

# LOOKING INWARD: DOMESTIC POLICY FOR CLIMATE CHANGE REFUGEES IN THE UNITED STATES AND BEYOND

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## INTRODUCTION

Climate change presents a special problem for many populations. Sea-level rise induced by climate change will displace many residents of Pacific Island nations, who may relocate to Hawai'i or California.<sup>1</sup> Christina Deeley, a native of the Marshall Islands' Majuro atoll, moved to Hawai'i after her family started to notice the impact of climate change.<sup>2</sup> When Christina moved, her mother chose to remain on the island, although Ms. Deeley believes she will soon be forced to relocate to Hawai'i as well.<sup>3</sup> Ms. Deeley reported that her mother has difficulty finding enough fish and clean water to keep her family healthy.<sup>4</sup>

Climate change also significantly impacts non-island nations. For example, increasingly frequent droughts drive

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1. See, e.g., Anne C. Mulkern, *As Distant Pacific Islands Flood, a Climate-Driven Exodus to the U.S. Grows*, E&E PUBLISHING (Sept. 9, 2013), <http://www.eenews.net/stories/1059986860>, archived at <http://perma.cc/Q92H-8ZBC>; *A Pacific Islands Man Says Climate Change Makes Him a Refugee From His Home*, PUB. RADIO INT'L (Nov. 8, 2013), <http://www.pri.org/stories/2013-11-08/pacific-islands-man-says-climate-change-makes-him-refugee-his-home>, archived at <http://perma.cc/G5RK-SYSF>.

2. Mulkern, *supra* note 1.

3. *Id.*

4. *Id.*

Mexican farmers north as it becomes more difficult to grow crops.<sup>5</sup> These climate change-induced droughts and their consequences have already forced many Mexicans to relocate to the United States. One Mexican farmer from Chiapas currently living in Pittsburg reported that he left Mexico for the United States because his farm no longer produced enough crops to support his family.<sup>6</sup> He is currently employed cleaning movie theaters to send money back home, despite his undocumented status.<sup>7</sup> Even indigenous Canadian tribes may be forced south due to retreating sea ice.<sup>8</sup> Sakiasiq Qanaq, an Inuit hunter, reports that his hunts have been yielding less in recent years.<sup>9</sup> For example, the annual spring narwhal hunt in 2013, which normally yields up to sixty whales, produced only three.<sup>10</sup> Moreover, the thinning sea ice makes the hunt more dangerous and less successful each year.<sup>11</sup>

These stories make it clear that climate change is already impacting human populations. Climate change is a human-induced phenomenon caused by burning fossil fuels for energy and emitting carbon dioxide and other greenhouse gases into the atmosphere.<sup>12</sup> However, because the climate is global and weather patterns around the globe are constantly shifting, it is difficult to prove that the climate is changing at all, and even more difficult to show that such changes are man-made.<sup>13</sup>

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5. Ashley Murray, *Climate Change Forces Mexican Farmers to Migrate*, ALLEGHENY FRONT (May 10, 2013), <http://www.alleghenyfront.org/story/new-natural-world-climate-change-forces-mexican-farmers-migrate>, archived at <http://perma.cc/3CX9-CNVR>; see also ELIZABETH DEHEZA & JORGE MORA, CLIMATE CHANGE, MIGRATION AND SECURITY: BEST-PRACTICE POLICY AND OPERATIONAL OPTIONS FOR MEXICO 13 (2013), available at <http://www.wilsoncenter.org/sites/default/files/RUSI%20Report%20English.pdf>, archived at <http://perma.cc/3DJ5-8ENL>.

6. Murray, *supra* note 5.

7. *Id.*

8. See Ed Struzik, *As Arctic Melts, Inuit Face Tensions with Outside World*, YALE ENV'T 360 (Oct. 1, 2012), [http://e360.yale.edu/feature/as\\_arctic\\_melts\\_inuit\\_face\\_tensions\\_with\\_outside\\_world/2577](http://e360.yale.edu/feature/as_arctic_melts_inuit_face_tensions_with_outside_world/2577), archived at <http://perma.cc/MN5H-Z7PK>.

9. *Id.*

10. *Id.*

11. *Id.*

12. See CLIMATE CHANGE: THE IPCC SCIENTIFIC ASSESSMENT 5 (1990), available at [http://www.ipcc.ch/ipccreports/far/wg\\_I/ipcc\\_far\\_wg\\_I\\_full\\_report.pdf](http://www.ipcc.ch/ipccreports/far/wg_I/ipcc_far_wg_I_full_report.pdf), archived at <http://perma.cc/SCT3-23B7> (assessing human contributions to observed climate changes).

13. See Stephen M. Gardiner, *A Perfect Moral Storm: Climate Change, Intergenerational Ethics and the Problem of Moral Corruption*, 15 ENVTL. VALUES 397, 399 (2006) [hereinafter Gardiner, *Perfect Moral Storm*] (explaining that

Although it is now widely acknowledged that the Earth's climate is changing, the international community has not internalized the impact that this change will have on human migration patterns.<sup>14</sup> As a result, current legal systems do not adequately address populations displaced by climate change. Individuals that flee their homes as a result of climate change have no legal status outside of their home country. This lack of status applies both internationally and within the United States. There is no legal instrument that creates and defines the rights that these individuals are entitled to once they leave their homes. Many proposals call for new international mechanisms to address these impacts,<sup>15</sup> but none of them apply specifically to the United States.

This Comment argues that the United States should enact legislation to create a legal status for climate migrants.<sup>16</sup> This legislation should be passed as part of comprehensive immigration reform. The term "climate migrants" refers to individuals or groups of individuals induced to leave their home country as a result of the impacts of climate change.<sup>17</sup> A

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proving cause and effect in climate change is difficult due to its global nature and the fact that greenhouse gases only disrupt the climate in the aggregate).

14. See *infra* Part I.A.1 (reviewing estimates of the number of people that will be displaced by climate change); Part III.A (discussing the lack of an international instrument addressing people displaced by climate change and proposals to create such an instrument).

15. See *infra* Part III.A (discussing international proposals that would address climate migrants).

16. There are many names for people displaced by climate change. Many scholars argue that the term climate refugee is proper to adequately reflect the plight of those displaced due to climate change. However, others argue that the word "refugee" is a legal term that carries with it certain obligations and rights, and is therefore improper to describe a population that currently has no legal status. See Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood, and the Post-Climate Era*, 2 CLIMATE L. 345, 349 n.14 (2011) [hereinafter Burkett, *The Nation Ex-Situ*]. Additionally, inhabitants of small island nations have rejected the term "climate refugees," arguing that it portrays people displaced by climate events as "weak, passive victims" in need of protection and is therefore undesirable and inaccurate. Karen Elizabeth McNamara & Chris Gibson, "We Do Not Want to Leave Our Land": Pacific Ambassadors at the United Nations Resist the Category of "Climate Refugees", 40 GEOFORUM 475, 479 (2009). For those reasons, and because this Comment argues that refugee status is improper for climate-displaced populations, it will use the term "climate migrants." This is a neutral and accurate term to describe the people that are the subject of this Comment.

17. This Comment uses an expansive definition compared to that established by most scholars. This is simply because it generally refers to all individuals that leave their homes due to climate change. Part III.A, *infra*, further discusses the debate over how to define climate migrants. Part IV, *infra*, will present a more

critical examination of the estimates of climate-induced migration patterns over the short and long term reveals that large numbers of climate migrants will relocate to the United States, regardless of whether the United States' immigration law permits their entry.<sup>18</sup> As of the beginning of 2015, only one senator has acknowledged this dilemma, and he proposed legislation that would address it.<sup>19</sup> This Comment offers a critique of—and an alternative to—that proposal.<sup>20</sup> It also suggests key elements that potential drafters should include when creating legislation that properly addresses the plight of climate migrants in this country.

Part I of this Comment discusses in greater detail why the United States should be concerned with climate migrants based on current and projected patterns of global movement induced by climate change. In particular, it examines the likely flow of climate migrants to the United States and suggests that the country should be prepared for a large influx of immigrants that choose to relocate due to climate change. It also considers the ethical dimension of the climate migrant dilemma and suggests that the United States has a heightened obligation to address this problem due to its substantial contribution to climate change. However, even accepting the argument that the United States owes no ethical obligation to climate migrants, policy makers should nevertheless consider enacting legislation for practical reasons.

With this background in mind, Part II reviews existing immigration laws and considers which laws could apply to climate migrants. There are a variety of immigration laws that might grant status to climate migrants, so long as applicants are able to meet a specific set of criteria. Many of these laws, however, are quite restrictive, and often allow only territorially present individuals to apply. Even if some climate migrants could meet this burden, the protections afforded by many

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precise definition to be used for legal purposes.

18. See *infra* Part I.A.1.

19. Senator Brian Schatz (Democrat) of Hawai'i proposed an amendment to the immigration bill being considered by the Senate. 159 CONG. REC. S4710 (daily ed. June 19, 2013) (SA 1411 proposed by Sen. Brian Schatz at § 3413). The Senate declined to adopt the amendment without comment, and passed the bill without it on June 27, 2013. See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (as passed by Senate, June 27, 2013). This proposed amendment will be discussed extensively *infra* Part IV.

20. This criticism is discussed thoroughly *infra* Part IV.A.

immigration statuses are insufficient to protect climate migrants. Part II ultimately concludes that existing laws fail to adequately address the plight that climate migrants will face. As a result, climate migrants will be compelled to enter the country and remain here illegally.

The United States should confront this problem by enacting legislation that addresses climate migrants before it becomes home to an unprecedented number of immigrants that have no lawful status. Part III considers what policymakers in the United States can learn from international proposals that address impending climate-induced migration. The international discourse pertaining to climate-induced migration generally revolves around international treaties and binding agreements. This discussion provides useful frameworks that the United States should consider when creating its own legal solution for the climate migrant dilemma, such as who should be eligible for legal protection and how much protection should be granted. However, Part III suggests that unilateral legislation to protect climate migrants may be more politically palatable than adopting relief under international law.

After reviewing the most important aspects of the various international proposals in Part III, Part IV goes on to discuss the only domestic proposal to address climate migrants—an amendment to the immigration reform bill that Congress failed to pass in 2013—and considers whether the amendment would adequately address the problem. This Comment suggests that it would not. Part IV proposes a list of necessary elements that should be included in domestic legislation. It suggests that, at a minimum, this legislation should include a narrowly tailored definition of climate migrant, mandatory application of lawful status, and the right to work and travel freely. It concludes by offering an alternative legislative solution.

#### I. WHY SHOULD THE UNITED STATES BE CONCERNED ABOUT CLIMATE CHANGE-INDUCED MIGRATION?

The United States should enact domestic legislation that creates a legal status unique to climate migrants for several reasons. In order to understand why this country must establish legal protection for climate migrants, it is helpful to first examine who climate migrants are and the United States'

role in their displacement. Section A identifies who these climate migrants are and ultimately concludes that, based on current migration trends and future predictions, the United States will soon face an unprecedented influx of people displaced by climate change.<sup>21</sup> Section B posits that the United States is obligated to address this large population. It explains that the United States' actions directly contribute to climate change. This contribution, combined with the potential influx of climate migrants, requires the United States to enact legislation that protects climate migrants.

A. *Facing the Realities of Climate Change-Induced Migration*

The practical implications of climate-induced migration justify enacting legislation to address the climate migrant dilemma. A massive influx of climate migrants into the United States is perhaps the most obvious consequence. Examining current international migration flows substantiates this probability, since these flows are the best indicia of future climate change-related migration.<sup>22</sup> Whether or not the United States is prepared, it will experience increased immigration rates as climate change displaces people around the globe. This should encourage the government to consider how to address these new populations.

This section demonstrates the potential consequences of ignoring climate migrants, who will soon arrive in large numbers. Subsection 1 discusses various estimates of current and future climate change-induced migration rates. Subsection 2 then examines which populations commonly migrate to the United States and considers what this might mean for the country as climate conditions in those regions worsen. Ultimately, the predictions of the enormous number of climate migrants that may arrive in the United States should alarm legislators; the undocumented population will swell and the country will have a large population of immigrants that it is unprepared to accommodate or integrate into American society.

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21. See *infra* Part I.A.1.

22. See, e.g., Jane McAdam, *Moving With Dignity*, in CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 162 (2012) [hereinafter McAdam, *Moving with Dignity*] (“[C]urrent patterns of movement . . . are the most likely indicators of future movement . . .”) (footnote omitted).

### 1. The Numbers at a Glance

The estimates of how many people have already been displaced by climate change—and how many will be displaced in the near future—vary. Some individuals and populations will strongly prefer to relocate within the borders of their home countries.<sup>23</sup> Others will be unable to afford the costs of moving internationally.<sup>24</sup> Thus, numerical estimates of climate migrants in the coming years are highly uncertain.

In making these estimates, scholars must take into account the adaptive capacities of affected nations,<sup>25</sup> the possibility that climate change may occur more rapidly or slowly than predicted,<sup>26</sup> and the fact that so far there is no settled definition for climate migrants.<sup>27</sup> In 2007, researchers Frank Biermann and Ingrid Boas reviewed various estimates, including one prediction that sea-level rise and drought will create 212 million climate migrants by 2050.<sup>28</sup> Some scholars suggest that this estimate is excessively high.<sup>29</sup> To sum up the wide range of estimates, the International Organization for Migration reports that the numbers range from 25 million to 1

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23. McNamara & Gibson, *supra* note 16, at 479; Jane McAdam, *Environmental Migration Governance* 31 (Univ. of New S. Wales Faculty of Law Research Series, Working Paper No. 1, 2009) [hereinafter *Environmental Migration*].

24. See McAdam, *Moving with Dignity*, *supra* note 22, at 167 (demonstrating that Bangladeshis living in areas vulnerable to climate change-induced disruption often lack the resources to move long distances).

25. See Maxine Burkett, *In Search of Refuge: Pacific Islands, Climate-Induced Migration, and the Legal Frontier*, 98 ASIA PAC. ISSUES 1, 3 (2010) [hereinafter Burkett, *In Search of Refuge*] (“There are also many factors in addition to the original impetus for migration that can influence the decision to migrate—including political and economic development and the capacity of individuals, communities, and countries to adapt to external pressures.”).

26. See Mostafa Mahmud Naser, *Climate Change, Environmental Degradation, and Migration: A Complex Nexus*, 36 WM. & MARY ENVTL. L. & POL’Y REV. 713, 732–33 (2012) (explaining that some movement may be caused by slow-onset environmental changes, and some may result from sudden disasters).

27. See *infra* Part III (discussing the lack of legal status for climate change migrants).

28. Sir Nicholas Stern’s 2006 Review corroborates the Myers estimate. The authors note that Myers recently increased his estimate to 250 million. Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance to Protect Climate Refugees*, 10 GLOBAL ENVTL. POL. 60, 68 (2010).

29. For example, Professor Jane McAdam of the University of New South Wales describes the Myers estimate as “alarmist.” JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 26 (2012).

billion by 2050.<sup>30</sup>

Even without an exact figure, the impacts of climate change on human migration are no longer merely theoretical. Indeed, in recent years the effects of climate change have forced more and more people to permanently relocate from their homes with no real hope of return.<sup>31</sup> The island nation of Tuvalu, for example, has already lost large portions of its coastline and six of its atolls due to sea-level rise.<sup>32</sup> Tuvalu has initiated a series of high profile negotiations with New Zealand and Australia to create a resettlement regime for its population in the event of complete inundation.<sup>33</sup> Other nations have not approached the prospect of losing their land so directly. In those nations, lack of clean water, drought, political turmoil, and loss of livelihood (for example, through loss or substantial degradation of arable land) have caused those who can afford it to leave their homes in search of a more stable livelihood.<sup>34</sup> Therefore, it is clear that climate change is already forcing people out of their homes, and nations are already considering how to address climate change-related, large-scale relocation.

