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Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time

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PUBLIC NUISANCE SUITS FOR THE CLIMATE JUSTICE MOVEMENT: THE RIGHT THING AND THE RIGHT TIME

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Abstract: The climate justice movement seeks to provide relief to vulnerable communities that have been disproportionately affected by climate change impacts. Public nuisance litigation for climate change impacts is a new and growing field that could provide the legal and policy underpinnings to help secure a viable foundation for climate justice in the United States and internationally. By securing victories in the court system, these suits may succeed where the domestic environmental justice movement failed in seeking to merge environmental protection and human rights concerns into an actionable legal theory. This Article first examines the nature and scope of the climate change impacts that are affecting vulnerable populations throughout the world. It then traces the evolution of public nuisance claims for climate change impacts, discusses the *Native Village of Kivalina v. Exxon Mobil Corp.* case as a turning point in the evolution of these claims, and considers what obstacles remain on the path toward success for *Kivalina* and similar suits in the United States and abroad. The *Kivalina* case involves the right set of facts and legal theories to afford a remedy to victims who are disproportionately affected by climate change. Ultimately, the *Kivalina* litigation could help to institutionalize climate justice claims as part of the post-Kyoto Protocol framework by recognizing a private right to be free from climate change impacts that threaten the sustainability of vulnerable communities.

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INTRODUCTION

Climate change is here to stay. The questions of whether climate change is happening and what the international community can do to respond to it are no longer the predominant focus of domestic and international climate change law and policy discussions. The international community made significant progress in addressing the global climate change problem with the Kyoto Protocol,[1] which

1. Kyoto Protocol to the United Nations Framework Convention on Climate Change, *opened for signature* Mar. 16, 1998, 2303 U.N.T.S. 148 (*entered into force* Feb. 16, 2005).

responded to the causes of global climate change with ambitious targets and timetables for the parties' reduction of greenhouse gas emissions.[2]

However, ratifying the Kyoto Protocol, a controversial and multi-faceted instrument, was only the first step in tackling this daunting and omnipresent global crisis. The international community is now confronting an indefinite "period of consequences"[3] from climate change impacts. Accordingly, the new question at the forefront of the climate change policy debate in the post-Kyoto era[4] is what legal remedies will be most effective to *mitigate* and *adapt* to these impacts.[5]

In the context of climate change adaptation, the climate justice movement has emerged as a mechanism to address the rights of the victims of climate change impacts.[6] Climate justice embraces a human rights approach to advocating for rights and remedies for climate change.[7] Rather than focusing on the climate change phenomenon itself, climate justice focuses on the rights of those disproportionately affected by the impacts of climate change.[8] The challenge in seeking to

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2. *Id*., art. 3.

3. Ken Alex, *A Period of Consequences: Global Warming as Public Nuisance*, 26A STAN. ENVTL. L.J. 77, 77 (2007).

4. The Kyoto Protocol expires in 2012. Kyle W. Danish, *The International Regime*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW 31, 31 (Michael B. Gerrard, ed., Am. Bar Ass'n 2007). The international community's first step toward developing a post-Kyoto treaty regime is embodied in the Copenhagen Accord, which was drafted in December 2009 at the Fifteenth Conference of the Parties to the United Nations Framework Convention on Climate Change. Though merely a non-binding political agreement, the Accord reflects the shift in focus to adaptation by recognizing the disproportionate climate change impacts that developing countries now endure and establishing a fund to address adaptation to those impacts. *See* U.N. Framework Convention on Climate Change Conference of the Parties, Copenhagen, Den., Dec. 7–19, 2009, *Copenhagen Accord*, arts. 1, 2, 3, 6, 7, 8, and 10, U.N. Doc. FCCC/CP/2009/L.7 (Dec. 18, 2009), *available at http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf#page=4.pdf* [hereinafter Copenhagen Accord].

5. David Hunter, *The Implications of Climate Change Litigation for International Environmental Law-Making, in* ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 357, 358 (William C.G. Burns & Hari M. Osofsky eds., 2009).

6. For a discussion of the basic principles of the climate justice movement, see generally Alice Kaswan, *Justice in a Warming World*, 26 ENVTL. FORUM 48, 48–70 (2009).

7. *See generally* Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625 (2007) (arguing for recognition of an indigenous right to environmental self-determination, which would allow indigenous peoples to maintain their cultural and political status in their traditional lands and would impose affirmative requirements on nation-states to engage in a mitigation strategy to avoid catastrophic harm to indigenous peoples).

8. *See generally* Sara C. Aminzadeh, *A Moral Imperative: The Human Rights Implications of Climate Change*, 30 HASTINGS INT'L & COMP. L. REV. 231 (2007); Sumudu Ataputtu, *Global Climate Change: Can Human Rights (and Human Beings) Survive This Onslaught?*, 20 COLO. J. INT'L ENVTL. L. & POL'Y 35 (2008); Jessie Hohmann, *Igloo as Icon: A Human Rights Approach to Climate Change for the Inuit?*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 295 (2009); Int'l Council on Human Rights, *Climate Change and Human Rights: A Rough Guide* (2008),

implement a human rights-based response to this problem is that such an approach is notoriously difficult to enforce, both domestically and internationally.

The climate justice movement stands to gain a great deal if it could use common-law enforcement mechanisms as a bootstrap to lay a foundation for a codified framework of climate justice rights and remedies in domestic and international law instruments. Legislative responses at the national and regional levels that implement cooperative international solutions to the climate change problem are best, but such solutions take time and leave gaps. For example, the negotiations for the post-Kyoto regime will likely address climate justice concerns at some level, but will inevitably leave gaps regarding how victims of climate change impacts may seek recourse to protect their rights to self-determination.[9]

At least in the near future, common law mechanisms will continue to be the most viable options to ensure adequate forms of relief for the victims of climate change impacts in the United States and elsewhere. Public nuisance claims have been one of the most prominent forms of common-law-based climate change litigation. These suits have evolved in three stages, which are reflected in several cases. The first stage in this sequence involved a suit by state attorneys general on behalf of citizens against major power companies for injunctive relief to reduce greenhouse gas emissions.[10] The second stage involved the same class of plaintiffs—state attorneys general led by California—against major automobile manufacturers for damages for climate change impacts in California.[11] Currently, the third stage, and most important for purposes of this Article, involves suits by individual plaintiffs for climate change impacts that they experienced directly in the wake of Hurricane Katrina,[12] and in the form of coastal erosion impacts in the Native Village of Kivalina, Alaska.[13]

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http://www.ichrp.org/en/projects/136.

9. For example, after years of negotiations focusing on climate change adaptation concerns in developing countries, the Copenhagen Accord drafted in December 2009 only scratched the surface of the climate change adaptation challenges that developing countries now face. *See* Copenhagen Accord, *supra* note 4. For a discussion of the relevant provisions of the Copenhagen Accord and how they leave much to be desired in providing viable climate justice relief, see *infra* Part IV.B.

10. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009). For a discussion of *Connecticut v. American Electric Power Co.*, see *infra* Part II.B.1.

11. California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). For a discussion of *California v. General Motors Corporation*, see *infra* Part II.B.2.

12. Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009). For a discussion of *Comer v.*

Public nuisance suits for climate change impacts have been controversial to say the least. Public nuisance suits seeking damages from lead paint manufacturers, when applied in the climate change litigation context, have been referred to as "alchemy in the courtroom"[14] and, in a related vein, as "[p]erhaps the most innovative but problematic litigation strategy being pursued."[15] Nevertheless, public nuisance suits in the climate litigation context can help the cause of climate justice by helping to secure human rights-based relief for those disproportionately affected by climate change impacts.[16]

Part I of this Article examines the nature and scope of climate change impacts to vulnerable populations throughout the world and how the climate justice movement emerged to respond to the plight of these victimized populations. Part II traces the evolution of public nuisance claims for climate change issues, beginning with the federal common law of interstate pollution as the foundation for such claims. Part III discusses the *Kivalina* case[17] as a turning point in public nuisance claims for climate change impacts. It first addresses how the plaintiffs' litigation strategy in *Kivalina* builds on and learns from the public nuisance cases that preceded it, and then considers what obstacles remain for *Kivalina*-like litigation to be viable in the future.

Part IV concludes that the *Kivalina* case involves the right set of facts and legal theories to afford a remedy to this class of victims of climate change impacts without opening the door too far for future litigants. Theories of relief originally enshrined in successful, albeit piecemeal, common law actions represent a small and necessary first step to sound a warning bell and provide some relief to vulnerable populations affected by climate change impacts. More importantly, the *Kivalina* case also could help lay a foundation for possible long-term, institutionalized frameworks at the international level to address on a broader scale the rights of populations disproportionately affected by climate change. Such an opportunity could mirror and capitalize on the evolution of

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Murphy Oil USA, see *infra* Part II.B.3.

13. Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009).

14. Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 941 (2007).

