, and tentative reconstitution of their presumed totalization producing an open alternative that is both similar and strikingly different.\footnote{Id at 60–61.}

In other words, rather than trying to produce something from the fight among opposing views, progress can be made, according to Soja, by creating a space that somehow allows for all of the difference. In this choice of marginality, as Soja terms it, there is also an opening of new possibilities.\footnote{Id at 97–100.}

This Section explores whether this concept of Thirdspace might be useful in the context of international law and climate change litigation. It engages what it would mean to create a Thirdspace in the current polarized discourse, which occurs in the broader context of fundamentally divergent constructions of nation-state spaces. From that base, it asks the crucial normative question of whether Thirdspace approaches might provide new possibilities for constructive progress.

1. Constructing Thirdspace

This project of construction is quite a daunting one, which may be why Thirdspace did not set off an instant policy revolution. In practical terms, what would it mean to simultaneously acknowledge the validity of perspectives in intense conflict with one another? How can one view the nation-state as at the center of power, as one power source among many, and as an invalid product of subordination at the same time? This Section renarrates the story of climate change and international law in a way that attempts to answer those questions.

In Thirdspace, the four above narratives of climate change litigation—and other possible ones that I did not include—come together, but not in a synthesis. Suits and petitions help to shape nation-state approaches to their formal lawmaking regarding climate change, serve as forms of lawmaking in their own right, and are constrained by the fundamental problems with the international legal system. The stories of this litigation do not build upon one another, but coexist as versions which contain their own validity. Rather than choosing one narrative as truth that excludes the others, thirding—the process by which one creates Thirdspace—allows for a recognition of each of their truths.
Such an approach is not simply an attempt to create a “kumbaya” moment in which people who wildly disagree with one another sit down in a circle, hold hands, and find their common ground. Rather, it represents a recognition that an attempt to solve the problem of climate change through only one of these stories may not be as effective. The strict and modified Westphalian narratives capture the role that treaty and customary international law must play in solving the problem, but they may understate the significance of other forms of lawmaking.\(^5\) Pluralist and critical approaches both acknowledge other important sources of power, but their analyses of hybridity and attempts to move away from the valorization of the state often choose not to focus as much on the formal process of treatymaking.\(^\text{153}\)

The key point of thirding for the purposes of this Article’s analysis is not that these approaches are incapable of telling complete stories or providing nuanced policy solutions, but rather that they tend not to because of where they focus. Transnational legal process tells an incredibly helpful narrative of the nuances of norm internalization, which could help craft more thoughtful approaches to climate change litigation and policy, but the center of gravity of such proposals will simply be different than that of the hybrid models that might come out of a global legal pluralist account. We lose something if we include only one story. *Massachusetts v EPA* simultaneously operates as a domestic law case, impacts US policy on climate change, influences the international legal discourse, and remains steeped in elite US institutions. Each of those stories is true and helps to provide a complete picture of the case. The openness and play of thirding allows for riffs—not unlike those Keith Aoki has described in the context of the creation of blues music\(^\text{154}\)—in which one potentially can achieve an understanding unavailable from the trenches of conflict.

2. Appropriate Contexts for Thirdspace

Acknowledging the potential value of thirding does not, of course, resolve when such an approach might be appropriate and how it fits into the broader discourse on climate change litigation and international law. This Section explores that terrain. It suggests that an effort to create Thirdspace would be particularly helpful in the period before a final either/or decision must be made or in situations where multiple solutions can coexist.

Discussions about climate change regulation often are framed in terms that reflect a particular view of the nation-state and its role in international law

\(^{152}\) See Sections III.A and II.B.

\(^{153}\) See Sections III.C and III.D.

without acknowledging other possibilities. So, for instance, a proposal might focus on the future of the international treaty regime with little acknowledgement of how such a regime might interact with nonstate or substate actors. Or, conversely, a dialogue about AB 32, California’s groundbreaking law governing greenhouse gas emissions, might not situate it in the broader context of other “international” regulatory efforts taking place.\(^{155}\)

This tendency to treat different approaches to climate change regulation as discrete options to some extent reflects a practical reality. It would be impossible to consider simultaneously all of the efforts taking place on climate change with every regulatory decision. Such an approach would be time-consuming, burdensome, and potentially paralyzing. Moreover, although it would be helpful to approach climate change regulation more holistically and systematically, regulatory redundancy arguably allows for innovation and improves the possibility of getting emissions under control.\(^ {156}\)

A preference for thirding in the early stages of decisionmaking, however, does not require an impossibly complex process that includes every conceivably relevant factor. Rather, it dictates a more open stance towards what those factors are. It suggests that while people are crafting the next climate change treaty, they should consider how different narratives of that agreement might change the way in which it should be framed. Similarly, in contemplating litigation, substate actors should consider how thinking of it as influencing national policy versus as international lawmaking in its own right should influence their strategy.

By positing that seemingly—and perhaps actually—incompatible worldviews can have simultaneous explanatory value, a Thirdspace approach opens up the possibility of escaping the boxes that constrain legal thinking. If we choose to view situations from multiple narrative perspectives, we likely end up with more options on the table before our final need to make an either/or decision. And sometimes those options might change what the choices are.