## 2. Migration to the United States

Although exact numbers are difficult to predict, many who voluntarily or involuntarily relocate outside of national borders will choose to make the United States their final destination.

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30. *Migration and Climate Change*, INT'L ORG. FOR MIGRATION, <http://www.iom.int/cms/climateandmigration> (last visited Jan. 31, 2014), *archived at* <http://perma.cc/8T4W-93UQ>. A variety of other empirical studies propose different estimates, including 10 million, 300 million, and everything in between. See Françoise Gemenne, *Why the Numbers Don't Add Up: A Review of Estimates and Predictions of People Displaced by Environmental Changes*, 21 GLOBAL ENVTL. CHANGE 41 (2011).

31. For example, the government of Papua New Guinea has already permanently relocated 2,600 people from the Carteret Islands, one its many groups of atolls, due to the effects of sea-level rise. Naser, *supra* note 26, at 724.

32. Breanne Compton, Note, *The Rising Tide of Environmental Migrants: Our National Responsibilities*, 25 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 358, 361 (2014).

33. Tiffany T.V. Duong, Comment, *When Islands Drown: The Plight of "Climate Change Refugees" and Recourse to International Human Rights Law*, 31 U. PA. J. INT'L L. 1239, 1240 (2010).

34. For example, at least one study has indicated that drought has forced farmers in Mexico to abandon their crops and cross the border into the United States. Shuaizhang Feng, Alan B. Krueger & Michael Oppenheimer, *Linkages Among Climate Change, Crop Yields and Mexico-US Cross-Border Migration*, 107 PROC. NAT'L ACAD. SCI. 14257 (2010).

Predicting the number of climate migrants that will come to the United States is difficult since most scholars have focused on predicting global estimates of migration.<sup>35</sup> The United States has long been a destination for immigrants from around the world. According to the Migration Policy Institute, about one in five immigrants resided in the United States in 2014.<sup>36</sup> However, the United States will receive even more immigrants from certain nations as a result of climate change.

Historical ties and geographic proximity render it likely that Mexican climate migrants will migrate to the United States. There are already signs that cross-border migration from Mexico is increasing as climate change begins to impact crop yields.<sup>37</sup> Researcher Shuaizhang Feng and his colleagues, acknowledging that there are many factors unique to the Mexican-American relationship driving migration from the former to the latter, estimate that the effects of climate change will cause 5.5 to 6.7 million Mexicans to migrate to the United States by 2080.<sup>38</sup> This would be a substantial increase, yet it represents just a fraction of climate migrants worldwide. Although immigration rates from Mexico to the United States have decreased since 2001,<sup>39</sup> Mexico nevertheless produced the most migrants to the United States of any country in the world as recently as 2010.<sup>40</sup>

The United States will also see substantial immigration from Asia, both because of the sheer size of the region's population, and because the United States has historically been

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35. See Gemenne, *supra* note 30.

36. See Chiamaka Nwosu, Jeanne Batalova & Gregory Auclair, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLY INST. (Apr. 28, 2014), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>, archived at <http://perma.cc/Y9T8-9YD6> ("Nearly 41 million immigrants lived in the United States in 2012 . . . About 20 percent of all international migrants reside in the United States . . .").

37. See Feng et al., *supra* note 34.

38. The authors acknowledge that their results are uncertain to the extent that they necessarily rely on climate change estimates that are uncertain, but they suggest that their study underestimates the numbers rather than overestimating them. *Id.* at 14260–61.

39. DANIEL CHIQUIAR & ALEJANDRINA SALCEDO, *MEXICAN MIGRATION TO THE UNITED STATES: UNDERLYING ECONOMIC FACTORS AND POSSIBLE SCENARIOS FOR FUTURE FLOWS 1* (2013).

40. U.N. Secretary-General, *New Trends in Migration: Demographic Aspects*, 6 U.N. Doc. E/CN.9/2013/3 (Feb. 11, 2013).

a receiving nation for this population.<sup>41</sup> The Asian Development Bank published a report in 2012 on expected climate change-induced migration patterns from Asia and the Pacific.<sup>42</sup> The study noted that international migration to the United States from certain countries in the Asia Pacific region would substantially increase in the coming years.<sup>43</sup> Due to historic migration patterns, both Micronesia and Polynesia have strong ties to North America and the United States, and migrants from those countries tend to settle abroad permanently.<sup>44</sup> The study also predicted that environmental stress in Bangladesh would lead to large-scale permanent relocation of Bangladeshis to “traditional immigrant-receiving countries,” a category that includes the United States.<sup>45</sup> Sea-level rise will cause approximately 26 million climate migrants to leave Bangladesh by 2050.<sup>46</sup> Anywhere between 39 and 812 million people (a “worst case scenario” estimate) in South Asia alone will be at risk of water stress resulting from temperature rise by the year 2085.<sup>47</sup> Sea-level rise has already begun to disrupt the livelihood of many living along the Ganges-Brahmaputra-Meghna River Delta.<sup>48</sup>

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41. See ASIAN DEVELOPMENT BANK, ADDRESSING CLIMATE CHANGE AND MIGRATION IN ASIA AND THE PACIFIC 33–34, ¶ 146 (2012) [hereinafter ADDRESSING CLIMATE CHANGE & MIGRATION IN ASIA & THE PACIFIC].

42. *Id.*

43. *Id.*

44. *Id.* at 18, ¶¶ 83, 85.

45. *Id.* at 33–34, ¶ 146.

46. Biermann & Boas, *supra* note 28, at 70.

47. *Id.* Water stress can be caused by mere inches of sea-level rise, depending on a country’s topography and where its citizens reside. *Id.* In fact, sea-level rise is not the only type of water stress that at-risk regions will suffer from. The Aral Sea, nestled between Kazakhstan and Uzbekistan, has been drying up rapidly over the past several years. Once the world’s fourth-largest lake, its salinity increased and the lakebed’s contaminated soil impacted surrounding agricultural lands. Moreover, the evaporation of the lake’s waters made the winters and summers more extreme in the region. Brad Lendon, *Once-Vast Aral Sea Dries Up to Almost Nothing*, CNN (Oct. 1, 2014, 5:20 AM), <http://www.cnn.com/2014/09/30/world/asia/aral-sea-drying/index.html>, archived at <http://perma.cc/VXA4-2ZL2>. Similarly, diversion of water from the Dead Sea between Jordan, Israel, and Palestine is decreasing its water levels and increasing its salinity, causing ecological concerns in the region. See *Mid-East Governments Sign Red Sea-to-Dead Sea Water Deal*, BBC NEWS (Dec. 9, 2013, 4:47 PM), <http://www.bbc.com/news/world-middle-east-25308701>, archived at <http://perma.cc/J2XN-UWQB>.

48. Naser, *supra* note 26, at 724–25 (“The Ganges-Brahmaputra-Meghna river delta, which stretches from India and Bangladesh, to Nepal, China, and Bhutan, is home to approximately 129 million people.”); see also Angela Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, 30

Many small island nations also have social and political ties to the United States that will cause climate migrants to resettle there as climate events become more common. Climate change-related weather patterns have already begun to displace people from island nations in the Pacific region.<sup>49</sup> In 2005, sea-level rise caused the government of Papua New Guinea to relocate 2,600 residents of the Carteret Islands, one of its groups of atolls, to a nearby island—should sea-level rise affect the nation's larger islands, there will be no nearby island and many residents will relocate to the United States instead.<sup>50</sup> Additionally, the Asian Development Bank noted that tropical cyclones and storm-tide swells have displaced people in Fiji, Kiribati, the Marshall Islands, the Solomon Islands, and the Federated States of Micronesia, all countries whose citizens also tend to migrate to the United States.<sup>51</sup> Moreover, extreme weather events will likely affect these regions even more frequently in the future.<sup>52</sup> The United States is, and will continue to be, a common destination for the population of climate migrants that will be displaced by these weather events.<sup>53</sup>

The Philippines is another island nation that will likely produce a substantial number of climate migrants. The United States has a special relationship with the Philippines, stemming from its colonial authority over the island nation

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L. & POL'Y 502, 505 (2008).

49. See Naser, *supra* note 26, at 724, 725.

50. *Id.* at 724 (citing Int'l Org. for Migration, *Migration, Climate Change and the Environment* 4 (IOM Policy Brief, 2009)).

51. ADDRESSING CLIMATE CHANGE & MIGRATION IN ASIA & THE PACIFIC, *supra* note 41, at 35–36 (“In 2008 alone the region experienced natural disasters of a kind likely to be exacerbated by climate change . . . a devastating tropical cyclone (Gene) resulted in substantial damage to agriculture, infrastructure and utilities in Fiji . . . . Saltwater intrusion into field and crops and contamination of freshwater aquifers has been reported in the Solomon Islands.”) (quoting Philippe Boncour & Bruce Burson, *Climate Change and Migration in the South Pacific Region: Policy Perspectives*, in CLIMATE CHANGE & MIGRATION: SOUTH PACIFIC PERSPECTIVES 5, 11 (2010)).

52. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS, SUMMARY FOR POLICYMAKERS 18 (2013), available at <http://www.ipcc.ch/report/ar5/wg1>, archived at <http://perma.cc/3LTJ-RMNZ>.

53. ADDRESSING CLIMATE CHANGE & MIGRATION IN ASIA & THE PACIFIC, *supra* note 41, at 36. Displaced populations from some countries, such as Mexico or Canada, will probably migrate to the United States because of its proximity. However, diaspora communities, economic conditions, and historic or cultural ties also probably attract immigrants to the United States.

that lasted from 1898 to 1946.<sup>54</sup> For this reason, many Filipino climate migrants will migrate to the United States. In 2010, the Philippines produced the tenth highest number of international migrants to the United States.<sup>55</sup> Moreover, the effects of climate change on the region are already apparent. Typhoon Haiyan, a record-making violent storm, devastated the Philippines in 2013.<sup>56</sup> Manila, the nation's capital, was already sinking and was therefore at heightened risk of inundation.<sup>57</sup> Nationwide, the typhoon rendered an estimated 600,000 Filipinos homeless and affected as many as 11 million by damaging property, farms, roads, and other essential infrastructure.<sup>58</sup> As storms like Typhoon Haiyan increase in frequency, those with the resources to do so will relocate to safer, less weather-prone regions; many Filipinos will choose the United States.

The United States can also expect climate migrants from Haiti. Haiti has a strong diaspora community in the United States, and the 2010 earthquake is one of many instances of substantial Haitian immigration to the United States.<sup>59</sup> The 2010 earthquake left over 200,000 dead and at least 1 million people homeless, and the country continues to struggle with inadequate housing, waterborne disease, food scarcity, and deforestation that increases the risks of flooding.<sup>60</sup> After the

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54. THOMAS LUM, CONG. RESEARCH SERV., RL 33233, THE REPUBLIC OF THE PHILIPPINES AND U.S. INTERESTS 1 (2012).

55. U.N. Secretary-General, *New Trends in Migration: Demographic Aspects*, ¶ 15, U.N. Doc. E/CN.9/2013/1 (Feb. 11, 2013).

56. *Typhoon Haiyan: Worse Than Hell*, ECONOMIST (Nov. 16, 2013), <http://www.economist.com/news/asia/21589916-one-strongest-storms-ever-recorded-has-devastated-parts-philippines-and-relief>, archived at <http://perma.cc/T3P4-SL2G>.

57. *Id.*

58. *Id.*

59. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 492–97 (2009) (describing Haitian and Cuban immigration to the United States); DONALD M. KERWIN, THE FALTERING U.S. REFUGEE PROTECTION SYSTEM: LEGAL AND POLICY RESPONSES TO REFUGEES, ASYLUM SEEKERS, AND OTHERS IN NEED OF PROTECTION 23 n.148 (2011).

60. Amanda A. Doran, *Where Should Haitians Go? Why “Environmental Refugees” are Up the Creek Without a Paddle*, 22 VILL. ENVTL. L.J. 117, 117 (2011). In addition, severe weather events continue to disrupt the country's recovery. See 5 *Issues to Watch as Haiti Recovers from Issac*, SCRIBOL <http://scribol.com/environment/5-issues-to-watch-as-haiti-recovers-from-isaac> (last visited Nov. 14, 2014), archived at <http://perma.cc/J856-7XYM> (discussing continued recovery efforts after a 2012 tropical storm hit Haiti, following on the tail of the 2010 earthquake).

earthquake, the United States extended relief from deportation to 100,000 Haitians living in the United States illegally, and 30,000 Haitians that had already been ordered deported.<sup>61</sup> As climate change exacerbates the impacts of occurrences such as the 2010 earthquake, residents will likely leave the island in increasing numbers. Although many Haitians will migrate to other destinations,<sup>62</sup> many others will join friends and family in the United States.<sup>63</sup> In sum, this country faces an influx of climate migrants in the coming years.

*B. An Ethical Perspective on Climate Migrants and National Contributions to Climate Change*

Despite disagreements over the details, scholars agree in predicting that there will be a large number of climate migrants who will significantly impact immigrant-receiving nations. Moreover, as discussed above, many climate migrants will choose to resettle in the United States. This raises some important questions: Should the United States welcome this population? If so, why? This Section argues that the United States is ethically obligated to assist climate migrants because its excessive greenhouse gas emissions greatly contribute to climate change.

Proving the direct cause of climate change is a unique problem. The effects of different nations' emissions cannot be differentiated from one another; rather, the impacts of all greenhouse gas emissions are global.<sup>64</sup> Thus, some might argue that no one should be held responsible for particular climate events since it is impossible in each instance to prove whose emissions caused them.<sup>65</sup> Scholars address this dilemma by suggesting that the group of nations with the highest greenhouse gas emissions should be collectively responsible for addressing the various effects of climate change,<sup>66</sup> including

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61. Julia Preston, *Haitians Illegally in U.S. Given Protected Status*, N.Y. TIMES (Jan. 15, 2010), <http://www.nytimes.com/2010/01/16/world/americas/16immig.html>, archived at <http://perma.cc/6Y4V-W7ZX>.

62. See JAMES FERGUSON, MINORITY RIGHTS GRP. INT'L, *MIGRATION IN THE CARIBBEAN: HAITI, THE DOMINICAN REPUBLIC AND BEYOND* (2003), available at <http://www.oas.org/atip/regional%20reports/migrationinthecaribbean.pdf>, archived at <http://perma.cc/ZLE7-CME7>.

63. KERWIN, *supra* note 59, at 23 n.148; see also Preston, *supra* note 61.

64. See Gardiner, *Perfect Moral Storm*, *supra* note 13, at 399–400.

65. *Id.*

66. This concept is not limited to international discussion on climate change,

the challenges faced by displaced populations. In keeping with this logic, developed nations bear a greater responsibility to address the consequences of climate change. The United States and the European Union have led the world in greenhouse gas emissions for decades.<sup>67</sup> These greenhouse gas emissions have increased the temperature of the planet and caused severe disruption to the global ecosystem, and continue to do so today.<sup>68</sup> Developed nations' role in changing the global climate system gives rise to an ethical obligation to shoulder the burden of solving the problem.<sup>69</sup> Thus, although it is impossible to prove that United States emissions directly caused the climate events that displaced populations and led them to resettle in the United States, justice and fair compensation demand that the country assist those displaced persons seeking relief at its borders.