15. Kevin Haroff & Jacqueline Hartis, *Climate Change and the Courts: Litigating the Causes and Consequences of Global Warming*, 22 NAT. RESOURCES & ENV'T 50, 55 (2007–2008).

16. Hunter, *supra* note 5, at 357, 360. *But see* Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. COLO. L. REV. 701, 701 (2008) (discussing the Inuit as strong plaintiffs and electric companies as vulnerable defendants, and how even with those ideal parties the prospect of successful climate litigation is bleak).

17. *Kivalina*, 663 F. Supp. 2d 863.

citizen suits under federal environmental laws by institutionalizing a private right to be free from climate change impacts that threaten the sustainability of vulnerable communities in a post-Kyoto world.

I. CLIMATE CHANGE IMPACTS AND THE NEED FOR THE CLIMATE JUSTICE MOVEMENT

This section of the Article first considers the nature and scope of climate change impacts on vulnerable populations throughout the world. It then examines the evolution of climate justice and traces its origins to the environmental justice movement in the United States and to the ever-increasing interplay between human rights and the environment in international law.

A. The Nature and Scope of Climate Change Impacts on Vulnerable Populations

Devastating climate change impacts have been projected for some time now. In 2000, scientists predicted temperature increases of up to 10.8 degrees Fahrenheit and sea levels rising thirty-one inches in the next century.[18] These escalations were attributed to heat-trapping emissions from industrial pollution and car exhaust.[19] Effects of this trend include, for example, atolls becoming inundated, coral reef erosion, rising seas threatening fresh water supplies, destruction of infrastructure, and intensified storm systems.[20]

These predictions have become a reality. In fact, for some vulnerable areas and populations, it is already too late for a meaningful legal response to climate change impacts. For example, Lohachara Island, in India's part of the Sundarbans, was the first inhabited island to be claimed by rising seas; this left 10,000 inhabitants homeless.[21] In addition, some of the uninhabited islands of Kiribati, a Pacific atoll nation, and Suparibhanga, Lohachara's neighbor, have been lost.[22] One-half of the populated island of Ghoramara also has been permanently inundated, and more of the island is expected to be inundated in the near

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18. Jerome Socolovsky, *Island Nations Desperate for Action on Global Warming*, ASSOCIATED PRESS, Nov. 17, 2000, http://www.commondreams.org/headlines/111700-01.htm.

19. *Id.*

20. *Id.*

21. Geoffrey Lean, *Disappearing World: Global Warming Claims Tropical Island*, THE INDEPENDENT, Dec. 24, 2006, http://www.independent.co.uk/environment/climate-change/disappearing-world-global-warming-claims-tropical-island-429764.html.

22. *Id.*

future.[23] In total, a dozen islands, inhabited by 70,000 residents, are considered to be in danger of being swallowed by the sea.[24] Other areas in the Indian Ocean are similarly threatened by climate change impacts. Waves threaten the coastline of Zanzibar,[25] and Bangladesh bears the risk of overflowing rivers and rising seas.[26] In the Maldives alone, sixty percent of the 194 inhabited islands of the archipelago are currently facing varying degrees of erosion.[27]

These climate change impacts also threaten other low-lying areas of the world. In the North Sea, Sylt, the largest German Frisian island, has lost 800,000 cubic meters of sand from its beaches.[28] In the Pacific Ocean, Micronesia has lost islets; Fiji is experiencing reduced rainfall, coastal erosion, and coral bleaching; an eight-foot sea wall cannot prevent an airport from flooding in the Marshall Islands; and populations are being displaced in Vanuatu and Tuvalu.[29]

Should global warming continue at its present rate, an estimated 2,000 Torres Strait Islanders would be displaced to the Australian mainland later this century.[30] Global sea levels are projected to rise twenty-six to fifty-nine centimeters by 2100.[31] The islands are highly susceptible to these proposed conditions due to their low elevation, some parts only being one meter above sea level.[32] The Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment Report determined that the Torres Straits will be among the "most vulnerable regions" to climate change in Australia.[33]

The indigenous peoples of Australia also must confront the harsh realities of global warming. Current climate projections for the next fifty

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23. Somini Sungupta, *Sea's Rise in India Buries Islands and a Way of Life*, N.Y. TIMES, Apr. 11, 2007, http://www.nytimes.com/2007/04/1 1/world/asia/11india.html?pagewanted=1&_r=1.

24. Lean, *supra* note 21.

25. Fredrica Boswell, *Waves Threaten Zanzibar Paradise*, BBC NEWS, Dec. 13, 2007, http://news.bbc.co.uk/2/hi/africa/7100107.stm.

26. Catherine Jacob, *Vanishing Islands of Bangladesh: Climate Change Toll*, SKY NEWS, Feb. 27, 2008, http://news.sky.com/skynews/Home/Sky-News-Archive/Article/20080641296130.

27. Simon Gardner, *Interview-Sea May Swallow Maldives if Global Warming Unchecked*, REUTERS, Feb. 3, 2007, http://www.reuters.com/article/latestCrisis/idUSCOL104974.

28. Julio Godoy, *Climate Change: Islands Could Fall off the Map*, IPS NEWS, Feb. 17, 2007, http://www.ipsnews.net/news.asp?idnews=36618.

29. Global Islands Network, *Disappearing Islands*, http://www.globalislands.net/news/newsdeskitem.php?newstype=Special&newsid=4660&mfxsr=8 (last visited Aug. 10, 2009).

30. *Id.* at Part I.

31. *Id.*

32. *Id.* at Part II C.

33. *Id.*

years in northern Australia include higher temperatures, more extreme rainfall, sea level rise, and more intense cyclones.[34] Potential consequences include the erosion and saltwater inundation of long sections of coastline, river deltas, wetland areas, and offshore islands, while inland areas are likely to have more bushfires, dust storms, flooding, droughts, and extremes in temperatures.[35] These changes to the surrounding environment will have detrimental effects on these natural-resource-dependent peoples.[36] Rising temperatures and precipitation can result in increased heat stress, respiratory diseases, communicable diseases, and mosquito-borne diseases, such as Dengue.[37] Sea level rise and coastal erosion can destroy homes and infrastructure,[38] while the destruction of agriculture and ceremonial sites can harm a people's livelihood and culture.[39] These potential harms could be realized unless immediate action is taken to prevent them.

These impacts have caused a new era of environmental refugeeism.[40] As of this writing, there are approximately twenty-five million environmental refugees around the world.[41] Poor crop yields in Mexico are exacerbating the existing problem of Mexican citizens illegally crossing the border into the United States.[42] Drought in northeast Brazil is forcing one in every five people born there to leave their homeland to avoid drought.[43] The Gobi Desert is slowly devouring 4000 square miles

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34. DONNA GREEN, CLIMATE CHANGE AND HEALTH: IMPACTS ON REMOTE INDIGENOUS COMMUNITIES IN NORTHERN AUSTRALIA, 1 CSIRO Marine and Atmospheric Research Paper 012, § 1.4 (2006), *available at* http://www.sharingknowledge.net.au/files/climateimpacts_health_report.pdf.

35. *Id.*

36. David S.G. Thomas & Chasca Twyman, *Equity and Justice in Climate Change Adaptation Amongst Natural-Resource-Dependent Societies*, 15 GLOBAL ENVTL. CHANGE 115, 115 (2005), *available at* http://www.astepback.com/GCC/Equity%20and%20Justice%20in%20CC%20Adaptation.pdf. These populations are subsistence-based communities, often comprised of indigenous peoples, and are on the front-line of climate change impacts because of a lack of infrastructure and because they often reside close to the sea for fishing. *Id*.

37. GREEN, *supra* note 34, § 1.4.

38. *Id.* §§ 1.4, 1.5.

39. *Id.* § 1.4.

40. *See generally* Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349 (2009).

41. Jordan Tchilingirian, *Global Warming Is Creating Climate Change Refugees Says Christian Agency*, EKKLESIA, Oct. 20, 2006, http://www.ekklesia.co.uk/content/news_syndication/article_061019refugees.shtml.

42. *Id.*

43. *Id*.; *see also* Seren Boyd & Rachel Roach, *Feeling the Heat: A Report from Tearfund* 5, 15 (2006), http://www.tearfund.org/webdocs/Website/News/Feeling%20the%20Heat%20Tearfund%20report.pdf.

per year of the inhabitable lands that lie next to it in China.[44] In Nigeria alone, 1350 square miles of land are converted to desert each year, forcing farmers and others dependent on agriculture to flee to urban areas.[45]

More specific examples of climate change migration have taken place in the Republic of Kiribati and Tuvalu, two low-lying atoll nations in the Pacific region.[46] Although it has been difficult to pinpoint the causes for population movements from rural-outer-islands to urban-central islands, there is strong evidence that environmental factors play an important role.[47] Sea level rise, influxes of drought, loss of land, unreliable food and water supplies, and general health decline have all contributed to these movements.[48] In Kiribati, more than half of the population resides in the Gilbert Island group, where the capital of South Tarawa is located.[49] The Southern Gilbert Islands have been overwhelmed by long periods of drought and shorter periods of rainfall.[50] The Southern Gilberts can have as little as 360 millimeters of rain per year in comparison to the 2,400 millimeters typical for the Northern Gilberts.[51] Population movements have also been correlated to increased potable water scarcity, influxes of drought, coral reef depletion, and coastal erosion on outer islands.[52] In Tuvalu, owners of coastal lands that had become increasingly salinated by the encroaching sea had to relocate to the makeshift settlement of Fongafale on Funafuti.[53] If current global climate trends are allowed to continue, an increasing number of island communities will be forced to leave their homes.