Being open to a range of perspectives, however, is always easier when a high level of congruence exists, as discussions of climate change litigation at recent conferences exemplify. With the US Supreme Court granting certiorari in Massachusetts v EPA and then ruling in favor of the petitioners, this case and other pending and potential litigation have been a hot topic over the last few months. Climate change litigation was featured at both the American Association of Law Schools and American Society of International Law annual


meetings in 2007, and numerous symposia have engaged its implications. Just as notably, questions about these cases increasingly have arisen in more general international legal fora, such as at the panel at the Yale Journal of International Law conference mentioned in the Introduction.

The conversations, unsurprisingly, have varied significantly depending on the level of agreement among the speakers. In panels of participants who largely agreed on the value of climate change litigation, different theoretical perspectives and—more commonly—approaches to litigation strategies tended to build synergistically upon one another. When the panels included more ideological diversity, exemplified by the 2007 American Society of International Law panel, the participants who disagreed with one another often debated.

That tendency either to agree and complement or to debate similarly occurs in legal scholarship. The Limits of International Law and reactions to it, discussed previously, exemplify this phenomenon in broader international legal discourse. Posner’s new piece advocating against potential human rights suits and the prospective articles planning to respond to it embody this tendency in the more specific context of climate change litigation.

Taking Thirdspace seriously means considering how to deal with fundamentally divergent narratives. Or, to put it more concretely, if we focus on Posner’s new piece—which arguably represents a convergence of the battles over international law and the discussions about how climate change litigation should fit into a regulatory scheme—what is the meaning and value of having it occupy the same space as the responses to it?

Posner’s piece addresses a particular type of potential climate change litigation: international human rights claims in US courts against corporations under the Alien Tort Claims Act. My more detailed response will suggest—among other arguments—that his assumptions and analysis lack context in a


160 See note 10.

161 See notes 144–147.

162 See notes 13, 144–146.
variety of ways, such as how the US approach to regulating greenhouse gases compares to that of other countries, the range of climate change litigation within which such a suit would be occurring, or additional analyses of the relationship between climate change and environmental justice.\textsuperscript{163} If one chooses to view those two very different analyses as part of the same space rather than as simply posing an "either/or" decision, better analysis emerges. Someone contemplating a human rights suit over climate change arguably would be well-advised to consider both his concerns and my responses to them (as well as other relevant commentaries). Even if the petitioner strongly disagrees with one of these perspectives, as seems likely given the divergence in views, treating both approaches as relevant narratives allows for a fuller discourse about when such a suit would be appropriate and how—if at all—it could be framed to avoid the issues that he raises. That discourse does not necessarily result in a synthesis of competing views, but ensures that the chosen narrative reflects the multiplicity of narratives that exist.

Such an approach, at first blush, may seem deceptively simple. After all, it would verge on malpractice for a litigator in any context to ignore the various approaches to the issues at hand. But such openness is rare in the current discourse over both climate change litigation and international law. I have had colleagues who view themselves as moderates agonize to me over how they can possibly situate their work in the balkanized terrain of international law. Analyses of the Kyoto Protocol and future treaties, of climate change litigation, and of how to structure cap-and-trade regimes tend to occur relatively separately from one another despite their clear relationship. I encounter mostly nonoverlapping groups of people in discussions over climate science, climate law, international legal theory, and race and social justice. Until we make more of a commitment to thirding, we box our discourse in unhelpful ways.

3. A Thirdspace for Massachusetts v EPA

While the need to move beyond boxing in our approaches to thinking about climate change litigation has theoretical grounding, this dilemma does not simply pose a conceptual problem for academics. To move this more general discussion into a specific practical context, this Section considers what it would mean to take such an approach in the context of Massachusetts v EPA. It explores how the divergent stories of Part III might come together in Thirdspace analysis.

The preceding narratives lay out four possible perspectives on the case: (1) it is relevant only through its contribution to treaties and customary international law; (2) it may influence formal international law and the commitments of nation-states in a range of complex ways (which may include state interests or

\textsuperscript{163} See notes 144–146.
norms); (3) it represents the intersection of multiple normative communities and helps to develop formal and informal international law; and (4) it emerges from a flawed system of international governance and reflects its fundamental inequities. Although these four approaches have substantial overlap, as discussed above, they cannot be fully synthesized. A logical difficulty would exist, for example, in simultaneously viewing the case's international legal relevance as only through its contribution to formal consent between equal sovereign states and as part of a complex dance among multiple actors in international lawmaking broadly defined. 

Moreover, each of these narratives is undergirded by different understandings of how the nation-state fits into the story. Thirding in this context means somehow treating the nation-state as a black box and looking inside it, or accepting the basis for its authority and its illegitimacy. Even theories that live quite close together on the spectrum pose this difficulty. For example, what would it mean to center and decenter the nation-state in the same conceptual space? The very structure into which Massachusetts v EPA fits begins to have a confusing fluidity if one avoids making either/or choices among the four options posed above. In such an approach, an explanation of the case and its significance inhabits an ever-shifting terrain of formal and informal law, multiple levels of governance, and the various actors involved. Essentially, thirding involves taking a pluralist approach to the validity of the possible narratives of the case, only one of which—at least in the four options given in this Article—is a pluralist story.