Scholars also argue that developed nations are obligated to help less developed nations address climate change because they are in the best economic position to do so.<sup>70</sup> Indeed, members of the international community codified the notion that developed nations bear greater responsibility for mitigating climate change and assisting less developed nations

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but it is prevalent there. It is known as the "polluter pays" principle, whereby whoever caused the mess should be held accountable for cleaning it up. See Stephen M. Gardiner, *Ethics and Global Climate Change*, 114 ETHICS 555, 579–80 n.76 (2004) [hereinafter Gardiner, *Ethics*] (citing Henry Shue, *Equity in an International Agreement on Climate Change*, in EQUITY AND SOCIAL CONSIDERATIONS RELATED TO CLIMATE CHANGE (1995)).

67. See W.J.W. Botzen et al., *Cumulative CO<sub>2</sub> Emissions: Shifting International Responsibilities for Climate Debt*, 8 CLIMATE POL'Y 569 (2008) (demonstrating that the United States and Western Europe are responsible for the vast majority of current global carbon stocks).

68. *Id.*; see also WORLD BANK, TURN DOWN THE HEAT: WHY A 4°C WARMER WORLD MUST BE AVOIDED, 5–17 (2012) available at [www.medbox.org/turn-down-the-heat/download.pdf](http://www.medbox.org/turn-down-the-heat/download.pdf), archived at <http://perma.cc/HDM5-8H3D>.

69. See, e.g., Compton, *supra* note 32 (arguing that people displaced by climate change deserve the same international assistance that people displaced for political reasons receive, and that the international system should be adjusted to accommodate them); Sara C. Aminzadeh, Note, *A Moral Imperative: The Human Rights Implications of Climate Change*, 30 HASTINGS INT'L. & COMP. L. REV. 231 (2007) (suggesting that climate change should be understood as a human rights phenomenon that impacts poor communities disproportionately and requires a rights-based approach).

70. Maxine Burkett, *Climate Reparations*, 10 MELBOURNE J. INT'L L. 1, 12 & n.64 (2009) [hereinafter Burkett, *Climate Reparations*] ("[T]he tenets of distributive justice demand immediate and aggressive mitigation." (citing Donald Brown, *Climate Change*, in STUMBLING TOWARDS SUSTAINABILITY 273, 300 (2002))).

in adapting to its impacts in the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol.<sup>71</sup> Moreover, developed nations are economically advantaged largely because of their historical emissions.<sup>72</sup> Because they profited from the emissions that caused climate change, developed nations should assist the populations of those nations that suffer from these emissions rather than profit from them.<sup>73</sup>

If developed nations bear greater responsibility than less developed nations to reduce emissions and mitigate climate change, then it is natural to extend this notion of common yet differentiated responsibilities to the question of how to address the legal status of climate migrants. Although this Comment focuses primarily on the practical reasons for adopting legislation governing climate migrants, there are ethical reasons for doing so as well.<sup>74</sup> Many scholars suggest that the

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71. The United Nations Framework Convention on Climate Change was the international community's first attempt to address climate change through an international treaty. In it, each nation agreed to take certain steps to attempt to mitigate climate change. In both the Introduction and Article 4 of the UNFCCC, the Parties to the Convention explicitly stated that developed nations, on account of their disproportionate emissions and increased ability to reduce emissions without compromising their standard of living, must take the lead in reducing emissions. Under the UNFCCC, developing nations did not initially take on any obligations to reduce emissions. Rather, developed nations took on the burden of mitigating climate change. See United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 [hereinafter UNFCCC]. Because the UNFCCC was primarily an expression of the party's intentions and did not contain binding emissions reductions requirements, only binding requirements to offer assistance to developing nations in dealing with the effects of climate change, the parties negotiated the Kyoto Protocol several years later to institute such requirements. The Kyoto Protocol also incorporated the common but differentiated responsibility concept into its structure. Under the Kyoto Protocol, only developed nations have emissions reductions obligations. See Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998) [hereinafter Kyoto Protocol]. The United States was strongly opposed to this arrangement, which resulted in its withdrawal from the negotiations. See McAdam, *Moving with Dignity*, *supra* note 22 and accompanying text.

72. Gardiner, *Ethics*, *supra* note 66, at 579–80 (“[T]he obvious argument to be made is that the developed countries have largely exhausted the capacity [of the earth to absorb man-made emissions of carbon dioxide] in the process of industrializing and so have . . . denied other countries the opportunity to use ‘their shares.’ On this view, justice seems to require that the developed countries compensate the less developed for this overuse.”).

73. *Id.*

74. *Id.*

nations responsible for causing climate change must deal with the way this global change impacts other people and nations.<sup>75</sup> They propose various solutions, including paying damages or restitution and welcoming climate migrants.<sup>76</sup> Though individual proposals vary, this Comment agrees that the United States, as a highly industrialized nation with high greenhouse gas emissions, should address climate change not merely by reducing emissions and offering financial assistance to impacted nations, but by offering climate migrants sanctuary—a new home to replace a lost home.

The European Union has taken a leadership role in addressing climate change and is a good model for the United States. Not only did each of the individual nations which comprise the European Union sign on to the Kyoto Protocol and accept obligations for emissions reductions,<sup>77</sup> they also implemented a regional emissions trading program<sup>78</sup> and signed on to the Doha Amendment in 2012 to establish a second Kyoto Protocol commitment period—some of the only developed nations to do so.<sup>79</sup> Although the European Union

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75. See Burkett, *Climate Reparations*, *supra* note 70, at 12 (“Disproportionate historical emissions rates, and those emissions’ impact on current atmospheric carbon concentrations and temperature rise, compounded by the developed world’s sluggish response to climate impacts, raises significant and complex moral problems. . . .”); Gardiner, *Perfect Moral Storm*, *supra* note 13; J. TIMMONS ROBERTS & BRADLEY C. PARKS, *Introduction*, in A CLIMATE OF INJUSTICE 2, 8–19 (J. Timmons Roberts & Bradley C. Parks eds., 2006) (citing a Bangladeshi scholar saying, “If climate change makes our country uninhabitable . . . we will march with our wet feet into your living rooms.”).

76. Burkett, *Climate Reparations*, *supra* note 70; *see also* Burkett, *The Nation Ex-Situ*, *supra* note 16 (arguing that nation states should permit groups of climate migrants whose homes have vanished or become uninhabitable to live on their soil but be governed under the deterritorialized government of their vanished state to allow these groups to maintain their cultural and sovereign identity).

77. For a list of all the parties to the Kyoto Protocol, including the date of signature, acceptance, accession or approval, and entry into force, see *Status of Ratification of the Kyoto Protocol*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/kyoto\\_protocol/status\\_of\\_ratification/items/2613.php](http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php) (last visited Nov. 4, 2014), *archived at* <http://perma.cc/9YCF-QNPR>.

78. For an explanation of the European Union’s emissions trading program (EU ETS), see Richard G. Newell et al., *Carbon Markets 15 Years After Kyoto: Lessons Learned, New Challenges*, 27 J. ECON. PERSP. 123, 126–28 (2013). *See generally* CHRIS WOLD, DAVID HUNTER & MELISSA POWERS, CLIMATE CHANGE AND THE LAW Ch. 7 (2d ed. 2013) (discussing the creation, implementation, and basic structure of the EU ETS).

79. See Doha Amendment to the Kyoto Protocol, 1/CMP.8 (2012), *available at* [http://unfccc.int/files/kyoto\\_protocol/application/pdf/kp\\_doha\\_amendment\\_english.pdf](http://unfccc.int/files/kyoto_protocol/application/pdf/kp_doha_amendment_english.pdf), *archived at* <http://perma.cc/5VLK-AYEW>. “Commitment period” refers to a

nations have not yet come to a consensus as to the proper legal status for climate migrants, they have at least started this conversation and acknowledged their ethical obligations.<sup>80</sup> For example, at least in writing, Finnish and Swedish asylum law offer humanitarian protection on the basis of environmental catastrophe or climate change.<sup>81</sup> Belgium explicitly considered creating legal status for “climate change refugees,” and many other nations have forms of discretionary relief for climate migrants.<sup>82</sup> Although the United States is hesitant to acknowledge any obligations to assist climate migrants, it is similarly situated to the European Union in terms of emissions.<sup>83</sup> In fact, the United States continues to be one of the top greenhouse gas emitters per capita; for total emissions, only China exceeds the United States.<sup>84</sup>

Moreover, the UNFCCC requires the United States, as an Annex II<sup>85</sup> developed nation, to take on certain obligations to mitigate and help others adapt to climate change.<sup>86</sup> Although it

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period of years over which a nation agrees to reduce its greenhouse gas emissions by a certain percentage set according to the parties' agreement.

80. JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 104–15 (2012) (describing a variety of legislative schemes that address climate migrants in wealthy developed nations).

81. *Id.* at 113.

82. *Id.* at 112; *see also* Compton, *supra* note 32, at 373 (explaining that Australia and Canada admitted record numbers of refugees in 2012 and 2011, respectively).

83. *See* Subsidiary Body for Implementation, UNFCCC, National Greenhouse Gas Inventory Data for the Period 1990–2009, 29th sess., U.N. Doc. FCCC/SB1/2008/12 (2008).

84. *See* CO<sub>2</sub> Emissions (Metric Tons per Capita), WORLD BANK, <http://data.worldbank.org/indicator/EN.ATM.CO2E.PC> (last visited Dec. 14, 2014), *archived at* <http://perma.cc/UJ2X-PXHR> (reporting that the only countries that exceeded the United States in per capita emissions of greenhouse gases produced from burning fossil fuels and manufacture of cement between 2010 and 2014 are Aruba, Bahrain, Brunei Darussalam, Kuwait, Luxembourg, Oman, Qatar, Trinidad and Tobago, and the United Arab Emirates); *see also* CO<sub>2</sub> Emissions, WORLD BANK, <http://data.worldbank.org/indicator/EN.ATM.CO2E.KT> (last visited Dec. 14, 2014), *archived at* <http://perma.cc/3GPR-LSDQ> (reporting that only China emitted more total greenhouse gases than the United States between 2010 and 2014).

85. *See* UNFCCC, *supra* note 71, at Annex II. The UNFCCC divided its party-nations into categories based on income and assigned obligations to each category accordingly. *See* UNFCCC, *supra* note 71, at art. 4, par. 3.

86. *See* UNFCCC, *supra* note 71, at art. 4, par. 3 (mandating developed nations, as defined in Annex II, to provide new and additional funding to assist developing nations in addressing climate change); UNFCCC *supra* note 71, at art. 4 par. 4 (mandating developed nations defined in Annex II to assist developing nations in meeting the costs of adapting to climate change); UNFCCC, *supra* note

does not explicitly address the subject of climate migrants, the UNFCCC requires developed nations to assist less developed nations in adapting to climate change in article four.<sup>87</sup> Since relocating one's home is one form of adaptation,<sup>88</sup> this article can be read to require developed nations to assist in such relocation.<sup>89</sup> One way for them to do so would be to provide safe haven within the United States for those who are relocating. The UNFCCC also mandates that developed nations share technological advances that make industry more efficient or cleaner.<sup>90</sup> So far, the United States has not met either of these legal obligations.<sup>91</sup> The United States has not made meaningful efforts to reduce greenhouse gas emissions, and it continues to ignore its international obligations. Therefore, at the very least, it must join the conversation surrounding legal protection for climate migrants as an ethical matter.

## II. THE GAP IN DOMESTIC IMMIGRATION LAW FOR CLIMATE MIGRANTS

To understand why the United States should enact legislation that protects climate migrants,<sup>92</sup> it is necessary to examine the state of immigration law as it stands in January 2015. The United States has a tumultuous immigration history with varying periods of high and low rates of migration from many different parts of the world.<sup>93</sup> Immigration to the United

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71, at art. 4 par. 5 (mandating developed nations defined in Annex II to transfer relevant clean technology to developing nations); UNFCCC *supra* note 71, at Annex II (listing the developed nations).

87. UNFCCC, *supra* note 71, at art. 4 par. 4.

88. See Maryanne Loughry & Jane McAdam, *Kiribati – Relocation and Adaptation*, 31 FORCED MIGRATION REV. 51 (2008) (suggesting that natives of Kiribati will be forced to relocate if and when the island's infrastructure is no longer able to adapt to severe climate events).

89. See Compton, *supra* note 32.

90. UNFCCC, *supra* note 71, at art. 4 par. 3.

91. See Burkett, *Climate Reparations*, *supra* note 70, at 8–11 (discussing the failure of existing remedies to force the United States, among other nations, to address the impacts of greenhouse gas emissions on impacted populations).

92. Although this Part references immigrants generally, this term is distinct from “climate migrants.” I use the term immigrants purposefully to refer to all individuals who take up residence in the United States, whereas the term climate migrant refers only to those individuals that move as a result of climate change.

93. See generally WALTER A. EWING, IMMIGRATION POL'Y CTR., OPPORTUNITY AND EXCLUSION: A BRIEF HISTORY OF UNITED STATES IMMIGRATION POLICY (2012). For a comprehensive overview of immigration and policy in the United States, see SUSAN F. MARTIN, A NATION OF IMMIGRANTS (2011).

States has caused much political turmoil; the goals of immigration law are constantly in flux.<sup>94</sup> Today, immigration law is generally immigrant-exclusive, focused primarily on closing borders and deporting undocumented immigrants.<sup>95</sup> According to the Pew Research Center, there were approximately 11.2 million undocumented immigrants in the United States in 2012.<sup>96</sup> The United States' legal system inadequately addresses this population, which significantly impacts the country's economy and culture.<sup>97</sup> This population's status and rights are unsettled: unlawfully present individuals generally do not qualify for public benefits such as in-state tuition and driver's licenses,<sup>98</sup> employment laws do not protect undocumented and documented workers equally,<sup>99</sup> and the policy surrounding who should be deported (as well as how to treat those who are not prioritized for deportation) is

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94. *See id.* (describing the phases of immigration to the United States, from the early days when immigrants were welcomed to perform much-needed labor and populate the West, to periods of extreme racism and xenophobia that led the government to severely restrict who could enter the United States).

95. Ewing outlines the negative impact on immigrants through the passage of welfare reform in the 1990s and the emerging linkage between national security and immigration law and policy since 2001. The relevant exclusive laws include the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), and the Antiterrorism and Effective Death Penalty Act (AEDPA), which together serve to restrict immigrant access to public benefits and expedite removal procedures. *Id.* at 6–7.

96. *Unauthorized Immigrant Population Trends for States, Birth Countries and Regions*, PEW RESEARCH HISPANIC TRENDS PROJECT (Dec. 11, 2014), <http://www.pewhispanic.org/2014/12/11/unauthorized-trends>, archived at <http://perma.cc/X6TP-UDCW>.

97. EWING, *supra* note 93, at 6–7.

98. *See, e.g.*, Kari E. D'Ottavio, *Deferred Action for Childhood Arrivals: Why Granting Driver's Licenses to DACA Beneficiaries Makes Constitutional and Political Sense*, 72 MD. L. REV. 931, 955–56 (2013) (discussing debate over whether to grant driver's licenses to DACA beneficiaries); Ann Morse & Emily German, *Deferred Action for Childhood Arrivals (DACA): Federal Policy and Examples of State Actions*, NAT'L CONF. STATE LEGISLATURES (June 30, 2013), <http://www.ncsl.org/research/immigration/deferred-action.aspx>, archived at <http://perma.cc/6SGB-Z9R6> (discussing state decisions to grant or deny in-state tuition to DACA beneficiaries). Importantly, some states do provide driver's licenses for undocumented immigrants, including California, Colorado, and Connecticut. *See State Laws & Policies on Driver's Licenses for Immigrants*, NAT'L IMMIGR. L. CTR., <http://www.nilc.org/driverlicenseemap.html> (last updated Jan. 10, 2015), archived at <http://perma.cc/FX98-CQHS>.

99. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that undocumented workers are not eligible for backpay after unlawful firing for union activity because they were never eligible to work in the first place).

muddled.<sup>100</sup> The government has no comprehensive plan to address these “Americans in waiting,” and they consequently exist in a state of flux.<sup>101</sup> Although immigration reform continues to be a topic of great importance in the United States’ political system, Congress continuously fails to pass a legislative overhaul.<sup>102</sup> Additionally, while the Senate passed another comprehensive immigration reform bill in 2013, the House did not adopt the proposal, and Congress has not acted on immigration since then.<sup>103</sup>

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100. See, e.g., Memorandum from Jeh Charles Johnson, Sec’y, Dep’t Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigr. Servs., Thomas Winkowski, Acting Dir., U.S. Citizenship & Immigr. Servs., R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Protection, Exercising Prosecutorial Discretion with respect to Individuals Who Came to the United States as Children and with respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), available at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf), archived at <http://perma.cc/Y2LW-D42V> (expanding the class of individuals that will not be targeted for deportation); see also Complaint for Declaratory and Injunctive Relief at 26–28, *Texas v. United States*, No. 14120440 (S.D. Tex. Dec. 3, 2014), available at <https://www.texasattorneygeneral.gov/files/epress/files/20141203ImmigrationExecutiveOrderLawsuit.pdf>, archived at <https://perma.cc/CK3C-9JYU> (claiming that the expansion of the class of individuals that will not be targeted for deportation was unlawful and requesting that the court reverse the executive action).

101. Professor Hiroshi Motomura explains this term in full detail in his book of the same title. HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST HISTORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006). He argues that United States immigration policy, which is extremely complex and badly in need of reform, has created a distinction between citizens and noncitizens in a way that discriminates against even lawful immigrants, but substantially excludes unlawfully present individuals. *Id.* Motomura suggests that the United States must find a way to integrate its immigrant population. *Id.*

102. See, e.g., Rachel Weiner, *How Immigration Reform Failed, Over and Over*, WASH. POST (Jan. 30, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/01/30/how-immigration-reform-failed-over-and-over/>, archived at <http://perma.cc/53CV-MPKD>.

103. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (as passed by Senate June 27, 2013); Ashley Parker & Jonathan Martin, *Senate, 68 to 32, Passes Overhaul for Immigration*, N.Y. TIMES (June 27, 2013), <http://www.nytimes.com/2013/06/28/us/politics/immigration-bill-clears-final-hurdle-to-senate-approval.html>, archived at <http://perma.cc/3X7R-JWG7> (reporting that House Republicans were poised to reject the bill and are focused on narrower legislation that will not provide a path to citizenship for the United States’ 11 million undocumented immigrants). Notably, President Obama extended relief to millions of undocumented immigrants in November 2014 through several executive actions. Though broader than DACA, discussed *infra* note 149, the executive actions cover only a portion of the undocumented immigrants in the United States, and they primarily apply to parents or spouses of United States citizens or Lawful Permanent Residents. For descriptions of all of these actions, see *Fixing Our Broken Immigration System Through Executive*

Nevertheless, it is essential for the United States to develop and implement legislation to determine the legal status of climate migrants as they begin arriving in the country. If scholars have correctly estimated the number of climate migrants that will exist by 2050, the United States will face a rapidly increasing population of immigrants with no viable path to legal status, and potentially no inhabitable country to which they can return.<sup>104</sup> The current legal infrastructure, however, is inadequate to address even the existing immigrant population—let alone an enormous influx of climate migrants. Thus, the country must pass legislation to avoid swelling the ranks of undocumented immigrants whose illegal presence will contribute to costs and confusion in the United States.

Why does the current legal regime inadequately protect climate migrants? Section A will discuss refugee law, the most well-known protection for immigrants in the United States, and explain why it does not apply to climate migrants. Next, section B will discuss alternative legal protections that may be available, but which ultimately are inappropriate to address the influx of climate-displaced persons who lack legal status.

#### A. *Refugee Law and Asylum in the United States*

Refugee law in the United States largely tracks that of the 1951 United Nations Convention Relating to the Status of Refugees and the Convention's corresponding 1967 Protocol.<sup>105</sup> Under the Immigration and Nationality Act (INA) in the United States, a "refugee" is defined as:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is

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*Action – Key Facts*, DEP'T HOMELAND SECURITY, [http://www.dhs.gov/immigration-action?utm\\_source=hp\\_feature&utm\\_medium=web&utm\\_campaign=dhs\\_hp](http://www.dhs.gov/immigration-action?utm_source=hp_feature&utm_medium=web&utm_campaign=dhs_hp) (last published Jan. 5, 2015), archived at <http://perma.cc/VK5P-QX4K>.

104. See, e.g., Burkett, *The Nation Ex-Situ*, *supra* note 16; Aminzadeh, *supra* note 69.

105. See Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 137; see also Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter *Refugee Convention and Protocol*]; Biermann & Boas, *supra* note 28, at 73 n.52.

unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .<sup>106</sup>

The United States has not significantly altered this definition since the international community established it in 1951.<sup>107</sup> For an individual to show that she is a refugee, she must establish (1) past persecution or a well-founded fear of future persecution, (2) that is or was on account of one of the protected grounds listed in the definition, and (3) that the applicant was unable or unwilling to enlist government protection.<sup>108</sup> If an alien establishes that she is a refugee, an immigration judge or asylum officer may grant her application for asylum.<sup>109</sup>

It is generally settled that the definition of “refugee” in the United States does not apply to individuals or groups fleeing the environmental consequences of climate change.<sup>110</sup> The international community defined the term “refugee” and created the Convention and Protocol in the wake of World War II to protect victims of political, religious, and social upheaval.<sup>111</sup> This is why establishing refugee status requires

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106. Immigration and Nationality Act § 33(1), (2012) [hereinafter INA]; 8 U.S.C. § 1101(a)(42) (2012).

107. See Refugee Convention and Protocol, *supra* note 105.

108. INA § 33(1); 8 U.S.C. § 1101(a)(42).

109. *Id.* This Comment generally uses the term “refugee status” rather than asylum. The difference between these two forms of relief depends solely on where the applicant resides at the time she submits her application. The requirements for both are the same; in order to obtain asylum, a person must establish that she meets the definition of “refugee.” See Laura Hayes, *What’s the Difference Between U.S. Immigrant Refugees and Asylees?*, VISA NOW GLOBAL IMMIGR. (Oct. 22, 2013), <http://www.visanow.com/refugees-and-asylees>, archived at <http://perma.cc/DTX9-BW7B>. In addition, please note that this Comment will use the term “alien” only in Part III’s discussion of potential legal solutions. Under the INA, immigrant and non-immigrant are defined terms, and do not have their commonly understood meanings. Alien is also a term of art in the Act. It means any non-citizen, and is therefore the most applicable to the discussion in this Part. INA § 101(a)(3); 8 U.S.C. § 1101(a)(3) (“The term ‘alien’ means any person not a citizen or national of the United States.”).

110. Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 357 (2009); McAdam, *Environmental Migration*, *supra* note 23.

111. See OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *INTRODUCTORY NOTE*, UNITED NATIONS REFUGEE AGENCY, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES (2010).

proof of past persecution or a well-founded fear of future persecution.<sup>112</sup> It is difficult to argue that scarce resources, degraded economic and environmental conditions, or even increased political turmoil resulting from climate change, meet the standards of persecution as defined by the statute. Even if an asylum-seeker can prove persecution, she must also be able to show that it was “on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>113</sup> Discrete climate events are naturally occurring, even if those events subsequently contribute to the gradual degradation of environmental and economic conditions inside a country.<sup>114</sup> Therefore, such degradation is not “on account of” any of the listed factors.<sup>115</sup>

To prove that she is a refugee, an applicant must also demonstrate that she is unable to turn to her government for help.<sup>116</sup> The United States construes this requirement strictly, and is unlikely to grant asylum if the applicant did not suffer persecution “imposed by the government or by groups which the government is unable or unwilling to control.”<sup>117</sup> Thus, the applicant must name some identifiable actor as her persecutor.<sup>118</sup> Since neither climate change nor its consequences were imposed upon individuals by their own government or by a group that the government was unable or unwilling to control, it follows that these individuals will be unable to show that they are “refugees,” as defined by the statute.<sup>119</sup>

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112. See INA § 33(1); 8 U.S.C. § 1101(a)(42).

113. Refugee Convention and Protocol, *supra* note 105; INA § 33(1); 8 U.S.C. § 1101(a)(42).

114. See McAdam, *Environmental Migration*, *supra* note 23, at 4 (discussing the blurred distinction between natural and man-made disasters).

115. *Id.* at 12–13 (citing G. S. GOODWIN-GILL & J. MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 90–134 (3d ed. 2007)).

116. INA § 33(1); 8 U.S.C. § 1101(a)(42).

117. *Niang v. Gonzales*, 422 F.3d 1187, 1194 (10th Cir. 2005) (citing *Vatulev v. Ashcroft*, 354 F.3d 1207, 1209 (10th Cir. 2003)).

118. *Id.*; see also *Castro-Martinez v. Holder*, 674 F.3d 1073, 1081 (9th Cir. 2011).

119. It will be especially challenging for a citizen of any country that signed on to the Kyoto Protocol to show that her government was unable or unwilling to combat climate change. For further consideration of whether and how climate migrants could show that they are refugees according to United States refugee law, see Kara K. Moberg, *Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection*, 94 IOWA L. REV. 1107, 1119–26 (2009) (considering countries where the government has exacerbated environmental problems and the population could be considered one social group

Applicants for asylum in the United States face additional barriers beyond meeting the legal definition of refugee. For example, entering the country in the first instance is increasingly challenging, as the Department of Homeland Security (DHS) has the right to refuse entry at the border to any alien who does not claim persecution or request asylum.<sup>120</sup> In fact, since the terrorist attacks of September 11, 2001, the subsequent passage of the Patriot Act in 2001,<sup>121</sup> and the passage of the REAL ID Act in 2005,<sup>122</sup> securing both entry and legal status in the United States has become significantly more difficult.<sup>123</sup> Another restrictive act, the Illegal Immigration Reform and Immigrant Responsibility Act,<sup>124</sup> requires that an asylum applicant file within one year of arrival in the country.<sup>125</sup> This timeline does not adequately account for the fact that many refugees do not know how to apply or are unaware that they may qualify for this form of relief, and it imposes arbitrary constraints on potentially meritorious claims. The one year deadline, increased difficulty of entry, and the reduced number of applications granted post-9/11 have together caused the number of applications filed to decrease substantially.<sup>126</sup>

Most importantly, the United States grants asylum as a matter of discretion on a case-by-case basis.<sup>127</sup> If the government finds that a particular applicant's case merits both a finding of refugee status and an affirmative grant of asylum,

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but ultimately concluding that environmentally displaced persons could not qualify as refugees).

120. KERWIN, *supra* note 59, at 15–16; *see also* MIGRATION POL'Y INST., PILOT PROJECTS ON TRANSATLANTIC METHODS FOR HANDLING GLOBAL CHALLENGES IN THE EUROPEAN UNION AND THE UNITED STATES (2011), *available at* [http://eeas.europa.eu/us/grants/pilot\\_projects/conferences/2011/index\\_en.htm](http://eeas.europa.eu/us/grants/pilot_projects/conferences/2011/index_en.htm), *archived at* <http://perma.cc/M84Z-URMS>.

121. Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of the United States Code).

122. REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005).

123. KERWIN, *supra* note 59, at 12–13.

124. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat 3009-546 (1996).

125. INA § 208(a)(2)(B), 8 U.S.C. § 1158 (a)(2)(B) (2012).

126. KERWIN, *supra* note 59, at 12–13, 18.

127. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 428 n.5 (1987) (“It is important to note that the Attorney General is *not* required to grant asylum to everyone who meets the definition of refugee. Instead, a finding that an alien is a refugee does no more than establish that ‘the alien *may* be granted asylum *in the discretion of the Attorney General.*’”); INA § 208(a); 8 U.S.C. § 1158 (a)(2)(B)).

that decision can be limited to her unique situation.<sup>128</sup> The limit on the number of refugees the government will admit into the country each year further challenges asylum applicants.<sup>129</sup> Given the expected estimates of climate migrants that may come to the United States, refugee law in the United States is insufficient to handle the impending influx.

### *B. Alternatives to Refugee and Asylum*

Applying for asylum is not the only pathway to legal status in the United States for those fleeing the effects of climate change, although the few alternatives are limited in scope. Other alternatives include temporary protected status,<sup>130</sup> the executive branch's exercise of prosecutorial discretion,<sup>131</sup> applying for withholding of removal,<sup>132</sup> and humanitarian parole.<sup>133</sup> It is useful to review these potential alternatives to determine whether they apply or can be modified to address climate migrants.

#### 1. Temporary Protected Status

One option for climate migrants who move to the United States is temporary protected status (TPS). Under TPS, the Secretary of DHS<sup>134</sup> may grant temporary legal status and work authorization to immigrants for a predetermined period of time.<sup>135</sup> The Secretary may extend this period so long as the

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128. *Cardoza-Fonseca*, 480 U.S. 421.

129. Moberg, *supra* note 119, at 1128–29.

130. INA § 244(a)(1)(A), 8 U.S.C. § 1254a(a)(1)(A); KERWIN, *supra* note 59, at 23.

131. *See, e.g.*, Cox & Rodríguez, *supra* note 59 (describing the executive branch's authority over immigration law through prosecutorial discretion).

132. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A).

133. INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).

134. The INA uses the term “Attorney General.” This is a relic from when the Department of Justice had jurisdiction over immigration matters through the Immigration and Naturalization Service. Now that DHS has jurisdiction over immigration matters, the INA grants discretion to the Secretary of that agency every time it purports to grant discretion to the Attorney General. *See Organizational Chart*, DEP’T HOMELAND SEC. (Apr. 10, 2013), <http://www.dhs.gov/organizational-chart>, archived at <http://perma.cc/U6VV-RHAV>.

135. INA § 244(a)(1)(A), 8 U.S.C. § 1254a(a)(1)(A); KERWIN, *supra* note 59, at 23.

conditions that initially led to the designation persist.<sup>136</sup> Since TPS designation applies explicitly in cases of natural disasters, it would appear to be the ideal tool to grant climate migrants legal status in the United States.<sup>137</sup> In fact, the United States extended TPS to Haitians who lived in the United States after the devastating earthquake of 2010.<sup>138</sup> However, TPS has many shortcomings and limitations that render it insufficient for climate migrants' particular circumstances.

The most obvious limitation is that TPS only applies to individuals already present in the United States.<sup>139</sup> TPS would not cover someone attempting to enter the country at the border after fleeing her home in the wake of a severe or continuous climate event.<sup>140</sup> Thus, by definition, this legal status does not extend to climate migrants. However, even climate migrants already in the country will find fault with this form of relief. The Secretary may affirmatively grant TPS status to nations or groups of citizens from those nations that are suffering hardship after a significant climate event.<sup>141</sup> The Secretary *may* deem it appropriate to designate a country eligible for TPS pursuant to section 244 of the INA, but she is not required to do so, and a country may not affirmatively apply for TPS.<sup>142</sup> Further, the Secretary has explicit authority to decline to designate a country under section 244, even if it is suffering severe and adverse effects from climate change.<sup>143</sup> Even if a certain nation receives TPS designation under INA section 244, it still leaves permanently displaced climate migrants, such as nationals of inundated island nations, insecure because TPS status may be revoked as a discretionary matter.<sup>144</sup>

TPS has a number of other limitations as well. First, while

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136. KERWIN, *supra* note 59, at 23.