The United States also has been unable to avoid the grim reality of climate change induced migration. In fact, the largest example of this phenomenon has occurred on American soil. Millions of Gulf Coast residents were forced to abandon their homes and seek shelter elsewhere when Hurricane Katrina struck New Orleans in August 2005.[54] Large

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44. Tchilingirian, *supra* note 41.

45. *Id.*

46. Justin Locke, *Climate Change-Induced Migration in the Pacific Region: Sudden Crisis and Long Term Developments*, 175 GEOGRAPHICAL J. 171 (2009).

47. *Id.*

48. *Id.* at 1.

49. *Id.* at 1, 9.

50. *Id.* at 12–13.

51. *Id.*

52. *Id.*

53. *Id.* at 176, 177.

54. Lester R. Brown, *Global Warming Forcing U.S. Coastal Population to Move Inland: Estimated 250,000 Katrina Evacuees Are Now Climate Refugees* (Aug. 16, 2006),

parts of the city still face major challenges due to blight, unaffordable housing, and infrastructure issues. According to the Brookings Institution Metropolitan Policy Program and the Greater New Orleans Community Data Center, "[a]s of June 2009, nine neighborhoods still have less than half of the active residential addresses they did before Katrina."[55] The scale of abandonment remains high in New Orleans, St. Bernard, and Jefferson parishes with 65,888; 14,372; and 11,516 unoccupied residences, respectively.[56] Housing affordability continues to be a pressing challenge for many critical workers and lower income residents trying to return to local neighborhoods where rents are at an all-time high.[57] Furthermore, public transportation and other community services such as childcare are operating at a fraction of pre-storm operation levels.[58]

Climate change induced devastation also has plagued indigenous peoples in Alaska. Increased temperatures in the Arctic have diminished the thickness, extent, and duration of sea ice that forms along the coast of Kivalina,[59] located at the tip of a six-mile long barrier reef, approximately seventy miles north of the Arctic Circle on the northwest coast of Alaska.[60] Without the protection formerly provided by sea ice and land-fast sea ice, Kivalina has become vulnerable to destruction from waves, storm surges, and erosion.[61] The U.S. Army Corps of Engineers, Alaska District, confirmed these changes in an April 2006 report stating that due to global climate change, the Chukchi Sea was less likely to be frozen during winter storms.[62] Additionally, in December 2003, the United States Government Accountability Office (GAO) reported that "the right combination of storm events could flood the entire village at any time."[63]

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http://www.earthpolicy.org/index.php?/plan_b_updates/2006/update57#.

55. THE BROOKINGS INST. METRO. POLICY PROGRAM & GREATER NEW ORLEANS CMTY. DATA CTR., THE NEW ORLEANS INDEX: TRACKING RECOVERY OF NEW ORLEANS 18 (Aug. 2009), https://gnocdc.s3.amazonaws.com/NOLAIndex/NOLAIndex.pdf.

56. *Id.* at 6.

57. GCR & Assocs., Inc., The New Orleans Region 4 Years After Katrina: A Focus on Recovery 3 (2009), http://www.gcrconsulting.com/downloads/Katrina%20Four%20Year%20Ann.pdf.

58. *Id.*

59. Complaint for Damages at 45, Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. CV08-1138 SBA).

60. *Id.*

61. *Id.*

62. *Id.* at 45–46.

63. *Id.*

Due to the amount of erosion that Kivalina has already endured, and its increased vulnerability to continued damage, the GAO has determined that remaining on the island is no longer a viable option for the community.[64]

The Native Village of Kivalina is a self-governing, federally recognized Inupiat Eskimo village[65] of approximately 400 people who reside in the city of Kivalina, Alaska.[66] The ongoing destruction of Kivalina property has necessitated the relocation of the entire village.[67] The Army Corps of Engineers projects the cost of relocation to be between $95 and $125 million,[68] whereas the GAO estimates that it will cost between $100 and $400 million.[69] The Village of Kivalina will face devastation should the community not be relocated.[70]

On September 13, 2008, Senator Lisa Murkowski (R-Alaska) remarked that her state is at the "tip of the spear" of climate change in the United States.[71] This metaphor effectively captures the plight of vulnerable populations on the front line of climate change impacts. The *Kivalina* litigation seeks to secure a remedy for one such vulnerable population and, in turn, can help inspire and lay a foundation for a new era of legal remedies for similarly situated victims domestically and internationally.[72]

B. Climate Justice as a Response to the Plight of Vulnerable Populations

Climate justice has both domestic and international law underpinnings. First, the evolution of environmental justice in the United States helped lay a foundation for the climate justice field by recognizing an area outside of the traditional boundaries of environmental law for which the law should provide a remedy—namely, the disproportionate impacts of environmental regulation on minority and low-income communities.[73] This theory encountered some obstacles

64. *Id.*

65. *Id.* at 4.

66. *Id.* at 1.

67. *Id.*

68. *Id.*

69. *Id.* at 46.

70. *Id.* at 45–46.

71. Margaret Kriz, *Swept Away*, NAT'L J., Sept. 13, 2008, at 44.

72. For a discussion of the *Kivalina* litigation and its implications for enhancing climate justice relief domestically and internationally, see *infra* Parts III, IV.

73. The international law framework can also influence domestic approaches to environmental

when tested in the federal courts under Equal Protection Clause analysis and it ultimately failed to secure remedies for such disproportionate impacts through the court system.[74] The litigation was not in vain, however, as it raised awareness of the need for a response to this inequity and prompted subsequent proactive measures at the federal and state levels to mitigate or avoid such disproportionate impacts in the future.[75]

Beyond the realm of environmental justice in the United States, a parallel development under international law evolved concerning the growing recognition of the intersection between environmental law and human rights.[76] The rise of the notion of sustainable development has helped fuel this awareness, and scenarios involving unsustainable growth that caused disproportionate impacts on indigenous populations (such as deforestation and development in the Amazon) have drawn international attention. More recently, climate change has created the potential for cultural genocide[77] or may at least require the relocation of these peoples.[78]

At the international level, the movement to recognize a human right to a healthy environment has enjoyed decades of support, and has increased significantly with the increase in awareness regarding climate change impacts. More specifically, the importance of the right to a healthy

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justice. *See generally, e.g.*, Maxine Burkette, *Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 BUFF. L. REV. 169 (2008) (arguing for application of a component of the international environmental law framework, the Clean Development Mechanism from the Kyoto Protocol, to domestic environmental justice circumstances).

74. *See generally* Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that Title VI does not create a private right of action to enforce disparate impact regulations); S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771 (3d Cir. 2001) (holding that the EPA's disparate impact regulations do not create a right enforceable under section 1983).

75. *See, e.g.*, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted in* 42 U.S.C. § 4321 (2006) requiring federal agencies to administer their programs, policies, and activities that affect human health or the environment in a manner that avoids, to the maximum extent possible, "disproportionately high and adverse" effects on minority and low-income populations).

76. Angela Williams, *Promoting Justice within the International Legal System: Prospects for Climate Refugees, in* CLIMATE LAW AND DEVELOPING COUNTRIES: LEGAL AND POLICY CHALLENGES FOR THE WORLD ECONOMY 84, 84 (Benjamin J. Richardson, et al., eds., 2009).

77. "Cultural genocide" in this context refers to the loss of cultural values and traditions due to environmental devastation. *See* AFP, *Climate Change 'Cultural Genocide' for Aborigines*, May 4, 2009, http://www.google.com/hostednews/afp/article/ALeqM5jZHYtI_h8rs0_K_iTK470lQ57hMA ("Rising sea levels and soaring temperatures would make their homelands uninhabitable, severing spiritual links and laying waste to the environment.").