So, why is such an approach useful at a policy level? What makes it reconstitutive rather than simply a theoretically interesting deconstruction? The

164 See Section III.
165 See Sections III.A and III.B.
166 See Section III.C.
167 See Section III.
168 Numerous geographers have explored dilemmas of fixity and fluidity in the context of scale. See Kevin R. Cox, Spaces of Dependence, Spaces of Engagement and the Politics of Scale, Or: Looking for Local Politics, 17 Pol Geog 1, 20–21 (1998); David Delaney and Helga Leitner, The Political Construction of Scale, 16 Pol Geog 93, 93 (1997); Andrew Herod, Scale: The Local and the Global, in Sarah L. Holloway, Stephen P. Rice, and Gill Valentine, eds, Key Concepts in Geography 229, 234, 242 (Sage 2003); Deborah G. Martin, Transcending the Fixity of Jurisdictional Scale, 18 Pol Geog 33, 35 (1999); Anssi Paasi, Place and Region: Looking through the Prism of Scale, 28 Progress in Hum Geog 536, 542–43 (2004); Neil Brenner, Between Fixity and Motion: Accumulation, Territorial Organization and the Historical Geography of Spatial Scales, 16 Envir & Planning D: Socy and Space 459, 461 (1998); Erik Swyngedouw, Excluding the Other: The Production of Scale and Sealed Politics, in Roger Lee and Jane Wills, eds, Geographies of Economies 167, 169 (Arnold 1997); Erik Swyngedouw, Neither Global nor Local: “Glocalization” and the Politics of Scale, in Kevin R. Cox ed, Spaces of Globalization: Reasserting the Power of the Local 137, 141 (Guilford 1997).
answer is that *Massachusetts v EPA* influences transnational regulatory governance in multiple ways; being open to more than one story helps to elucidate its role more clearly. At a formal level, it is an important domestic law precedent that pushes a federal regulatory agency to take climate change more seriously and opens the door for other pending climate change litigation. It puts pressure on the Executive Branch to move beyond its paltry steps to limit emissions, arguably a critical move given the extent of the US contribution.¹⁶⁹

But this formal story only provides a partial picture, as the other narratives make clear. The pluralist and critical stories help to ask crucial questions about how *Massachusetts v EPA* and other climate change litigation raise issues of culture and identity, issues which will be the subject of the third article in this trilogy.¹⁷⁰ Moreover, incorporating their visions of international lawmaking—and how this case might fit within it—into a conversation about post-Kyoto commitments, cap-and-trade, local efforts on climate change, etc., provides opportunities for more creative thinking. Given the dire predictions by the IPCC, even if the transnational regulatory regime becomes significantly stronger (which may or may not be politically feasible), encouraging greater creativity in climate law and policymaking is critical.¹⁷¹

Any version of *Massachusetts v EPA*'s impact recognizes it as a significant moment in grappling with the problem of climate change in the face of an inadequate transnational response. Even the dissenting opinions acknowledged the potential enormity of the problem.¹⁷² And Posner notes that this litigation arises in a context where “the more conventional means for addressing global warming—the development of treaties and other international conventions such as the Kyoto Accord—have been resisted by governments.”¹⁷³ Exploring the role that climate change litigation does and should play in transnational regulatory governance, however, requires more than this acknowledgment of widely divergent perspectives. To engage the panoply of issues that *Massachusetts v EPA* raises, holistic thinking is needed. A conscious commitment to thirding helps to push analysis in that direction.

¹⁶⁹ See Sections III.A and III.B.

¹⁷⁰ See Section III.C. That article is tentatively entitled *The Geography of Climate Change Litigation Part III: Reflections on Culture and Identity*.


¹⁷² See, for example, *Massachusetts v EPA*, 127 S Ct at 1463 (Roberts dissenting).

V. CONCLUDING REFLECTIONS

This Article opens with a claim that we are at a crucial juncture in the discourse over climate change and international law. It concludes by suggesting that our response to this crisis should not be one of foreclosing possibilities. If we are to make progress on difficult, cross-cutting issues, we must step outside of our camps, labels, and loyalties to engage in serious, creative thinking.

Such an approach does not preclude a fight for our values. We face hard either/or choices with respect to both our international legal commitments and our response to global climate change. However, as each version of “us” engages in such a struggle, we must find the moments in which thoughtful dialogue is possible. One way of creating those moments is by exploring the multiplicity of international legal narratives and what each narrative—with its vision of the nation-state—can add.

Law and geography approaches can assist with such an effort. By pushing us to interrogate our geographic assumptions, they provide possibilities for re-ordering and re-envisioning. Such analyses do not eliminate core areas of disagreement, but they perhaps create more opportunities for us to dwell in Thirdspace. These opportunities are critical in helping to address what Justice Roberts acknowledged in his dissent in Massachusetts v EPA as perhaps “the most pressing environmental crisis of our time.”\(^{174}\)

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\(^{174}\) Massachusetts v EPA, 127 S Ct at 1463.