137. ADDRESSING CLIMATE CHANGE & MIGRATION IN ASIA & THE PACIFIC, *supra* note 41, at 59 box 8.

138. *Id.*

139. INA §§ 244(c)(1)(A)(i)–(ii), 8 U.S.C. §§ 1254a(c)(1)(A)(i)–(ii).

140. Note, however, that applicants for TPS must demonstrate that they were in the United States on the date TPS is extended, not on the date of the climate event. *Id.* Therefore, individuals who fled their country immediately after a climate event occurred could benefit from TPS if they reached the United States before the executive extended TPS status to that country.

141. KERWIN, *supra* note 59, at 23.

142. See INA § 244(a)(1), 8 U.S.C. § 1254a(a)(1).

143. See *id.*

144. INA § 244(b)(3)(B), 8 U.S.C. § 1254a(b)(3)(B).

aliens are designated under TPS, they may not travel freely outside the country, they are not considered to be permanently residing in the United States under color of law, and states may choose to withhold public benefits from them.<sup>145</sup> Second, the initial designation of TPS for any nation lasts between six and eighteen months, although the Secretary may extend this period if country conditions persist.<sup>146</sup> The Secretary may revoke this status at any time upon a finding that country conditions no longer call for a designation under Section 244.<sup>147</sup> Finally, Congress may choose to extend lawful permanent residence to TPS beneficiaries upon the expiration of their status, but this requires a supermajority of the Senate.<sup>148</sup> As a result, climate migrants would remain uncertain of the duration of their work authorization and legal status in this country. Because of its temporary, discretionary nature and limited scope, TPS is insufficient to address the potentially large and diverse influx of climate migrants.

## 2. Prosecutorial Discretion

Prosecutorial discretion is a decision on the part of the executive branch *not* to target certain unlawful aliens for removal if a substantial interest will not be served by pursuing the case.<sup>149</sup> In both 2011 and 2012, DHS issued memos calling for prosecutorial discretion on the part of immigration officers.<sup>150</sup> President Obama used this legal tool in 2012 to offer

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145. It should be noted that none of the limitations restricting immigrants with TPS apply to those granted refugee status. *See* INA § 244(h), 8 U.S.C. § 1254a(h) (requiring a supermajority in the Senate to offer path to citizenship for anyone granted relief under TPS by adjustment of status to that of lawful permanent residence); *see also* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 111 (explaining that refugees have a right to nonrefoulement, access to the domestic court system, access to education, and the right to travel documents issued by the host country).

146. INA §§ 244(b)(2)(B), (b)(3), 8 U.S.C. §§ 1254a(b)(2)(B), (b)(3).

147. INA § 244(b)(3)(B), 8 U.S.C. § 1254a(b)(3)(B).

148. INA § 244(h), 8 U.S.C. § 1254a(h). As recent events illustrate, reaching an agreement on any matter at all in the Senate is a difficult prospect. *Cf.* Rebecca Kaplan & Stephanie Condon, *Government Shutdown Begins: Congress Fails to Agree on Spending Bill*, CBS NEWS (Oct. 1, 2013), [http://www.cbsnews.com/8301-250\\_162-57605398](http://www.cbsnews.com/8301-250_162-57605398), archived at <http://perma.cc/4Y6W-Y6E6> (discussing the 2013 government shutdown caused by Congress's partisan divisions and its inability to reach agreement on the federal budget and whether to increase the debt limit).

149. KERWIN, *supra* note 59, at 23–24.

150. The 2011 Memo issued guidance as to who should exercise prosecutorial discretion, at what point, and what factors to consider in making the

relief from deportation to undocumented aliens who were brought into the country at a young age and met certain criteria.<sup>151</sup> As with President Obama's Deferred Action for Childhood Arrivals, an explicit grant of prosecutorial discretion acts as the executive branch's promise not to deport an individual.<sup>152</sup> A grant of prosecutorial discretion affords an alien work authorization, either automatically or after she submits an application.<sup>153</sup>

While prosecutorial discretion has many benefits, there are major challenges to using this legal mechanism to solve the plight of climate migrants. First, like TPS, it is temporary in nature.<sup>154</sup> The executive branch's application of prosecutorial discretion is subject to judicial challenge based on political differences between the legislative and executive branches of government.<sup>155</sup> Second, this form of relief is a policy but not a law; the government does not guarantee that an individual will

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determination. The 2012 Memo specifically directed the exercise of prosecutorial discretion where immigrants were brought into the country unlawfully as children. Memorandum from John Morton, Dir., U.S. Immigr. and Customs Enforcement, to Field Office Dirs., Special Agents in Charge, and Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) [hereinafter Morton Memo], *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>, *archived at* <http://perma.cc/GL33-NN3X>; Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David Aguilar, Acting Comm'r, U.S. Customs and Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship and Immigr. Servs., and John Morton, Dir., U.S. Immigr. and Customs Enforcement, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) [hereinafter DACA Memo], *available at* <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>, *archived at* <http://perma.cc/ZP6A-YVLK>.

151. For a list of these criteria, see DACA Memo, *supra* note 150.

152. *Id.*; *see also* Letter from Immigration Law Professors to President Obama, Exec. Auth. to Protect Individuals or Grps. from Deportation (Sept. 3, 2014), *available at* [https://pennstatelaw.psu.edu/\\_file/Law-Professor-Letter.pdf](https://pennstatelaw.psu.edu/_file/Law-Professor-Letter.pdf), *archived at* <https://perma.cc/4Q5B-BUV9>.

153. *See* Control of Employment of Aliens, 52 Fed. Reg. 16,216, 16,219 (May 1, 1987) (codified at 8 C.F.R. pts. 109, 274a).

154. David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 101 (2013) ("Executive immigration policy is subject to significant change with each new presidential inauguration." (citing Cox & Rodríguez, *supra* note 59, at 464)).

155. *See id.* at 137–39 (considering whether President Obama's use of prosecutorial discretion in his Deferred Action for Childhood Arrivals memo is or should be a constitutional use of the executive power in immigration law).

be safe from deportation.<sup>156</sup> Finally, aliens receive limited legal rights under prosecutorial discretion.<sup>157</sup> The memo that outlined the President's deferred action program explicitly acknowledged that it does not grant legal status.<sup>158</sup> Although it may be used to benefit a large group of aliens—unlike refugee law which is applied case-by-case—it nevertheless fails to adequately address climate migrants' legal status. Therefore, prosecutorial discretion is both fleeting and uncertain.

### 3. Parole

Parole is a legal fiction whereby aliens who are already present in the United States unlawfully are allowed to remain, and are treated as if they crossed the border lawfully.<sup>159</sup> The DHS Secretary may grant parole to individuals who do not meet the definition of a refugee if there is a "compelling reason in the public interest" to do so, or for urgent humanitarian reasons.<sup>160</sup> The executive branch may also use parole to admit otherwise ineligible immigrants, though Congress has attempted to limit this authority with language requiring a compelling reason for granting parole.<sup>161</sup>

For climate migrants, parole suffers from many of the same downfalls as TPS and prosecutorial discretion. Not only is it temporary, it is discretionary and does not confer on a beneficiary the same rights to which a lawful permanent resident or citizen would be entitled.<sup>162</sup> This form of relief is not widely granted, and is typically limited to exceptional circumstances.<sup>163</sup> Notably, even if the President grants parole to an entire population, Congress retains the authority to grant or withhold that population's adjustment of status to lawful permanent residents.<sup>164</sup> If Congress chooses not to pass legislation allowing for adjustment, the grant expires once the

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156. *Id.*

157. *See* DACA Memo, *supra* note 150.

158. *Id.*

159. KERWIN, *supra* note 59, at 24–25.

160. *Id.* at 25 (citing INA § 212(d)(5)(B)). Some examples of urgent humanitarian or compelling reasons include allowing an individual to receive treatment for a medical illness or to testify in a trial. *See id.*

161. Cox & Rodríguez, *supra* note 59, at 506 n.163.

162. *Id.* at 501–04.

163. *Id.* at 502–03 (explaining the President's use of humanitarian parole to admit large populations of unlawful Caribbean immigrants during refugee crises).

164. *Id.* at 504.

humanitarian crisis or purpose of the parole has subsided.<sup>165</sup> Additionally, since parole is at its core a form of prosecutorial discretion, any challenge to the executive's authority to favor certain groups over others using this legal tool will cast its legitimacy into doubt.<sup>166</sup> Therefore, parole is also insufficient to address incoming climate migrants in a consistent, efficient, and certain manner.

#### 4. Withholding of Removal

Another option, withholding of removal, is related to refugee law's principle of nonrefoulement, which suggests that a sovereign nation must not return an individual to another sovereign nation if she is likely to suffer persecution.<sup>167</sup> Withholding of removal requires the applicant to show that it is "more likely than not" that she will suffer persecution upon return to her home country on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>168</sup> This is a higher burden than an applicant for asylum must meet, and therefore involves overcoming the same challenges for climate change refugees.<sup>169</sup> As discussed above, refugee and asylum law are unlikely to apply to climate migrants. Thus, withholding of removal is also an inadequate legal tool for climate migrants.

Ultimately, the suite of immigration tools available today does not encompass climate migrants. These individuals do not clearly fall under any legal status in the United States. Although individuals may be able to use refugee law or parole to enter the country on a case-by-case basis, the current legal framework offers little flexibility to address large populations of climate migrants forced to leave their homes. The next question, then, is why and how the country must change its piecemeal approach to climate migrants and what elements it

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165. INA § 212(d)(5), 8 U.S.C. § 1182(d)(5).

166. See David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE 167, 174–75, 178–79 (2012) (arguing that if President Obama's Deferred Action for Childhood Arrivals program is an improper use of prosecutorial discretion then the executive's use of parole is as well).

167. See Compton, *supra* note 32, at 368–69.

168. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A); KERWIN, *supra* note 59, at 3. Note that these are the same grounds required to establish refugee status.

169. KERWIN, *supra* note 59, at 3.

should consider in drafting domestic legislation.

### C. Avoiding “Business as Usual” in the United States

Aside from human rights, there are significant practical justifications for the United States to enact domestic legislation to address the arrival of climate-displaced populations. First, the country already has a large population of undocumented immigrants.<sup>170</sup> This has created domestic political turmoil, as well as a large population that exists without legal rights or protection.<sup>171</sup> The country does not have the economic resources to process and deport climate migrants if they arrive in numbers approximating scholarly predictions.<sup>172</sup> Next, the fact that climate migrants may be fleeing completely uninhabitable countries means there may be no logical return country.<sup>173</sup> The subsections that follow will discuss these justifications for why the United States should enact legislation addressing the legal status of climate migrants before they arrive.

#### 1. The Undocumented Population and its Impacts

Undocumented climate migrants will cause political and economic disruption in the same manner as other undocumented immigrants, but on a much larger scale due to their much larger numbers. As discussed above, the United

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170. WALTER A. EWING, IMMIGR. POL’Y CTR., OPPORTUNITY AND EXCLUSION: A BRIEF HISTORY OF UNITED STATES IMMIGRATION POLICY 7 (2012).

171. See generally HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014) (discussing how the United States’ immigration laws created a large population of undocumented immigrants that live in the country with minimal legal protections and offering suggestions for how to resolve the problem).

172. See Morton Memo, *supra* note 150 (noting that, in 2012, the United States had sufficient resources to remove 4 percent of deportable or removable immigrants); Memorandum from John Morton, Dir., U.S. Customs & Immigr. Enforcement, to all Field Off. Dirs., all Special Agents in Charge, and all Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>, archived at <http://perma.cc/E6LH-DD23> (citing lack of resources as a justification for prioritizing only certain individuals for removal).

173. See Burkett, *The Nation Ex-Situ*, *supra* note 16, at 351–55 (discussing the unique plight of small island nations and the novel international legal questions that their dilemma raises).

States immigration policy<sup>174</sup> typically tracks periods of domestic economic conditions and immigration rates.<sup>175</sup> If history provides an accurate model for the future, large numbers of climate migrants arriving in the United States will significantly impact the country as a whole, as well as local communities. This may, in turn, spur anti-immigration policies that marginalize climate migrants.<sup>176</sup>

The government should try to integrate undocumented immigrants, including climate migrants, for many reasons. Marginalization imposes costs on the entire economy. The presence of a large, undocumented labor force in this country tends to degrade wages and conditions for unskilled jobs.<sup>177</sup> This hurts both United States citizens and immigrant populations. On the other hand, studies show that where immigrants are legally present, their participation in the economy has historically provided concrete economic benefits for the receiving country.<sup>178</sup> Additionally, although immigrants are often accused of taking citizens' tax dollars in the form of public welfare benefits, empirical evidence shows that they do not consume those resources at greater rates than citizens.<sup>179</sup> In fact, Professor Kevin Johnson points to the European welfare state to suggest that “[r]elatively easy access to benefits for immigrants in Europe . . . has not caused unduly negative fiscal impacts.”<sup>180</sup> Moreover, access to public benefits in the United States is often limited to citizens.<sup>181</sup> Thus, the fears that cause the country to close its borders are misplaced,

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174. See generally MARTIN, *supra* note 93.

175. See, e.g., Jack Citrin et al., *Public Opinion Toward Immigration Reform: The Role of Economic Motivations*, 59 J. POL. 858, 875 (1997) (finding historical links between restrictionist policies, immigrant impacts on local communities, and economic downturns).

176. *Id.* at 874–77.

177. See Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 226–30 (2003).

178. See *id.* at 233–44 (outlining the economic benefits of open borders).

179. *Id.* at 239–40; see also, e.g., Ian Macdonald, *Where Do Social Security Payments Made by Undocumented Workers Go?*, GREENBERG TRAUIG (Sept. 26, 2014), <http://www.gtlaw-insidebusinessimmigration.com/immigration-and-customs-enforcement-ice/where-do-social-security-payments-made-by-undocumented-workers-go>, archived at <http://perma.cc/H3M2-M3GK> (“According to the Social Security Administration (SSA) unauthorized workers are paying an estimated \$13 billion per year in social security taxes and are receiving about \$1 billion in return.”).

180. *Id.* at 239.

181. *Id.*

and the benefits of opening them go unrecognized.

If there are costs to having open borders, there are also substantial costs associated with enforcing restrictive immigration laws.<sup>182</sup> DHS, charged with enforcing immigration law in the United States, receives limited financial resources.<sup>183</sup> In fact, President Barack Obama cited budget constraints to justify exercising prosecutorial discretion for undocumented immigrants that came to the country as children.<sup>184</sup> An influx of climate migrants that far exceeds current rates of immigration has the potential to overwhelm the immigration enforcement system. Failing to economically and socially integrate undocumented immigrants is also likely to impose both economic and social costs by fracturing communities and creating a “shadow population” of unlawful aliens.<sup>185</sup> Society as a whole suffers the consequences of the existence of this population.<sup>186</sup> In sum, creating some legal

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182. See *supra* note 172 and accompanying text.

183. In 2012, President Obama decreased DHS’s budget for immigration enforcement. See Michele Waslin, *What the President’s 2013 Budget Means for the Administration’s Immigration Priorities*, IMMIGR. IMPACT (Feb. 21, 2012), <http://immigrationimpact.com/2012/02/21/what-the-presidents-2013-budget-means-for-the-administrations-immigration-priorities>, archived at <http://perma.cc/U38A-3BWL>; see also Rubenstein, *supra* note 154, at 105 (considering the possibility that the executive branch’s resource constraints justify prosecutorial discretion in some cases). To complicate matters further, Congress has threatened to withhold funding for immigration agencies based on political grounds. See Deirdre Walsh, Dana Bash & Ted Barrett, *Congress Barely Meets DHS Deadline*, CNN (Feb. 28, 2015), <http://www.cnn.com/2015/02/26/politics/dhs-shutdown-vote-republicans>, archived at <http://perma.cc/9UUS-7BXT>.