78. *See supra* Part I.

environment in developing nations has attracted attention,[79] especially in developing nations that are either particularly vulnerable environmentally to climate change, or that lack the infrastructure to respond adequately to such threats.[80]

The latest climate change science confirms the importance of an institutionalized climate justice framework as part of the post-Kyoto regime. The United Nations Environment Programme (UNEP) released a report in September 2009 entitled *Climate Change Science Compendium 2009*.[81] This UNEP report underscores the need for immediate action to avoid the catastrophic climate change impacts that are projected by 2100, as well as the dangerous "tipping points" that could be reached within a few decades that would have tragic implications for the world's major ecosystems, such as the Sahara and the Amazon.[82] The report notes that it still may be possible to avoid many of these catastrophic impacts, but only if there is "effective, efficient, and equitable" action to reduce greenhouse gas emissions and states take proactive measures to assist vulnerable countries adapt to the projected impacts.[83]

Responding to the needs of vulnerable communities is not a "one size fits all" proposition. For example, the impacts of climate change on indigenous peoples raise difficult legal and ethical issues. Professor Rebecca Tsosie has suggested that the standard adaptation strategy of relocating a vulnerable population out of harm's way could be culturally genocidal for many groups of indigenous people when viewed in the climate justice context.[84] As an alternative, she argues for recognition of an indigenous right to environmental self-determination, which would allow indigenous peoples to maintain their cultural and political status upon their traditional lands.[85] In the context of climate change policy,

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79. *See*, *e.g.*, TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS 200–15 (2005) (discussing the value of establishing constitutional environmental rights for poorer societies); Amy Sinden, *An Emerging Human Right to Security from Climate Change: The Case Against Gas Flaring in Nigeria*, *in* ADJUDICATING CLIMATE CHANGE, *supra* note 5, at 173 (examining theories under which a right to security from climate change could be grounded in human rights theory and how such rights might be applied to impose liability on a private multinational corporation).

80. U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (UNFCCC), CLIMATE CHANGE: IMPACTS, VULNERABILITIES AND ADAPTATION IN DEVELOPING COUNTRIES 5–6 (2007), *available at* http://unfccc.int/resource/docs/publications/impacts.pdf.

81. U.N. Environment Programme, *Climate Change Science Compendium 2009*, http://www.unep.org/compendium2009/ (offering the full text of the report).

82. *Id.*

83. *Id.* at 51.

84. *See generally* Tsosie, *supra* note 7.

85. *Id.* at 1657–74.

such a right would impose affirmative requirements on nation-states to develop a plan to avoid catastrophic harm to indigenous peoples.[86] Tsosie further recognizes that tort-based theories of compensation for the harms of climate change have only limited capacity to address the concerns of indigenous peoples.[87] Ultimately, public nuisance claims in *Kivalina*-like scenarios are an important step, but only the beginning.

II. PUBLIC NUISANCE CLAIMS FOR CLIMATE CHANGE IMPACTS AS A FOUNDATION FOR CLIMATE JUSTICE RELIEF

To understand how public nuisance suits can enhance the opportunity for climate justice remedies domestically and internationally, it is necessary to examine the origin and evolution of these claims leading up to the *Kivalina* case. This Part discusses the narrow, but secure federal common-law foundation of interstate pollution jurisprudence, which underlies public nuisance claims for climate change impacts. It then traces the three-part evolution of public nuisance suits for climate change impacts.

A. Historical and Conceptual Foundations of Interstate Pollution Claims

An important threshold question is whether public nuisance claims for climate change impacts are justiciable. Climate change impacts are a form of interstate pollution. Although almost exclusively regulated by federal statutes, interstate pollution is also subject to federal common-law claims that trace their origins to two foundational cases: *Georgia v. Tennessee Copper Co.*[88] and *Illinois v. City of Milwaukee* (*Milwaukee I*).[89]

In 1907, in the landmark case of *Tennessee Copper*, the state of Georgia sought an injunction against Tennessee Copper for the company's sulfur dioxide emissions, which were transported by wind

86. *Id.* at 1674.

87. *Id.* at 1675.

88. 206 U.S. 230 (1907).

89. 406 U.S. 91 (1972). For a helpful discussion of the role of *Milwaukee I* and *City of Milwaukee v. Illinois* (*Milwaukee II*), 451 U.S. 304 (1981), in interstate pollution cases, see generally Matthew F. Pawa, *This Town Ain't Big Enough for the Two of Us: Interstate Pollution and Federalism under* Milwaukee I *and* Milwaukee II, 2009 A.B.A. SEC. ENV'T., ENERGY, AND RES. 121, *available at* http://www.abanet.org/environ/programs/keystone/2009/bestpapers/MatthewPawa_Keystone2009.pdf. *See infra* note 157 for a discussion of the *Milwaukee II* case.

and detrimentally affected five counties in Georgia.[90] These injuries included the destruction of forests, orchards, and crops.[91] Although Georgia was not the private property owner of these affected regions, the Court determined that the state "has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."[92] The Court further stated that Georgia had the final word as to the protection and maintenance of its natural resources.[93] The creation of the United States had not precluded states from protecting these quasi-sovereign interests.[94] Rather, the Court reasoned, a state in such a situation "is somewhat more certainly entitled to specific relief than a private party might be."[95]

The Court noted that the traditional means of equitably balancing the harm between private parties cannot be applied when at least one party is a state.[96] A state should not be required to relinquish its quasi-sovereign rights for compensation.[97] It is "fair" and "reasonable" that a state demand that its resources be left unharmed.[98] In *Tennessee Copper*, neither the injuries caused by, nor the conduct of, the defendants was contested.[99] The Court issued an injunction against the company.[100] Therefore, *Tennessee Copper* established the principle that a state subjected to interstate air pollution is able to seek injunctive relief from an emissions source in a neighboring state that caused the pollution problem. This premise sets one of the pillars in place for public nuisance cases for climate change impacts because such impacts are the product of the interstate, indeed global, phenomenon of climate change.

In 1972, in *Milwaukee I*, the Supreme Court issued its decision in the second foundational case concerning interstate pollution, which involved a water pollution dispute.[101] Illinois alleged that four cities in Wisconsin were polluting Lake Michigan, an interstate body of water. While

90. *Tenn. Copper Co*., 206 U.S. at 236.
91. *Id.*
92. *Id.* at 237.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 238.
97. *Id.* at 237.
98. *Id.* at 238.
99. *Id.*
100. *Id.* at 239.
101. 406 U.S. 91, 93 (1972).

Illinois had prohibited the pollution at issue on its side of the lake, Wisconsin had not.[102]

The Federal Water Pollution Control Act (FWPCA, also known as the Clean Water Act),[103] rather than state law, controls interstate water pollution claims.[104] *Milwaukee I* required application of federal common law, with some deference to state law, because the federal law only sets a floor.[105] States are given time to create their own water standards above this floor, but if they are unable to do so, the federal government may step in and ask the state to abate the pollution.[106] Federal common law is applied "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism."[107]

Interstate water pollution claims, like the one at issue in *Milwaukee I*, are public nuisance claims. When one state causes a public nuisance in another state, injunctive relief is available.[108] In *Milwaukee I*, the Court concluded that federal district courts have jurisdiction over interstate water pollution disputes that allegedly create a public nuisance, and that the Supreme Court has the discretion to remit such disputes to appropriate federal district courts for resolution.[109] The Court reasoned that although the remedies Illinois sought for apportioning interstate waters were not authorized under the FWPCA, the application of federal common law was consistent with the FWPCA.[110] It noted that while federal environmental protection statutes are sources of federal law, they do not necessarily represent the exclusive scope of federal law.[111] Until new federal laws preempt the federal common law of nuisance, federal courts will balance the equities in public nuisance suits regarding interstate water pollution.[112]

Relief for interstate pollution is also available to state plaintiffs under state public nuisance laws. For example, in *North Carolina v. Tennessee*

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102. *Id.*

103. 33 U.S.C. §§ 1251–1387 (2006).

104. *Milwaukee I*, 406 U.S. at 102.

105. *Id.* at 107.

106. *Id.* at 102.

107. *Id.* at 105 n.6 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421–27 (1964)).

108. *Id.* at 106 n.8 (quoting North Dakota v. Minnesota, 263 U.S. 365, 374 (1923)).

109. *Id.* at 108.

110. *Id.* at 103–04.

111. *Id.* at 103 n.5, 107 n.9.

112. *Id.* at 107.

Valley Authority (*North Carolina II*),[113] North Carolina sued the Tennessee Valley Authority (TVA) on behalf of its citizens alleging that the TVA's use of coal-fired power plants constituted a public nuisance.[114] North Carolina alleged it was harmed by nitrogen, sulfur dioxide, mercury, and other secondary pollutants from the TVA's emissions in neighboring states.[115] It claimed that these emissions constituted a public nuisance in the form of air pollution which, after being emitted in other states, travels into North Carolina and threatens the citizens' health, the state's economy, and the aesthetics of the region.[116]

North Carolina sought injunctive relief because the cost of abating the nuisance would be very high.[117] It filed suit in federal court under the Clean Air Act (CAA)[118] "savings clause," which allows the court to proceed under state public nuisance laws.[119] The court concluded that it had jurisdiction over the complaint and the injunctive relief sought, but noted that this type of disagreement must be settled based on the state law of each plant's locale, not a system-wide cap which could infringe on the powers of the legislative or executive branches.[120]

The TVA is a federal entity and the largest public electricity system in the United States, servicing large portions of Tennessee, Kentucky, Mississippi, and Alabama, and portions of Georgia, North Carolina, and Virginia.[121] It owns and operates eleven plants, seven of which are in Tennessee, two of which are in Kentucky, and two of which are in Alabama.[122] The TVA made three primary arguments to disclaim responsibility for the alleged public nuisance. First, although the emissions entered North Carolina, the harm alleged was mostly due to North Carolina's own emissions; second, the TVA's conduct was reasonable because its service is a necessity for millions who rely on less expensive energy; and third, the TVA has made efforts to reduce

113. 593 F. Supp. 2d 812 (W.D.N.C. 2009).

114. *Id.* at 815.

115. *Id.* at 818–28.

116. *Id.* at 815.

117. *Id.*

118. 42 U.S.C. §§ 7401–7671q (2006).

119. *See North Carolina II*, 593 F. Supp. 2d at 816 (citing North Carolina v. Tenn. Valley Auth. (*North Carolina I*), 549 F. Supp. 2d 725, 729 (2008)).

120. *Id*. at 816–17. *But see* Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009) (allowing a public nuisance claim for injunctive relief to proceed against the six largest power companies in the nation).

121. *North Carolina II*, 593 F. Supp. 2d at 818.

122. *Id.*

emissions already, so the emissions entering North Carolina could not be considered to be in "unreasonable amounts."[123]

Given the TVA's plant locations, the court applied the laws of Alabama, Kentucky, and Tennessee.[124] The court granted North Carolina's relief in part and denied it in part.[125] Because the several plants North Carolina included in its complaint were in a few different states, the court analyzed each of the plants' conduct separately based on the public nuisance law of the state where the plants were located.[126]

These interstate pollution cases each involved states suing in a *parens patriae* capacity. The *Milwaukee I* and *Tennessee Copper* cases firmly established the federal common-law foundation upon which the public nuisance cases for climate change rely. The *North Carolina* case confirmed and extended this approach to interstate pollution dispute resolution through the application of state public nuisance law under the CAA's savings clause. This firm foundation for resolving interstate pollution disputes paved the way for public nuisance suits for climate change impacts.

B. The Three-Stage Evolution of Public Nuisance and Climate Change

Drawing on the interstate pollution cases, the progression of public nuisance claims for climate change impacts began with *Connecticut v. American Electric Power Co.*,[127] which involved states seeking injunctive relief. It was subsequently refined in *California v. General Motors Corp.*,[128] in which the states adjusted their theory of the case and sought damages rather than injunctive relief. This state-as-plaintiff

123. *Id.* at 815.

124. *Id.* at 829–34.

125. *Id.* at 831–34.

126. *Id.* at 817, 829–31. The court held that some of the plants were public nuisances to North Carolina by their state's public nuisance laws, while some were not. The injunctions granted varied according to what controls the plant already employed. For plants that did not have scrubbers, the court held that these pollution controls must be installed and maintained properly for emissions reduction. *Id*. at 832. For plants that had broken scrubbers, or did not have enough to cover all the emissions, the court held that these controls must be fixed or additional ones must be added. *Id*. The court also applied an annual cap on emissions and required that TVA provide semi-annual accounting to confirm its compliance. *Id*. at 832–34.

127. 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009). On November 5, 2009, the defendants filed for a petition for rehearing en banc before the Second Circuit. Petition for Rehearing En Banc, Conn. Am. Elec. Power Co., No. 05-5104-cv (2d Cir. filed Nov. 5, 2005), *available at* http://www.bdlaw.com/assets/attachments/Connecticut%20v%20AEP%20Petition.pdf.

128. No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

foundation then evolved into a claim for damages in *Comer v. Murphy Oil USA*,[129] in which individual plaintiffs sought to recover for climate change impacts to their communities.[130]

1. *First Stage: States Sought to Enjoin Greenhouse Gas Emissions from the Private Sector in* Connecticut v. American Electric Power Co.

In *American Electric Power*, the district court dismissed the public nuisance case brought by various states and nonprofit land trusts against several power companies.[131] The plaintiffs sought injunctive relief to reduce the power companies' greenhouse gas emissions contributing to global warming.[132] The threshold question in the case was whether the relief that the plaintiffs sought presented a nonjusticiable political question outside the scope of the court's jurisdiction.[133]

The political question doctrine requires federal courts to avoid deciding matters that are better left to the political branches to resolve. However, the mere fact that the issues in a case arise in a politically charged context does not convert a case into a nonjusticiable political question.[134]

In *Baker v. Carr*,[135] the Court established six independent factors to determine whether a political question existed.[136] The factors are:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches

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129. 585 F.3d 855 (5th Cir. 2009). On November 30, 2009, the defendants filed for a petition for rehearing en banc before the Fifth Circuit. Petition for Rehearing En Banc, Comer v. Murphy Oil USA, No. 07-60756 (5th Cir. filed Nov. 30, 2009). *See* Jennifer Koons, *Courts May Beat Congress, U.N. to Punch on GHGs*, GREENWIRE, Dec. 17, 2009, http://www.eenews.net/public/Greenwire/2009/12/17/2.

130. See *infra* Part III.B for a discussion of the impacts of these cases on the political question and standing doctrines.

131. *Am. Electric Power Co.*, 406 F. Supp. 2d at 267.

132. *Id.*

133. *Id.* at 271.

134. *See, e.g.*, *Comer*, 585 F.3d at 873.

135. 369 U.S. 186 (1962).

136. *Id.* at 217.

> of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[137]

The factors from *Baker v. Carr* were not meant to serve as a stand-alone definition of a "political question." Rather, they are intended to guide federal courts in deciding whether a question is entrusted by the Constitution or federal laws exclusively to a federal political branch for its decision.[138]

The district court in *American Electric Power* concluded that the case presented a nonjusticiable political question because the court faced "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[139] The court reasoned that the scope and magnitude of the case touched on many areas of national and international policy, which reflected the "transcendently legislative nature" of the litigation.[140] Furthermore, the court recognized the overall complexity of such policy determinations by noting several past and current actions (and deliberate inactions) of Congress and the executive branch on the issue of climate change.[141] Ultimately, the case was dismissed because the injunctive relief sought required "identification and balancing of economic, environmental, foreign policy, and national security interests," which the court determined to be a nonjusticiable political question for the political branches, not the judiciary, to address.[142]

On September 22, 2009, in a long-awaited and pleasantly surprising decision for environmental plaintiffs, the Second Circuit vacated the district court's dismissal of the public nuisance claim,[143] holding that the district court had erred in dismissing the case on political question

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137. *Id.*

138. *Comer*, 585 F.3d at 872 ("[I]f a party moving to dismiss under the political question doctrine is unable to identify a constitutional provision or federal law that arguably commits a material issue in the case exclusively to a political branch, the issue is clearly justiciable and the motion should be denied without applying the *Baker* formulations.").

139. 406 F. Supp. 2d, 265, 272 (S.D.N.Y. 2005) (quoting Vieth v. Jubelirer, 541 U.S. 267, 277–78 (2004)), *vacated*, 582 F.3d 309 (2d Cir. 2009).

140. *Id.* at 272.

141. *Id.* at 273.

142. *Id.* at 274.

143. *Am. Elec. Power Co.*, 582 F.3d at 393. *See generally* Richard Lazarus, *A Huge Green Win in the 2nd Circuit*, 26 ENVTL. FORUM, Nov.–Dec. 2009, at 14 (describing the outcome and reasoning of the Second Circuit's decision in *American Electric Power* and the challenges that the plaintiffs face in the wake of the decision).

grounds.[144] The court further concluded that the plaintiffs had stated valid claims under the federal common law of nuisance.[145]

On the political question issue, the court applied the six-factor test established in *Baker v. Carr*. The court noted that *Baker* set a high bar for nonjusticiability and that the Supreme Court has "only rarely" found that a political question bars adjudication of an issue.[146] Particularly relevant to the court's analysis was its discussion of the first and second factors from the *Baker* test.[147] The court described the first *Baker* factor as the "dominant consideration in any political question inquiry."[148] It rejected the defendants' arguments that allowing the plaintiffs' claims would result in a national emissions policy or undermine the separation of powers.[149] The court stated:

> Nowhere in their complaints do Plaintiffs ask the court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches. Instead, they seek to limit emissions from six domestic coal-fired electricity plants on the ground that such emissions constitute a public nuisance that they allege has caused, is causing, and will continue to cause them injury.[150]

The court also rejected the defendants' arguments that the complexities involved in pollution control and climate change cases made it impossible to apply meaningful legal standards to this case.[151] The court reasoned that the defendants' arguments were "undermined by the fact that federal courts have successfully adjudicated complex common law nuisance cases for over a century."[152] The court compared the plaintiffs' claims to several past complex interstate nuisance cases that were considered to be judicially manageable.[153] The Second Circuit concluded that "[w]ell-settled principles of tort and public nuisance law

144. *Am. Elec. Power Co.*, 582 F.3d at 315.

145. *Id.*

146. *Id.* at 321.