184. See DACA Memo, *supra* note 150 (“[A]dditional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases . . .”).

185. See MOTOMURA, *supra* note 101, at 151, 160–67; see also Johnson, *supra* note 177, at 216–18 (outlining the social harms of stigmatizing immigrants); see also Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1450 (2006) (citing Plyler v. Doe, 457 U.S. 202, 218–19 n.18 (1982)).

186. For example, when undocumented workers fail to report crimes to government officials, society on the whole suffers the costs. In fact, the government has explicitly acknowledged these costs by creating a special visa, called a U visa, that provides temporary relief from deportation for immigrant victims of crime that cooperate with police in investigations. The United States Customs and Immigration Service began issuing U visas in 2008, and there are 10,000 available each year. It has had more meritorious applications than available visas for the past five years. See USCIS Approves 10,000 U Visas for 5th Straight Fiscal Year, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 11, 2013), <http://www.uscis.gov/news/alerts/uscis-approves-10000-u-visas-5th-straight-fiscal-year>, archived at <http://perma.cc/ESK4-TAUT>; see also Kittrie, *supra* note 185, at 1454–55.

mechanism to integrate climate migrants before they arrive in the United States will maximize economic and social benefits to the country while minimizing costs.

## 2. Dealing with Disappearing Nations

Assuming that the United States declines to enact legislation for climate migrants and continues to rely on existing immigration law to address this problem, it will face the practical challenge of how to treat individuals whose homes become uninhabitable due to sea-level rise or other environmental disasters.<sup>187</sup> In many cases, the United States will have no logical country to which it could deport climate migrants.<sup>188</sup> It would be challenging to decide the meaning of “uninhabitable” in this instance. This Comment would grant Congress that responsibility by suggesting that it should define climate migrant narrowly and technically.<sup>189</sup> Focusing on an individual or population obviates the need to determine whether a nation itself is uninhabitable. If these populations benefitted from targeted prosecutorial discretion or one of the country’s other alternatives to refugee status,<sup>190</sup> they would still be subject to the potential issues outlined in Part II, including the temporary nature of the relief, the lack of access to public benefits and travel, and the legal hurdle of entering the United States.<sup>191</sup>

Moreover, dealing with climate migrants on a case-by-case basis would divide them into several different legal categories. The resulting complicated, piecemeal approach would lead to confusion for government officials, employers, and climate

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187. Professor Maxine Burkett outlines this dilemma, arguing that many low-lying island nations will become completely uninhabitable even before they are inundated. Even while acknowledging and respecting the desires of certain populations not to leave their homes, individuals from these island nations will be forced to do so. Professor Burkett proposes a unique solution to this dilemma, which is to treat the entire diaspora as a nation ‘*ex-situ*,’ that is, a nation without a territory. Domestic legislation enacted in the near future could nest effectively within this broader structure of de-territorialized nations. Burkett, *The Nation Ex-Situ*, *supra* note 16.

188. *See generally* Burkett, *In Search of Refuge*, *supra* note 25; ADDRESSING CLIMATE CHANGE & MIGRATION IN ASIA & THE PACIFIC, *supra* note 41, at 36 ¶ 163.

189. *See infra* Part IV.B.

190. *See supra* Part II.

191. *Id.*

migrants themselves as to their legal status, rights, and obligations. Deporting climate migrants on a case-by-case basis comes with its own problems. Not only would the United States need to find receiving nations for deportees, but such an approach would subject it to international human rights criticism.<sup>192</sup> Finally, the government is unlikely to have the resources to deport climate migrants in large numbers; those who are granted temporary relief would swell the ranks of an already-large population of undocumented immigrants.<sup>193</sup>

### III. LEARNING FROM THE INTERNATIONAL LEGAL SYSTEM

There are several international instruments and agencies that deal with the legal, political, and cultural issues of climate change-induced migration. For example, in its 1990 report, the Intergovernmental Panel on Climate Change (IPCC)<sup>194</sup> estimated that climate change-induced migration would pose grave and novel problems for the international community.<sup>195</sup> The IPCC has since reasserted this claim,<sup>196</sup> as have the International Organization for Migration,<sup>197</sup> the Inter-Agency Standing Committee,<sup>198</sup> and a variety of regional and national

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192. See Aminzadeh, *supra* note 69 (arguing that protecting climate migrants is a moral imperative according to international human rights law).

193. See *supra* note 172 (explaining that the government only has the resources to deport a fraction of the eleven million undocumented immigrants in the country).

194. The IPCC was established by the United Nations Environment Program (UNEP) and the World Meteorological Organization (WMO) in 1988 to assess the state of the climate and the risks of climate change.

195. See CLIMATE CHANGE: THE IPCC SCIENTIFIC ASSESSMENT 135 (1990), available at [http://www.ipcc.ch/ipccreports/far/wg\\_I/ipcc\\_far\\_wg\\_I\\_full\\_report.pdf](http://www.ipcc.ch/ipccreports/far/wg_I/ipcc_far_wg_I_full_report.pdf), archived at <http://perma.cc/9T7S-9BHL> (discussing some of these problems, including the issue of where climate migrants can find new homes, what rights they will have, and how to assist populations in nations suffering from climate change that cannot afford to move or adapt to its effects).

196. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 488 (2007), available at [http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4\\_wg2\\_full\\_report.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4_wg2_full_report.pdf).

197. See *Mission*, INT'L ORG. MIGRATION, <http://www.iom.int/cms/en/sites/iom/home/about-iom-1/mission.html> (last visited Nov. 9, 2013), archived at <http://perma.cc/H3J6-FNKU> (emphasizing the importance of integrating migrants into their new home states and facilitating cross-cultural communication to ease the burdens of migration on both migrants and society).

198. INTER-AGENCY STANDING COMM., IASC OPERATIONAL GUIDELINES ON THE PROTECTION OF PERSONS IN SITUATIONS OF NATURAL DISASTERS, INTER-

organizations.<sup>199</sup> Although there are many organizations and institutions weighing in on the matter, it is clear that there is no settled legal regime that specifically confronts the plight and status of climate migrants.<sup>200</sup>

The international legal community has debated several proposals. Although none will solve the unique plight of climate migrants in the United States, the proposals offer valuable ideas about which elements should be included in domestic immigration reform. This Part will briefly review the most relevant international proposals, which are based on refugee law,<sup>201</sup> environmental law,<sup>202</sup> or other forms of international law.<sup>203</sup> It will then demonstrate why domestic legislative action is nevertheless necessary.

#### A. *An International Treaty?*

Some scholars argue that climate migrants should be protected under an international treaty. A treaty would require signatories to resolve a number of issues, including how to define climate migrants, and what type of international mechanism would best address the issues they face. These

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AGENCY STANDING COMMITTEE (2011), available at <https://docs.unocha.org/sites/dms/Documents/Operational%20Guidelines.pdf>, archived at <https://perma.cc/LNR6-H5L3>.

199. For an assessment on climate-induced migration in the Asia-Pacific region, see ADDRESSING CLIMATE CHANGE & MIGRATION IN ASIA & THE PACIFIC, *supra* note 41. For an assessment of how climate-induced migration will impact the United States, see Feng et al., *supra* note 34. See also PETER SCHWARTZ & DOUG RANDALL, AN ABRUPT CLIMATE CHANGE SCENARIO AND ITS IMPLICATIONS FOR UNITED STATES NATIONAL SECURITY (2003).

200. Burkett, *The Nation Ex-Situ*, *supra* note 16; see also Jane McAdam, *Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not the Answer*, 23 INT'L J. REFUGEE L. 1 (2011) [hereinafter *Swimming Against the Tide*] (acknowledging that there is no international treaty addressing populations displaced by climate change but arguing that such a treaty is not the best solution).

201. Biermann & Boas, *supra* note 28, at 74 & n.64 (describing proposals to extend refugee status to climate migrants under the Refugee Convention and Protocol).

202. See generally *id.* (arguing that the international community should develop another protocol under the UNFCCC specifically to address climate migrants).

203. See Docherty & Giannini, *supra* note 110 (arguing for a separate international treaty addressing climate migrants); see also Burkett, *The Nation Ex-Situ*, *supra* note 16 (arguing for recognition of sovereign, deterritorialized nations composed of groups of climate change-displaced individuals with common identities).

international debates help inform the national discussion. Accordingly, this Comment discusses them briefly below.

### 1. Finding a Workable Definition

The international treaty discussion includes a debate over how to define climate migrants that could be very useful in the United States. The notion of an “environmental refugee” is generally credited to Essam El-Hinnawi of the United Nations Environment Programme (UNEP).<sup>204</sup> El-Hinnawi proposed the following definition:

[T]hose people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life [sic]. By ‘environmental disruption’ in this definition is meant any physical, chemical and/or biological changes in the ecosystem (or the resource base) that render it, temporarily or permanently, unsuitable to support human life.<sup>205</sup>

Although El-Hinnawi’s was the first definition of its kind, it has not settled the debate over who should be included.<sup>206</sup> Scholars point to at least five broad points of debate: (1) whether relocation is forced or voluntary,<sup>207</sup> (2) whether relocation is temporary or permanent,<sup>208</sup> (3) whether the relocation is within the home country or crosses national borders,<sup>209</sup> (4) whether the environmental harm causing the migration was anthropogenic or not,<sup>210</sup> and (5) whether the

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204. Docherty & Giannini, *supra* note 110, at 363.

205. *Id.* at 363 (quoting ESSAM EL-HINNAWI, ENVIRONMENTAL REFUGEES 4 (1985)).

206. See Docherty & Giannini, *supra* note 110; Biermann & Boas, *supra* note 28.

207. ESSAM EL-HINNAWI, ENVIRONMENTAL REFUGEES 4 (1985); NORMAN MYERS, ENVIRONMENTAL REFUGEES: AN EMERGENT SECURITY ISSUE 1 (2005), available at <http://www.osce.org/eea/14851>, archived at <http://perma.cc/F47K-M6HY>.

208. *Id.* (with opposing views).

209. EL-HINNAWI, *supra* note 207 at 4–5; MYERS, *supra* note 207, at 1.

210. EL-HINNAWI, *supra* note 207; Biermann & Boas, *supra* note 28 (suggesting environmental degradation unrelated to human activities be excluded).

environmental harm was gradual or sudden.<sup>211</sup> There is no consensus on how nations should resolve these issues. Notably, the international community has not reached a consensus regarding even the proper term to use to describe individuals and populations that relocate as a result of climate change.<sup>212</sup> This question has framed the international debate over who should receive protection as a climate migrant, and it will also frame the debate in the United States.

## 2. Proposals Under International Refugee Law

As in domestic law, refugee law is an area of international law that may be a useful tool for climate migrants. The United Nations Convention Relating to the Status of Refugees and its 1967 Protocol outline the law on international refugees.<sup>213</sup> The Convention defines a refugee as someone who:

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>214</sup>

The Convention also specifies the basic rights of refugees and the obligations of host nations.<sup>215</sup> These include access to education, the right to travel freely with travel documents issued by the host nation, access to the judicial system, and the right to work.<sup>216</sup> Additionally, host nations agree not to expel

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211. Biermann & Boas, *supra* note 28, at 67 (suggesting that sudden or gradual environmental degradation should be included in the definition).

212. *See supra* note 16 and accompanying text.

213. Refugee Convention and Protocol, *supra* note 105 (defining the term “refugee” and establishing international protections for persecuted individuals). The Refugee Convention and Protocol are binding because the United States is a party to both instruments, and explicitly adopted them and enacted laws to implement them in the United States. For more information on the Convention and Protocol, see *supra* Part III.A.

214. *See id.* Ch. I, art. 1(A)(2).

215. *See id.* Ch. II.

216. *Id.*; see also Compton, *supra* note 32.

or return refugees to their home country.<sup>217</sup> Despite the issues with refugee law as a solution for climate migrants in the United States discussed in Part II, at least one proposal suggests that the rights of climate change refugees should be outlined as a protocol under the United Nations Refugee Convention of 1951 or perhaps added as an amendment to the 1967 Protocol.<sup>218</sup>

### 3. Proposals Under International Environmental Law

Scholars have also considered basing protection for climate migrants on the international environmental law regime. The leading proposal would adopt a protocol under the UNFCCC.<sup>219</sup> Yet another proposal calls for a distinct United Nations International Convention.<sup>220</sup> Most environmental-law-based proposals share several features.<sup>221</sup> First, they presuppose that a top-down agreement set up and enforced by an organization rather than by individual nations according to their own standards, or a treaty with international participation is the best way to approach climate change.<sup>222</sup> Second, they recognize that a working definition of climate change refugees must be

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217. *See id.*

218. Biermann & Boas, *supra* note 28, at 74 nn.63–64.

219. *Id.* at 28. As discussed above, the UNFCCC was the international community's general commitment to reduce greenhouse gas emissions and address the impacts of climate change. The Kyoto Protocol was the binding agreement under the UNFCCC that set specific reduction requirements for each nation. *See supra* Part I.A.

220. Docherty & Giannini, *supra* note 110; Biermann & Boas, *supra* note 28. Such a proposal would require that the international community come together to create, negotiate, and implement an international convention on climate migrants. As they did with the Kyoto Protocol to the UNFCCC, the parties could implement binding protocols for the convention as needed.

221. There are several exceptions to the generalized discourse on migration that is attributable to climate change. *See* Maxine Burkett, *The Nation Ex-Situ*, *supra* note 16 (proposing the recognition of Nations *ex-situ*, that is, without sovereign territory, to address island nations that are rendered uninhabitable by climate change); McAdam, *Environmental Migration*, *supra* note 23 (arguing that a universal definition to describe those fleeing climate change may not be desirable, because it may stifle flexibility and sensitively tailored approaches to delineate the rights of displaced populations on a case-by-case basis); McAdam, *Swimming Against the Tide*, *supra* note 200 (suggesting a universal treaty is not the proper solution to the lack of legal status of those induced to relocate due to climate change).

222. *See, e.g.*, Docherty & Giannini, *supra* note 110; Biermann & Boas, *supra* note 28.

settled on in order to move forward in this process.<sup>223</sup> Third, the proposals have a sense of urgency, suggesting that scholars believe mass migration will occur, and that it will happen soon.<sup>224</sup> Last, most scholars insist that participation by individual sovereign nations, which have failed to implement domestic precautionary measures, is essential to the development of a comprehensive legal regime that protects the rights of climate migrants.<sup>225</sup>

### *B. The Failure of International Solutions*

The Montreal Protocol's success in eliminating ozone-depleting substances convinced many that an international treaty would be the best way to solve climate change and greenhouse gas emissions.<sup>226</sup> As Professor William Boyd explained in his article exploring the evolution of environmental law, both the UNFCCC and the Kyoto Protocol were modeled off the Montreal Protocol, and most scholars believed that they would be similarly successful in reducing emissions across the planet.<sup>227</sup> But the major issues with creating a legal regime based upon international law are that the process is slow and cumbersome, consensus is elusive, and enforcement is difficult. The international climate regime is composed of individual sovereign nations, each with its own goals and agenda.<sup>228</sup> For this reason, international climate governance since the Montreal Protocol has failed to address the biggest issues of environmental law.<sup>229</sup> Professor Boyd argues that despite the global nature of climate change, a global solution with a top-down climate change framework is unrealistic and unattainable.<sup>230</sup> Rather, problem solving in environmental governance should consist of "multiple actors coordinating through a variety of organizational forms."<sup>231</sup>

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223. *Id.*

224. Biermann & Boas, *supra* note 28.

225. McAdam, *Environmental Migration*, *supra* note 23, at 11.

226. William Boyd, *Climate Change, Fragmentation, and the Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage*, 32 U. PA. J. INT'L. L. 457, 485–86, 488 (2010).