147. *Id.* at 324–30. The first two factors of the *Baker* test are: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it." Baker v. Carr, 369 U.S. 186, 217 (1962).

148. *Am. Elec. Power Co.*, 582 F.3d at 324 (quoting Lamont v. Woods, 948 F.2d 825, 831 (2d Cir. 1991)).

149. *Id.* at 325.

150. *Id.* (citation omitted).

151. *Id.* at 326–30.

152. *Id.* at 326.

153. *Id.* at 326–30.

provide appropriate guidance to the district court in assessing Plaintiffs' claims and the federal courts are competent to deal with these issues."[154] When a federal court has jurisdiction, the fact that a case may present complex issues is not an automatic reason for the court to shy away from resolving the matter.

The court also held that the plaintiffs stated a valid claim under the federal common law of nuisance.[155] It rejected defendants' contentions that the plaintiffs' public nuisance claims under federal common law should be dismissed because of their breadth and factual complexity.[156] Additionally, the court held that the CAA had not displaced[157] a federal common law of nuisance action because the EPA has not yet regulated greenhouse gas emissions in such a way that "speaks directly" to the issue that the plaintiffs raised.[158]

2. *Second Stage: States Sought Damages Rather than Injunctive Relief in* California v. General Motors Corp.

In *California v. General Motors Corp.*, the district court dismissed the claims brought by the State of California against various major automakers for allegedly "creating, and contributing to, an alleged public nuisance—global warming."[159] The State sought compensation for current and future expenditures and damages it had incurred and would continue to incur as a result of global warming.[160]

In its analysis, the court referenced a chronology of relevant environmental policy actions taken by Congress and the executive branch in addressing the complex issue of global warming.[161] Against this backdrop, the court examined the issue of whether the State's claims presented nonjusticiable political questions.[162]

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154. *Id.* at 329.

155. *Id.* at 392.

156. *Id.* at 326.

157. The court distinguished *Milwaukee II*, 451 U.S. 304 (1981), which held that the comprehensive nature of the Clean Water Act had left no room for a federal common law of nuisance action for water pollution (i.e., the Court concluded that the Act had "displaced" such actions).

158. *Am. Elec. Power Co.*, 582 F.3d at 381 (citing *Milwaukee II*, 451 U.S. at 319–24).

159. No. C06-05755 MJJ, 2007 WL 2726871, at *1, *16 (N.D. Cal. Sept. 17, 2007) (granting defendants' motion to dismiss).

160. *Id.* at *2.

161. *Id.* at *3–5 (citing *Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 269 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009)).

162. *Id.* at *5–7.

The court reviewed and applied several cases, including *Baker v. Carr*, *American Electric Power*, and *Massachusetts v. Environmental Protection Agency*,[163] regarding the tests for justiciability of political questions.[164] Relying on these precedents, the court determined that it could not "adjudicate Plaintiff's federal common law global warming nuisance tort claim without making an initial policy determination of a kind clearly for nonjudicial discretion."[165] Furthermore, the court concluded that the plaintiffs' claims would have a significant effect on interstate commerce and foreign policy, reiterating that such issues are constitutionally committed to the political branches of government.[166]

California appealed the case to the Ninth Circuit.[167] In seeking a six-month extension of the appeal, California stated that it would withdraw its appeal if the federal government responded in the interim to regulate greenhouse gas emissions from new motor vehicles or if any of the defendants filed for bankruptcy.[168] In 2009, both of these conditions were met. First, the EPA "acknowledged that carbon dioxide and other greenhouse gases are a public health danger and must be regulated."[169] In addition, "the President directed the Department of Transportation to establish higher national fuel efficiency standards in line with the standards California has sought to implement for the last several years."[170] Second, defendants Chrysler and General Motors filed for bankruptcy.[171] Consequently, California voluntarily dismissed its appeal on June 19, 2009.[172]

3. Third Stage: Private Plaintiffs Sought Damages in Comer v. Murphy Oil USA

In *Comer v. Murphy Oil USA*, the plaintiffs sued several energy companies seeking relief for Hurricane Katrina-related property damage,

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163. 549 U.S. 497 (2007).

164. *General Motors Corp*., 2007 WL 2726871, at *5–10.

165. *Id.* at *13.

166. *Id.* at *13–14.

167. Unopposed Motion to Dismiss Appeal at 1, California v. Gen. Motors Corp., No. 07-16908 (9th Cir. filed June 19, 2009), *available at* http://www.globalclimatelaw.com/uploads/file/California%20v%20GM%20dismissal.pdf.

168. *Id.* at 2.

169. *Id.* (citing Declaration of Deputy Attorney General Harrison M. Pollak in Support of Motion to Dismiss Appeal at ¶ 2, *Gen. Motors Corp*., No. 07-16908 [hereinafter Pollak Declaration]) .

170. *Id.* at 2–3 (citing Pollak Declaration ¶ 3, *General Motors Corp*., No. 07-16908).

171. *Id.* at 3 (citing Pollak Declaration at ¶ 4, *General Motors Corp*., No. 07-16908).

172. *Id.* at 4.

which allegedly had been intensified by the defendants' contributions to global warming.[173] The district court dismissed the case on standing and political question grounds.[174]

To establish Article III standing, a plaintiff must satisfy three requirements: (1) it has suffered an injury in fact that is "concrete and particularized" and that is "actual or imminent, not conjectural or hypothetical;"[175] (2) the injury must be "fairly trace[able]" to the challenged action of the defendant;[176] and (3) it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[177] The district court's standing decision was based on the determination that the alleged injuries were not "fairly attributable" or "traceable" to the individual defendants.[178]

The district court addressed the political question issue by referencing the many individual state statutes and programs that have been created to address the issue of global warming.[179] The purpose of this analysis was to demonstrate that the issue involves not only a legitimate and important debate, but one that "simply has no place in the court, until such time as Congress enacts legislation which sets appropriate standards by which this Court can measure conduct, whether it be reasonable or unreasonable . . . ."[180] The court concluded that such policy decisions are best left to the legislative and executive branches of government because they are in the best position to make such decisions and are constitutionally empowered to do so.[181]

On appeal, the Fifth Circuit reversed and concluded that the plaintiffs had standing and that the public nuisance claim could proceed because it was not a political question.[182] In its standing analysis, the court focused on causation. It stated that the Article III traceability requirement "need not be as close as the proximate causation needed to succeed on the merits of a tort claim. Rather, an indirect causal relationship will suffice,

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173. Transcript of Hearing of Defendants' Motion to Dismiss at 18–20, 23, Comer v. Murphy Oil USA, No. 1:05CV436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) [hereinafter Transcript].

174. Comer v. Murphy Oil USA, 585 F.3d 855, 860 (5th Cir. 2009).

175. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

176. *Id.* at 560–61 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)).

177. *Id.* (quoting *Simon*, 426 U.S. at 41–42).

178. Transcript, *supra* note 170, at 36.

179. *Id.* at 36–39.

180. Comer v. Murphy Oil USA, 585 F.3d 855, 860 n.2 (5th Cir. 2009).

181. *Id.*

182. *Id.* at 860.

so long as there is 'a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant.'"[183] In concluding that the plaintiffs had satisfied the traceability requirement, the court analogized the *Comer* scenario to *Massachusetts v. EPA*, in which the Supreme Court determined that the causation element had been met.[184] Like in *Massachusetts v. EPA*, the Fifth Circuit held that it did not matter if the defendants were merely a few of many sources to cause harm to the plaintiffs.[185] To satisfy the "fairly traceable" element of standing, the court concluded that the relevant test is whether "the pollutant causes or *contributes to* the kinds of injuries alleged by the plaintiffs."[186]

The defendants relied on causation cases under the Clean Water Act (CWA)[187] and argued that the holdings of these cases should not be extended to the global warming context. In rejecting the defendants' arguments, the court provided important additional support for its conclusion that the fairly traceable standard is not limited to CWA cases:

> Defendants try to distinguish the above precedents on the ground that they are unique Clean Water Act ("CWA") cases. Contrary to defendants' argument or suggestion, the Clean Water Act could not and did not lower the constitutional minimum standing requirements and make CWA cases inapposite here. The CWA's "grant of standing reaches the outer limits of Article III . . . Thus, if a Clean Water Act plaintiff meets the constitutional requirements for standing, then he *ipso facto* satisfies the statutory threshold as well."[188]

In its political question doctrine analysis, the Fifth Circuit made an important observation as to why public nuisance claims for climate change impacts must be considered justiciable, at least for the immediate

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183. *Id.* at 864 (quoting Toll Bros., Inc. v. Twp. of Readington, 555 F.3d 131, 142 (3d Cir. 2009)).

184. *Id.* at 865 (citing Massachusetts v. EPA, 549 U.S. 497, 520–24 (2007)). The court distinguished other cases upon which the defendants relied, stating that those cases depended on independent superseding actions by parties not before the court, or they involved speculation about what the effects of the defendants' action would be, or what actions other parties would take in the future. *Id*. at 865 n.5 (citing *Massachusetts*, 549 U.S. at 520).

185. *Id.* at 865.

186. *Id.* at 866 (quoting Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 557 (5th Cir. 1996)).

187. *See* Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006).

188. *Comer*, 585 F.3d at 867 n.6 (quoting Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 161 (4th Cir. 2000)). The court further reasoned that Congress cannot lower constitutional minimum standing requirements; therefore, standing jurisprudence under the CWA is fully applicable to this case. *Id.* Moreover, the court noted that the standing jurisprudence from the CWA cases has been applied to other contexts. *Id.*

future. The court noted that until the federal government responds to the climate change issue with legislation or regulations, "the Mississippi common law tort rules questions posed by the present case are justiciable, not political, because there is no commitment of those issues exclusively to the political branches of the federal government by the Constitution itself or by federal statutes or regulations."[189] Moreover, the court noted that even if Congress does enact a comprehensive federal law concerning greenhouse gas emissions, it might very well preserve state common law remedies, as the CWA did.[190]

Two additional factors were critical to the court's political question doctrine analysis. First, the case involved a private suit against private parties, not a suit arguing about the government's action or inaction, and as such was less likely to be considered a nonjusticiable political question.[191] Second, the plaintiffs were merely seeking damages, not an injunction. The court reasoned that actions for damages are more judicially manageable and are "considerably less likely to present nonjusticiable political questions."[192] The court relied on Fifth Circuit precedent to support this proposition, which concluded that "[m]onetary damages . . . do not . . . constitute a form of relief that is not judicially manageable."[193]

In reaching its decision, the Fifth Circuit acknowledged the Second Circuit's recent decision in *American Electric Power*. It noted that the Second Circuit's reasoning was fully consistent with the Fifth Circuit's approach in *Comer*, particularly with respect to the Second Circuit's "careful analysis of whether the case requires the court to address any specific issue that is constitutionally committed to another branch of government."[194] The court further noted that the defendants' reliance on the district courts' decisions in *California v. General Motors Corp.* and *American Electric Power* was improper, and that those decisions are "legally flawed" and "clearly distinguishable" from the present case.[195]

The Fifth Circuit relied on two justifications for distinguishing these cases that are particularly relevant to the analysis in this Article. First, the court noted that the *General Motors* court "failed to explain how the 'national and international policy issues' implicated by global warming,

189. *Id.* at 870.

190. *Id.* at 878. The CWA's savings clause appears at 33 U.S.C. § 1365(e) (2006).

191. *Comer*, 585 F.3d at 873.

192. *Id.* at 874.

193. *Id.* (citing Gordon v. Texas, 153 F.3d 190, 195 (5th Cir. 1998)).

194. *Id.* at 876 n.15.

195. *Id.* at 876.

or the impossibility of attributing pollution to specific external sources in the global warming context, would render the political question doctrine applicable."[196] Second, the court emphasized that "[a]lthough the worldwide effects of greenhouse gas emissions may . . . . make it difficult for the plaintiffs to show proximate causation, it does not follow that the issue has been committed exclusively to the political branches for decision."[197]

III. *KIVALINA V. EXXONMOBIL CORP.* AS A MODEL FOR CLIMATE JUSTICE RELIEF

The *Kivalina* litigation[198] reflects the refinement in litigation strategy that has evolved from the public nuisance cases for climate change impacts that preceded it. In *Kivalina*, the plaintiffs, the Native Village of Kivalina and the City of Kivalina, Alaska, filed a public nuisance suit against several oil, energy, and utility companies for allegedly contributing to the effects of global warming from their excessive emissions of greenhouse gases.[199] The plaintiffs claimed that the defendants' emissions exacerbated sea level rise, contributing to increased coastal erosion that destroyed part of their village and requiring relocation of Kivalina's residents.[200] The Northern District of California granted the defendants' motion to dismiss for lack of subject matter jurisdiction because the federal common law claim for public nuisance is barred by the political question doctrine, and the plaintiffs lacked standing.[201]

This Part discusses the promise and potential pitfalls of the *Kivalina* litigation. It first reviews the Northern District of California's decision addressing standing and the political question doctrine. It then analyzes the two most significant challenges facing the plaintiffs in *Kivalina* and similarly situated future plaintiffs seeking to recover for climate change impacts in public nuisance cases: (1) the political question doctrine and (2) standing.

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196. *Id.* at 877 n.18 (quoting California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *15 (N.D. Cal. Sept. 17, 2007)).

197. *Id.*

198. Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009). On November 5, 2009, the plaintiffs in *Kivalina* filed their notice of appeal to the U.S. Court of Appeals for the Ninth Circuit. *See* Koons, *supra* note 129.

199. *Kivalina*, 663 F. Supp. 2d at 868.

200. *Id.* at 869.

201. *Id.* at 868.

A. The Kivalina *Litigation*

The threshold question in *Kivalina* was whether the court had subject matter jurisdiction over the plaintiffs' federal claim for common law nuisance.[202] Like the plaintiffs in *Comer*, the plaintiffs in *Kivalina* sought damages, not injunctive relief.[203] Unlike the Fifth Circuit in *Comer*, however, the *Kivalina* court concluded that the federal common law nuisance claim would force it to resolve a matter on which it lacked guidance to issue a reasoned conclusion.[204]

The Northern District of California rejected the Second Circuit's conclusion in *American Electric Power* that the common law provides judicially manageable standards to address the plaintiffs' claims.[205] It noted that the Second Circuit had relied on cases involving environmental injuries that are distinguishable from the injury at issue in *Kivalina*.[206] The *Kivalina* court reasoned that "[w]hile a water pollution claim typically involves a discrete, geographically definable waterway, Plaintiffs' global warming claim is based on the emission of greenhouse gases from innumerable sources located throughout the world and *affecting the entire planet and its atmosphere*."[207]

The Northern District of California then addressed standing, focusing on the "fairly traceable" standard for the causation element.[208] The plaintiffs attempted to establish standing by alleging that the defendants had "contributed" to their injuries.[209] The court determined that the "contribution" standard for traceability, which the Fifth Circuit applied in *Comer*, is limited to CWA actions.[210] Unlike the Fifth Circuit in *Comer*, the court relied heavily on the geographic nexus requirement when viewing the substantial likelihood that defendants' caused the alleged injury. "[T]o be 'fairly traceable,' the plaintiff must lie in the 'discharge zone of a polluter' and not 'so far downstream that their injuries cannot be fairly traced to that defendant.'"[211]

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202. *Id.* at 870.

203. *Id.* at 869.

204. *Id.* at 871.

205. *Id.* at 875.

206. *Id.*

207. *Id.* at 875.

208. *Id.* at 877 (citing Bennett v. Spear, 520 U.S. 154, 167 (1997)).

209. *Id.* (citing Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000); P.I.R.G. v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3d Cir. 1990)).

210. *Id.* at 881.

211. *Id.* at 879 (quoting *Gaston Copper*, 204 F.3d at 162).

In addition to finding that plaintiffs had failed the "zone of discharge" standard for traceability, the court also concluded that they had failed to meet the "seed of injury" requirement for traceability. It stated that "[e]ven if the contribution theory were applicable outside the context of a statutory water pollution claim, it is simply inapposite where, as here, Plaintiffs have not alleged that the 'seed' of their injury can be traced to any of the Defendants."[212] The plaintiffs conceded that the harm they alleged is a product of centuries of greenhouse gas emissions from "a multitude of sources *other than* the Defendants."[213] The court concluded that this attenuated chain of events failed the seed of the injury requirement.[214]

The plaintiffs further argued that they were entitled to relaxed "special solicitude"[215] standing requirements derived from *Massachusetts v. EPA*.[216] The court concluded that the plaintiffs were not entitled to such special standing because, unlike the state plaintiff in *Massachusetts v. EPA*, the plaintiffs here were seeking damages against a variety of private interests, not asserting procedural rights concerning an agency's rulemaking authority.[217]

Consequently, the Northern District of California granted the defendants' motion to dismiss for lack of subject matter jurisdiction because the federal common law claim for public nuisance is barred by the political question doctrine, and because the plaintiffs lacked standing.[218] Nevertheless, the *Kivalina* litigation is far from over. The district court's decision has been appealed to the Ninth Circuit and will be subject to reexamination in light of the plaintiff-friendly outcomes from the Second Circuit in *American Electric Power* and the Fifth Circuit in *Comer*.

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212. *Id.* at 880.

213. *Id.*

214. *Id.*

215. *Id.* at 882. The court meant to say "special solicitude," but it misspelled the term. The term "special solicitude" in the majority's opinion in *Massachusetts v. EPA*, 549 U.S. 497, 520 & n.17 (2007), is derived from the landmark case, *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907). It refers to a state's special ability to sue on behalf of its citizens to protect the natural resources and environmental health and safety of its citizens within its borders. *Massachusetts*, 549 U.S. at 519–20.

216. *Kivalina*, 663 F. Supp. 2d at 882 (citing *Massachusetts*, 549 U.S. at 519).