227. *Id.* at 486.

228. *Id.* at 487, 489.

229. *Id.* at 492; JAMES GUSTAVE SPETH, *RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT* 96 (2004).

230. Boyd, *supra* note 226, at 496.

231. *Id.* at 504.

National regulatory systems thus fit nicely into such a cross-jurisdictional system, making it possible to solve a global problem where it might otherwise be impossible.<sup>232</sup>

Although Professor Boyd's article assessed the structure of global environmental law in the context of emissions rather than migration, it provides a useful lens through which to view new patterns of climate change-induced migration. An international, treaty-based system is likely unattainable in the near future, despite the imminent increase in substantial climate-induced migration.<sup>233</sup> One important question to ask is, "What examples of national, sovereign state law, bilateral agreements, and regional instruments could provide a roadmap for developing interlocking systems of complementary and temporary protections?"<sup>234</sup> This approach, like Professor Boyd's, recognized that the international community may not be able to craft and implement a timely solution to challenges such as climate migrants.<sup>235</sup> As Professor Jane McAdam suggested, focusing too narrowly on establishing a global treaty may allow difficult conversations—such as what the treaty would look like and who should bear the greatest responsibilities—to impede progress.<sup>236</sup> This would, in turn, shift the focus away from implementing alternative, more immediate solutions.<sup>237</sup> Professor McAdam points to the complexity and unsettled nature of the nexus between climate change and human migration as one of the major impediments to creating a comprehensive international mechanism to deal with this problem.<sup>238</sup>

Some scholars continue to argue that an international treaty is the best mechanism to address climate migrants.<sup>239</sup>

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232. *Id.* at 504 (citing Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 *ECOLOGICAL L.Q.* 615, 654–56 (2009)).

233. *See* Boyd, *supra* note 226, at 496 (explaining why international environmental treaties are difficult to realize and enforce).

234. Benjamin Glahn, 'Climate Refugees'? Addressing the International Legal Gaps—Part II, INT'L BAR ASS'N, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=3E9DB1B0-659E-432B-8EB9-C9AEEA53E4F6> (last visited Nov. 30, 2014), archived at <http://perma.cc/6JA9-W5MD>.

235. *Id.*; *see also* Robert Falkner et al., *International Climate Policy After Copenhagen: Towards a 'Building Blocks' Approach*, 1 *GLOBAL POL'Y* 252 (2010) (suggesting that the top-down, international approach to climate change from Rio to Kyoto and beyond has failed).

236. McAdam, *Swimming Against the Tide*, *supra* note 200, at 5–6.

237. *Id.*

238. *Id.*

239. *See, e.g.*, Biermann & Boas, *supra* note 28, at 74 nn.62–64 (discussing

For example, Professors Bonnie Docherty and Tyler Giannini from Harvard Law School called for a new climate change refugee convention.<sup>240</sup> They rejected a climate-migrant solution based on existing international treaties, arguing that these treaties were not created for the purpose of addressing climate migrants and therefore would not adequately fit their needs.<sup>241</sup> They emphasized that a new convention was needed because it could be interdisciplinary, bring attention to the problem, and promote the involvement of many actors in creating a flexible solution to fit the problem.<sup>242</sup> While their argument successfully identified the failures of other proposals, it failed to take into account the political challenges and long lag-time of implementing an international treaty in a fractured global community with competing interests. Negotiating a new treaty takes a substantial amount of time. Additionally, to reach an agreement, the parties might have to concede issues or take on obligations that they oppose. This could put their compliance with those obligations at risk. On the other hand, a variety of interlocking bilateral and multilateral agreements would be more flexible and give each party a sense of ownership over its own obligations.

Thus, because the process is lengthy and cumbersome, the United States cannot wait for the international community to reach consensus on climate migrants. Moreover, because they do not sufficiently address domestic conditions and politics, the United States cannot rely on international treaties to solve this problem. For these reasons, the United States must take responsibility and create its own solution for climate migrants.

#### IV. UNITED STATES LEGISLATION FOR CLIMATE MIGRANTS

As this Comment has demonstrated, the United States will

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support for extending the Geneva Convention's mandate to cover climate migrants and the German Advisory Council on Global Change's rejection of this solution, and ultimately arguing for a new protocol to the UNFCCC); Docherty & Giannini, *supra* note 110, at 391–402 (arguing for a climate change refugee convention independent of all established treaties or conventions); FABRICE RENAUD ET AL., CONTROL, ADAPT OR FLEE: HOW TO FACE ENVIRONMENTAL MIGRATION? 17 (2007), available at <https://www.ehs.unu.edu/file/get/3973>, archived at <https://perma.cc/D48K-S6XN> (arguing for a global convention on climate displacement).

240. Docherty & Giannini, *supra* note 110, at 391–402.

241. *Id.* at 391.

242. *Id.* at 392.

soon receive climate migrants in large numbers. As of January 2015, climate migrants are granted no legal status upon their arrival—a situation that will have substantial consequences. Although many scholars have suggested negotiating new international treaties to address this population's plight, the international community is unlikely to reach such a solution in the near future.

As a matter of practical and logistical importance, then, the United States must address the domestic legal status of climate migrants. This Part examines the recent legislation that one Senator introduced in Congress as an important starting point for the conversation about domestic legislation. Next, it demonstrates that this proposal is missing key elements to effectively address climate migrants. Finally, this Part describes the elements that any future legislation must include to adequately address the problems associated with climate migration.

#### A. *Senator Schatz's Proposal*

The sole proposal introduced in Congress suggesting how the United States should treat climate migrants was made by Brian Schatz, a Senator from Hawai'i.<sup>243</sup> His proposal took the form of an amendment to the comprehensive immigration reform bill that Congress considered in 2013, and it reads as follows:

SEC. 3413 Specific Consideration of Stateless Groups of Individuals.

Pursuant to Section 3405, the Secretary [of DHS], in consultation with the Secretary of State, may designate, as stateless persons, any specific group of individuals who are no longer considered nationals by any state as a result of sea level rise or other environmental changes that render such state uninhabitable for such group of individuals.<sup>244</sup>

The Senator's amendment goes on to require that the United States Comptroller General carry out a study on the

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243. 159 CONG. REC. S4710 (daily ed. June 19, 2013) (SA 1411 proposed by Sen. Brian Schatz at § 3413).

244. *Id.*

effects of climate change-induced migration within the United States on federal immigration policies and federal, state, and local social services.<sup>245</sup> The study would specifically investigate rates of internal migration from Alaska, Hawai'i, and territories of the United States, as well as assess the costs associated with internal and external climate change-induced migration and the legal status of climate migrants.<sup>246</sup> The proposed amendment to the immigration reform bill was not adopted, and the Senate passed the bill without that language.<sup>247</sup>

Senator Schatz's amendment would have allowed the DHS Secretary, in her discretion and in consultation with the Secretary of State, to designate as stateless persons, individuals, or groups who permanently and completely lost their homes, or whose homes were rendered uninhabitable by climate change.<sup>248</sup> Those individuals would then be entitled, also at the Secretary's discretion, to conditional lawful status, which would allow them to work, travel outside the United States, and apply for adjustment to lawful permanent resident status after one year.<sup>249</sup> The proposal's overarching goal was to create protection for climate migrants in the United States even if they cannot meet the narrow requirements of the definition of refugees.<sup>250</sup>

In his statement supporting the proposed amendment, Senator Schatz combined two different legal concepts to create protection for climate migrants. First, he mirrored the language that legal scholars typically use when discussing

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245. *Id.* § 3414(a).

246. *Id.* § 3414(b).

247. See Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. [hereinafter S.744] (as passed by Senate June 27, 2013).

248. 159 CONG. REC. S4710 (daily ed. June 19, 2013) (SA 1411 proposed by Sen. Brian Schatz at § 3413).

249. S.744 § 3405 (amending INA by adding § 210A, as passed by Senate June 27, 2013).

250. Rebecca Leber, *Amendment Would Give Legal Status to People Displaced by Climate Change*, THINKPROGRESS (June 20, 2013, 4:30 PM), <http://thinkprogress.org/immigration/2013/06/20/2187831/climate-refugee-immigration-bill>, archived at <http://perma.cc/4DFH-NSUQ> (“Schatz explained . . . [This amendment] simply recognizes that climate change, like war, is one of the most significant contributors to homelessness in the world. And like with states torn apart and made uninhabitable by war, we have an obligation not to deport people back to a country made uninhabitable by sea level rise and other extreme environmental changes that render these states desolate.”).

refugees.<sup>251</sup> He referred to climate migrants by analogizing the challenges that they face to those of refugees fleeing war-torn or politically ravaged countries.<sup>252</sup> However, he did not then go on to suggest that climate migrants should be eligible to qualify as refugees and therefore apply for asylum. Rather, he would have allowed the DHS Secretary to designate individuals that have been permanently displaced by climate change as “stateless persons.”<sup>253</sup> This designation depends on Congress’s passage of comprehensive immigration reform, since stateless persons, like climate migrants, are not currently recognized by United States immigration law.<sup>254</sup> In fact, Senator Schatz explicitly distinguished his proposed legal relief from asylum law in confirming that, like TPS, it would only apply to individuals already present in the United States.<sup>255</sup>

### 1. Merits of the Amendment

In many ways, the Senator’s amendment would have been a significant improvement over existing law. The amendment would have allowed applicants to apply for lawful permanent resident status, which, although it is not guaranteed, at least offers a path to stable legal status. It would also have allowed beneficiaries to travel outside of the United States.<sup>256</sup> TPS, in contrast, only allows beneficiaries to travel abroad with the prior consent of the Secretary.<sup>257</sup> The amendment would have granted stateless individuals the right to apply for work authorization, allowing them to live and work openly.<sup>258</sup> Finally, it would have allowed beneficiaries to extend their status to family members, which is not a benefit extended

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251. See 159 CONG. REC. S4670 (daily ed. June 19, 2013) (statement of Sen. Brian Schatz).

252. *Id.*

253. *Id.*

254. See S.744 § 3405 (amending INA by adding § 210A, as passed by Senate June 27, 2013) (defining stateless persons in the United States and granting legal status, work authorization, and travel documents to persons designated as stateless).

255. See 159 CONG. REC. S4670 (daily ed. June 19, 2013) (statement of Sen. Brian Schatz) (“[The amendment] does not grant any individual or group of individuals outside the United States with any new status or avenue for seeking asylum in the United States.”).

256. S.744 § 3405 (amending INA by adding § 210A(b)(6)).

257. INA § 244(f)(3), 8 U.S.C. § 1254a(f)(3) (2012).

258. S.744 § 3405 (amending INA by adding § 210A(b)(5)).

under TPS.<sup>259</sup> In sum, Senator Schatz's proposed amendment could have been a valuable tool for climate migrants because it extended many of the benefits that they would receive as refugees without labeling them as such.

However, the importance of the proposal lies not just in its substance (especially since it was not adopted in the final language of the bill, which only passed in the Senate) but in the message it conveys to Congress and to the country more generally. In addition to explaining the need to create legal status for climate migrants, Senator Schatz appeals to his fellow Congresspeople to continue the conversation he started and affirmatively address the plight of climate migrants in the United States.<sup>260</sup> The proposal acknowledges this problem and aims to start a political conversation about climate migrants by presenting potential legislation to meet their needs. However, it also seeks to encourage the United States to grasp the scope of this problem. In addition to presenting a possible solution for climate migrants, the Senator also requires the government to assess the impacts of climate change on its own at-risk populations.<sup>261</sup> The proposed language of Senator Schatz's amendment is beneficial for both climate migrants and the United States regardless of whether it is ultimately adopted or perfectly drafted because it advances new concepts and considerations that pertain to climate change.

## 2. Flaws of the Amendment

While the Senator's proposal is an important starting point, it has several flaws that must be corrected to comprehensively address climate migrants. First, and most importantly, it would leave climate migrants exposed to many of the same gaps that exist in current law. The proposal would be useful for climate migrants once they were within the

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259. TPS status is only extended to individuals currently residing in the United States, so it does not extend to family members who are residing outside of the country. INA § 244(c)(1)(A)(i), 8 U.S.C. § 1254a(c)(1)(A)(i).

260. See 159 CONG. REC. S4670 (daily ed. June 19, 2013) (statement of Sen. Brian Schatz) (“[W]ith the kinds of forward thinking and pragmatic policies I am proposing today, we can put the United States on a path to respond to the challenges the country will face, and help protect those communities most at risk. I look forward to working with my colleagues to advance this important effort.”).

261. 159 CONG. REC. S4710 (daily ed. June 19, 2013) (SA 1411 proposed by Sen. Brian Schatz at § 3414(b)).

borders of the United States, but it would not alleviate the challenges of actually entering the country.<sup>262</sup> Because only a “stateless person present in the United States” would be able to apply for conditional lawful status, individuals fleeing climate change would not receive any affirmative benefits until they were in the United States.<sup>263</sup> Such relief would incentivize illegal entry by promising an eventual benefit to climate migrants regardless of the manner in which they entered the country. Additionally, “stateless person” is defined as “an individual who is not considered a national under the operation or laws of any country.”<sup>264</sup> However, some individuals may be forced to leave their homes before their country ceases to exist or to function, and therefore, they may still be nationals of that country.<sup>265</sup>

Another notable issue with the proposed legislation is its discretionary nature.<sup>266</sup> As with TPS, the legislation could leave entire populations of climate migrants exposed to exclusion as a matter of discretion.<sup>267</sup> Moreover, the proposal’s language did not address whether legal status is permanent or revocable. Because many of the impacts of climate change will permanently affect a large proportion of the global population, the government may be incentivized to use this remedy sparingly so as to limit the number of incoming climate migrants. For example, unless inhabitants of coastal areas can successfully and permanently guard against the encroaching coastline, sea-level rise will displace large communities.<sup>268</sup>

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262. The amendment itself says nothing about entry into the United States. As discussed in KERWIN, *supra* note 59, refugees are increasingly facing challenges in crossing the borders into the country. A variety of mechanisms have made it more difficult, even for those who claim asylum at the border, to gain lawful entry into the country.

263. S. 744 § 3405 (amending INA by adding § 210A(b)(1)(A)).

264. *Id.* (amending INA by adding § 210A(a)(1)).

265. See Burkett, *The Nation Ex-Situ*, *supra* note 16, at 353 (“[W]hen island states are no longer inhabited and the population is permanently displaced to other countries, it is unclear whether those citizens will become stateless persons under international law or landless citizens of a state that no longer exists.”).

266. *Id.*

267. INA § 244, 8 U.S.C. § 1254a; see also *supra* Part II.B.1.

268. For example, certain members of island nations have already resettled within their own nations. In one article, Professor McAdam describes climate change-induced displacement in Bangladesh as primarily internal. Additionally, many inhabitants of Tuvalu and Kiribati have begun to arrange for labor-based migration to Australia and New Zealand. McAdam, *Swimming Against the Tide*, *supra* note 200, at 18–23.

Although Professor Jane McAdam points out that climate migrants are more likely to relocate internally in the short term, they will look outside of their home countries and move abroad as extreme and long-term weather events become increasingly severe.<sup>269</sup> If extreme disruption due to sea-level rise eventually causes widespread displacement, it will affect many nations around the globe.<sup>270</sup>

The utility of lawful conditional status as a stateless person is further constrained by the fact that a beneficiary of such relief does not automatically transition to permanent lawful resident status. In order to adjust her status, each climate migrant must affirmatively apply after one year of continuous presence in the United States.<sup>271</sup> The applicant must bear the burden of proving that she is a stateless person, meaning that she is not a national under the laws of any country, that she is otherwise admissible under United States immigration laws, and that she did not voluntarily lose her nationality.<sup>272</sup>

Even if she meets this burden, the Secretary of Homeland Security may deny the application at her discretion after consideration of all appropriate evidence.<sup>273</sup> If the Secretary denies the application for adjustment of status, the applicant may not appeal the decision.<sup>274</sup> At this point, unless the applicant qualifies for some other form of relief, she will be subject to deportation. This could discourage climate migrants from applying, lest they call attention to their unlawful presence. A further complication is the limit on the number of people that may receive lawful permanent resident status as a stateless person.<sup>275</sup> Furthermore, as is the case with TPS, the Secretary may terminate a designation of a group as stateless

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269. *Id.*

270. Sea-level rise is likely to be a slow-onset climate event, but it will displace many people in coastal settlements, especially those who are unable, due to lack of resources, to implement adaptive measures. Naser, *supra* note 26, at 723–25; INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 488 (2007), available at [http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4\\_wg2\\_full\\_report.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4_wg2_full_report.pdf).

271. S. 744 § 3405 (amending INA by adding § 210A(c)(2)).

272. *Id.* (amending INA by adding §§ 210A(a), (d), (e)).

273. *Id.*

274. *Id.*

275. *Id.* (amending INA by adding § 210A(c)(4)).

at any time.<sup>276</sup>

*B. Necessary Elements of United States Legislation*

To extend the appropriate protections while maintaining political feasibility, legal designation of climate migrants in the United States must have certain key elements.<sup>277</sup> Any domestic legislation that seeks to address climate migrants should establish a hybrid legal status that is based on asylum, conditional lawful status as a stateless person, and TPS. This Comment proposes the following guidelines for legislation to address climate migrants: Congress's first step should be to explicitly define "climate migrant," rather than to require climate migrants to be able to demonstrate that they are no longer considered a national of any state. Next, it should eliminate the discretionary nature of the applicable legal status. While this leaves room for substantial political criticism, setting stringent requirements on who qualifies for this relief may help mitigate concerns of excessive immigration rates. Finally, legislation addressing climate migrants must be available to individuals that reside outside the United States. This Part concludes by offering an alternative proposal that contains these elements.

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276. INA § 244(b)(3)(B), 8 U.S.C. § 1254a(b)(3)(B); S.744 § 3405 (amending INA by adding § 210A(c)(1)(B)).

277. This Comment acknowledges that the debate surrounding climate change science in the United States and the overall contentious political climate will present political obstacles to creating any sort of legal designation for climate migrants. To illustrate just some of the issues in this area, Senator Schatz's proposal was reported in the media and met with derision by many. *See, e.g.,* Staff, *Hot Mess: Proposed Amendment to Immigration Bill would Grant Legal Status to 'Climate Change Refugees'*, TWITCHY (June 20, 2013, 6:06 PM), [http://twitchy.com/2013/06/20/hot-mess-proposed-amendment-to-immigration-bill-would-grant-legal-status-to-climate-change-refugees/#disqus\\_thread](http://twitchy.com/2013/06/20/hot-mess-proposed-amendment-to-immigration-bill-would-grant-legal-status-to-climate-change-refugees/#disqus_thread), archived at <http://perma.cc/9D7L-F3AC> ("The craziness never stops."). Additionally, a recent comprehensive study reported differences in responses to climate change including rates of belief and willingness to change behaviors or enact legislation addressing climate change between Democrats, Republicans, and Tea Party Members. ANTHONY LEISEROWITZ ET. AL., *POLITICS & GLOBAL WARMING: DEMOCRATS, REPUBLICANS, INDEPENDENTS, AND THE TEA PARTY*, YALE PROJECT ON CLIMATE CHANGE COMMUNICATION 4 (2011). Democrats are the most willing to change behaviors and enact legislation, Republicans slightly less so, and Tea Party Members are generally opposed. *Id.*

### 1. Narrowly Tailored Definition

Policymakers in the United States can draw a definition for climate migrants from the current discourse in international law. Since passing legislation to address climate migrants in the United States will be politically challenging, any definition for climate migrants should be narrow in scope to respond to concerns that creating legal status for this population would invite a flood of immigration. In considering issues of political feasibility, Frank Biermann and Ingrid Boas propose a narrowly tailored definition of climate migrants.<sup>278</sup> They would define “climate refugees’ as people who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least one of three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity.”<sup>279</sup> This definition limits legal relief to climate migrants fleeing only particular types of climate change-induced natural disasters. It also limits legal relief to those whose *natural* environment becomes so degraded that they *have to leave*. Thus, it would not cover populations fleeing political or economic turmoil, nor would it cover people who could remain in their own countries but choose not to. Adopting this definition, with some adjustments for domestic implementation, offers a sufficiently narrow basis for reform.

The definition proposed above is superior to Senator Schatz’s definition for several reasons. Senator Schatz’s amendment similarly limited the element of causation in his definition of climate migrants, although his definition was slightly more restrictive.<sup>280</sup> His amendment would have extended relief only to those whose states had been rendered completely uninhabitable due to sea-level rise, or other environmental causes.<sup>281</sup> Limiting the definition as Senator Schatz proposed would necessarily have excluded many climate

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278. Biermann & Boas, *supra* note 28, at 63–67.

279. *Id.* at 67. To see which extreme weather events would qualify, see *id.* at 67–69 (describing extreme weather events to include cyclones, tropical storms, floods, and describing drought and water scarcity to include desertification of land or salinization of water).

280. There is no record as to why Senator Schatz’s proposed amendment was not adopted.

281. 159 CONG. REC. S4710 (daily ed. June 19, 2013) (SA 1411 proposed by Sen. Brian Schatz at § 3413).

migrants, although it would have covered those most in need of some legal status in a country that is not their own. Senator Schatz's proposal, however, would not have included those climate migrants in need of temporary relocation.<sup>282</sup> If the definition were limited to only permanent climate migrants, then those who could not convince the United States government that they were here to stay would be unreasonably excluded and might attempt to enter the country illegally.

There are at least two major challenges with adopting Biermann and Boas's definition. First, it may be difficult for individuals to prove that they meet the definition's requirements. As with refugee status, relief may be granted or denied based solely on the whims of the official who reviews the application.<sup>283</sup> However, many forms of immigration relief under the INA mirror this procedure.<sup>284</sup> The system addresses this potential problem by creating a strict set of criteria for each form of relief, and this approach could work for climate migrant legislation as well. The legislature could adopt Biermann and Boas's definition of climate migrant but define each element in detail via law or regulation. If the requirements are clear and strict, individual officials have less discretion to act arbitrarily or out of bias. Creating a strict set of criteria would also solve the second challenge. Some will argue that this definition is too expansive, and therefore that it is both unclear and not politically feasible. However, if the legislation explicitly lists the definition's requirements, as the INA does with the requirements of refugee status,<sup>285</sup> this relief for climate migrants will be limited and clear. It will address the needs of climate migrants while simultaneously addressing political concerns.

## 2. Mandatory Application

If a climate migrant meets her burden of proving she satisfies the required elements, the determination of her legal status should be mandatory rather than discretionary. As with

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282. Biermann & Boas, *supra* note 28, at 63–66.

283. *See supra* Part II.A (discussing the requirements and process to apply for refugee status).

284. *See supra* Part II.B (discussing discretionary nature of many forms of immigration relief in the United States).

285. *See supra* note 106 and accompanying text.

Senator Schatz's proposed legislation, an applicant for relief as a climate migrant would still bear the burden of proving that she meets the statutory definition. However, once she does so, the DHS Secretary would be required to grant lawful status on that basis. The Secretary should also be authorized to issue a blanket grant of lawful status to climate migrants who are affected by a particular climate event. For example, if sea-level rise rendered an island nation entirely uninhabitable, the Secretary could grant lawful status to all island inhabitants as opposed to adjudicating each individual's application on a case-by-case basis.

Many critics will claim this protection goes too far, and that the Secretary should have the authority to grant or deny relief at her discretion. This Comment acknowledges this political difficulty; however, the provision would lose much of its value and force if relief for climate migrants were discretionary. As with setting clear standards in implementing the definition of "climate migrant," making relief mandatory would reduce the risk that individual officers could grant or deny relief without justification. To make the mandatory nature of the legislation more politically palatable, however, the narrowly tailored definition would sufficiently limit the number of people that would qualify for relief.

### 3. Complete Refugee Rights

As discussed above, it is also necessary for any proposal to explicitly grant the climate migrants all the legal rights of refugees, including the right to work and the right to travel freely both within and outside of the country.<sup>286</sup> None of the existing forms of relief in immigration law extend such comprehensive rights to individuals who do not qualify as refugees under the INA. However, climate migrants and refugees are similarly situated due to the difficulty for individuals from either group to return to their home country. The creation of an entirely new legal classification for this class of people would allow policymakers to tailor legislation to climate migrants' unique circumstances and still provide the maximum amount of protection.<sup>287</sup> Such a step is necessary to

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286. Compton, *supra* note 32, at 368–72 (describing the rights extended to refugees in international law).

287. This idea is not novel. At least one scholar argues that extending refugee

integrate climate migrants into the United States.

Ensuring that domestic climate migrant legislation includes these key elements will help to prevent both illegal entry and the creation of second-class citizens.<sup>288</sup> It provides a path to integration that will maximize the benefits to both the United States and the incoming climate migrant populations.<sup>289</sup> Finally, it will decrease uncertainty for both climate migrants and government officials, ensuring a smooth transition and minimizing political turmoil. Thus, legislation that creates legal status for climate migrants should take the form of a new mechanism under United States immigration law that would be a hybrid of existing protections for immigrants in dire circumstances.

It will not be easy to pass such legislation. Congress continues to struggle to pass any kind of meaningful legislation, and immigration reform is particularly controversial.<sup>290</sup> There was no indication as to why Senator Schatz's proposed amendment was not incorporated into the final immigration bill passed by the Senate, but public reactions illuminate possible objections.<sup>291</sup> Nevertheless, this Comment's proposal serves as a starting point for examining not just the big picture, but also the particular details of a legislative approach to climate migrants in the United States, and continues the discussion that Senator Schatz started.

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status fails to adequately protect climate change refugees and also disrupts the existing protection for political refugees and asylees, at least in part due to restrictions on the amount of refugees that may be admitted to the United States each year. *See generally* Moberg, *supra* note 119.

288. *See supra* note 185 and accompanying text.

289. *See, e.g.*, Katrina M. Wyman, *The National Immigration Policy Option*, in *THREATENED ISLAND NATIONS* (Michael B. Gerrard & Gregory E. Wannier eds., 2013) (arguing that climate change-induced migration can result in mutual benefits for migrants and receiving nations).

290. *See supra* note 231 and accompanying text.

291. *See, e.g.*, Rick Moran, *Granting Asylum to Illegal Immigrants Because of Climate Change?*, AM. THINKER (June 21, 2013), [http://www.americanthinker.com/blog/2013/06/granting\\_asylum\\_to\\_illegal\\_immigrants\\_because\\_of\\_climate\\_change.html](http://www.americanthinker.com/blog/2013/06/granting_asylum_to_illegal_immigrants_because_of_climate_change.html), *archived at* <http://perma.cc/X45Q-92LD> (describing the amendment as “nutty” and stating, “The amendment won’t pass, but introducing it shows just how anti-science many global warming supporters truly are.”); Nicki, *ORLY?*, LIBERTY ZONE (June 21, 2013), <http://thelibertyzone.com/tag/brian-schatz>, *archived at* <http://perma.cc/93HE-TSWG> (describing the amendment as “idiocy” and stating, “[The bill] would pretty much allow anyone claiming ‘stateless’ status to enter the country.”).

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#### 4. An Alternative to Senator Schatz's Amendment

Taking the aforementioned elements into account, this Comment proposes legislation similar to that outlined below:

##### Climate Displaced Person. —

(1) In General.—In this section, the term ‘climate displaced person’ means an individual who is outside of his or her home country and is unable to return because the country has been rendered uninhabitable by sea level rise, drought and water scarcity, or extreme weather events of such magnitude and recurrence as defined in subsection (c)(1) of this Section.

##### Status of Climate Displaced Persons.—

(1) Relief for certain individuals determined to be stateless persons.—The Secretary of Homeland Security shall provide conditional lawful status to an alien who is otherwise inadmissible or deportable from the United States if the alien—

(A) is a climate displaced person present in or seeking admission to the United States;

(B) applies for such status;

(C) has not permanently resettled in another country;

(D) is not inadmissible under section 212(a); and

(E) is not described in section 241(b)(3)(B)(i).

(2) Waiver.—The Secretary or the Attorney General may waive any provisions of this Section, including subsection (c) herein, with respect to such an alien for humanitarian purposes, to assure family unity, or if it is otherwise in the public interest.

(3) Work authorization.—The Secretary of Homeland

Security shall authorize an alien who has applied for and is found prima facie eligible for, or has been granted, relief under paragraph (1) to engage in employment in the United States.

(4) Travel documents.—The Secretary shall issue appropriate travel documents to an alien who has been granted relief under paragraph (1) that would allow him or her to travel abroad and be admitted to the United States upon return, if otherwise admissible.

(5) Treatment of spouse and children.—The spouse or child of an alien who has been granted conditional lawful status under paragraph (1) shall, if not otherwise eligible for admission under paragraph (1), be granted conditional lawful status under this section if accompanying, or following to join, such alien if—

(A) the spouse or child is admissible and is not described in section 241(b)(3)(B)(i); and

(B) the qualifying relationship to the principal beneficiary existed on the date on which such alien was granted conditional lawful status.

This proposed text excludes much detail—such as a list of qualifying environmental conditions—but the essential elements are present.<sup>292</sup> The section explaining adjustment of status could remain the same as that outlined in section 3405 of the Senate’s recent proposal for comprehensive immigration reform.<sup>293</sup> Additionally, the minimum specific environmental conditions present in a particular country for a climate migrant to be considered a “climate displaced person” should be enumerated. Lest that clause be used excessively to exclude individuals, the waiver provision would allow for increased flexibility for climate migrants to be admitted to the country under the statute, absent the enumerated environmental

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292. An additional heading for the bill should address Qualifying Environmental Conditions, but it is beyond the scope of this Comment. This section could be used to include additional qualifying weather events and qualifying conditions, as referenced in the model legislation’s section (a)(1).

293. S.744 § 3405 (amending INA by adding § 210A(c)).

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conditions. Though the statute outlined above is merely a draft, in proposing such legislation, this Comment seeks to add to the conversation that Senator Schatz started and proposes an alternative solution to the lack of legal status for climate migrants in the United States.

#### CONCLUSION

As a matter of practical, logistical, and ethical importance, the United States must develop a unique legal status for climate migrants. The rate of climate change-induced migration is already substantial and is likely to rise. Furthermore, the United States will receive a large portion of future climate migrants. As the number of undocumented and unauthorized immigrants already stresses the domestic political system, it would be unwise to leave the many new arrivals with no legal status and no path to citizenship. Any legislation passed by the United States should be included in a new immigration bill, which has been, and is likely to continue to be, a matter of great importance in Congress. Finally, this legislation should be narrowly tailored, in order to address the needs of climate migrants without creating political obstacles. Once in place, the United States could integrate and link its domestic policy with a future international treaty. If the international community does not reach a consensus or implement such a treaty, the domestic policy in the United States will simply be part of the expanding network of national and bilateral mechanisms that, when combined, properly protect climate migrants.