217. *Id.*

218. *Id.* at 883.

B. Obstacles to Success After Kivalina *and Their Solutions*

The *Kivalina* litigation's legacy will endure in many forms for many years to come. The basic premise of the claim is that vulnerable communities should have a judicial remedy when they are forced to bear the brunt of the burden for climate change impacts that give them no choice but to become environmental refugees. Public nuisance and, perhaps, other common law theories provide a potentially viable avenue of recourse for damages to help defray the costs of these tragedies.

Though viable in theory, public nuisance claims for climate change impacts face significant hurdles on the path to becoming institutionalized as part of a domestic or international legal framework. This Section argues that the political question doctrine and standing are the most significant of these potential obstacles, and that these obstacles impose appropriate limits on the reach of *Kivalina*-like plaintiffs in future public nuisance litigation.[219]

1. Multiple Recent Cases Demonstrate that Climate Justice Plaintiffs Can Overcome the Obstacle of the Political Question Doctrine

A public nuisance suit for climate change impacts like the one at issue in *Kivalina* would likely not be barred by the political question doctrine for two basic reasons. First, compensating victims of climate change is not textually committed to another branch; and second, assessing damages for such impacts fits within the realm of judicial competence and courts have "judicially discoverable and manageable standards"[220] at their disposal to address such claims.

In addition to the Second Circuit's decision in *American Electric Power* and the Fifth Circuit's decision in *Comer*, two other cases arguably open the door for the theory of the case in *Kivalina* to pass muster under the political question doctrine. These cases, *Barasich v. Columbia Gulf Transmission Co.*[221] and *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*,[222] distinguished the political

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219. All of the public nuisance claims for climate change impacts to date have been filed in federal court. To be viable, these interstate pollution claims are filed under the federal common law of interstate pollution, which serves as the basis for federal court jurisdiction in these cases. Relief for public nuisance claims may also be viable under state law under the savings clause of the CAA's citizen suit provision, but these suits also must be filed in federal court. *See supra* note 190 and accompanying text.

220. Baker v. Carr, 369 U.S. 186, 217 (1962).

221. 467 F. Supp. 2d 676 (E.D. La. 2006).

222. 438 F. Supp. 2d 291 (S.D.N.Y. 2006).

question doctrine reasoning of the district court in *American Electric Power*.

In *Barasich*, residents of southern Louisiana filed suit against oil- and gas-producing companies alleging that the companies had damaged the barrier marshlands, which in turn contributed to increased flooding and damage during Hurricane Katrina.[223] The plaintiffs alleged that the defendants' dredging activities interrupted the hydrology of the marshlands leading to destruction of plant life, destabilization of the soil, and eventual erosion, until the marshlands became open water.[224] In addition, the plaintiffs alleged that the defendants did not maintain their canals, which resulted in further damage to the marshlands.[225]

The Eastern District of Louisiana did not find the issue to be a nonjusticiable political question.[226] Applying the six-factor test from *Baker v. Carr*,[227] the court held that the first factor was not met because "the defendants do not contend, and the Court does not find, that there is a textually demonstrable commitment of coastal erosion questions to a coordinate political department."[228] The second factor was not met because the court followed Fifth Circuit precedent in *Gordon v. Texas*,[229] which held that "coastal erosion is not an area in which courts are unable to determine judicially manageable standards."[230] The court in *Gordon* also made the important distinction that suits for monetary damages generally do not invoke the political question doctrine, but suits for injunctive relief do.[231] The plaintiffs in the *Barasich* case only sought

223. *Barasich*, 467 F. Supp. 2d at 678.

224. *Id.* at 679.

225. *Id.*

226. *Id.* at 688.

227. For a discussion of the *Baker v. Carr* test, see *supra* Part II.B.1.

228. *Barasich*, 467 F. Supp. 2d at 682. The court recognized that this factor has typically been applied to issues involving impeachment and foreign relations. *Id*. at 681–82; *see also* Nixon v. United States, 506 U.S. 224, 237–38 (1993) (finding a suit by a federal judge challenging his impeachment nonjusticiable because there is a constitutional commitment of impeachment procedures to the legislative branch); Goldwater v. Carter, 444 U.S. 996, 1004–05 (1979) (finding a suit by members of Congress challenging the President's power to determine how to terminate a treaty with Taiwan nonjusticiable because it touched upon foreign relations, which is textually committed to the political branches).

229. 153 F.3d 190 (5th Cir. 1998).

230. *Barasich*, 467 F. Supp. 2d at 684.

231. *Id.* at 685 (citing *Gordon*, 153 F.3d at 195). The court in *Gordon* noted that "[i]ndeed, as compared to injunctive relief, requests for monetary damages are less likely to raise political questions. Monetary damages might but typically do not require courts to dictate policy to federal agencies, nor do they constitute a form of relief that is not judicially manageable." *Gordon*, 153 F.3d at 195. On the other hand, "requests for injunctive relief can be particularly susceptible to justiciability problems, for they have the potential to force one branch of government—the

monetary damages, not injunctive relief.[232] In addition, the Supreme Court has never applied the second factor of *Baker v. Carr* to private party disputes, such as the present case.[233] The third factor was not met because it only applies where there are no judicially manageable standards, but those existed here.[234]

The *Barasich* court distinguished the case before it from *American Electric Power*. First, the plaintiffs in *Barasich* sought damages and not an injunction, as had been the case in *American Electric Power*.[235] The court noted that damages are typically judicially manageable remedies and that the remedy sought in this case was restoration damages.[236] Furthermore, the court recognized that the nature of the injunction sought in *American Electric Power*, requiring the court to determine appropriate emission reduction rates, was essentially legislative, which was not at issue in this case.[237] *Barasich* also involved a tort negligence claim, which *American Electric Power* did not, and the court recognized that this claim helped distinguish the results of *American Electric Power*. [238] Given the judicially manageable standards of a tort case for an issue that fits within the basic parameters of a traditional tort case, the court concluded that this case was not precluded as a political question under the second *Baker* factor.[239] The court, however, held that the case should be dismissed due to plaintiffs' failure to prove adequate

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judiciary—to intrude into the decisionmaking properly the domain of another branch—the executive." *Id.* at 194.

232. *Barasich*, 467 F. Supp. 2d at 685.

233. *Id.* at 684.

234. *Id.* at 686–87. The court further reasoned that this case is distinguishable because private parties employing ordinary tort litigation are not requiring the court to use any standards it has not already used to manage tort cases. It quoted the Second Circuit, which stated, "[B]ecause the common law of tort provides clear and well-settled rules on which the district court can easily rely, this case does not require the court to render a decision in the absence of 'judicially discoverable and manageable standards.'" *Id*. at 685 (quoting Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991)).

235. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 268–69 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009).

236. *Barasich*, 467 F. Supp. 2d at 685.

237. *Id.* at 686.

238. *Id.* at 685.

239. *Id.* The court reviewed the last three factors of the *Baker* test as one inquiry. It held that these factors did not apply to the present case for two reasons. First, the issues in this case have not yet been reviewed by the other branches, so the court would not be disrespecting other branches by reviewing a decision they have already addressed. *Id*. at 687. Second, although the court recognized that the government and Congress have taken some actions in response to erosion issues, it held that judicial resolution of this issue would not conflict with federal actions because the plaintiffs are disputing the defendant's actions, not the permit process itself. *Id*. at 688.

redressability and causation, not because it involved a political question, as in *American Electric Power*.[240]

Another significant case to distinguish the district court's reasoning in *American Electric Power* is the MTBE products liability litigation.[241] In that case, several water companies sued numerous gasoline producers that were alleged to have used gasoline products containing methyl tertiary butyl ether (MTBE) that contaminated groundwater.[242] The complaint included public nuisance and other tort-related claims, alleging that the defendants' products contaminated groundwater.[243] The defendants moved to dismiss these claims as nonjusticiable political questions under the *Baker* test, emphasizing the two factors involving initial policy determinations (third factor) and lack of respect for another already interested branch (fourth factor).[244] The court held that the plaintiffs' claims were not precluded by the political question doctrine.[245]

Given that the Supreme Court had not recently ruled on the third and fourth factors of the *Baker* test, the *MTBE* court considered relevant circuit court precedent[246] and distinguished *American Electric Power*. Regarding the third factor, the court disagreed with the defendants' claim that to balance "relevant economic, environmental, energy and security interests implicated by plaintiffs' effort to ban MTBE" would require the court to engage in an initial policy determination that should be left to the political branches.[247] The court noted the difference between determining *liability* and determining *policy*.[248] Because Congress had not addressed the issue by banning such additives or limiting the liability of producers, the court only needed to address

240. *Id.* at 695.

241. *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 438 F. Supp. 2d 291 (S.D.N.Y. 2006).

242. *Id.* at 293.

243. *Id.*

244. *Id.* at 299.

245. *Id.* at 304. The fact that the court addressed the issues under Fed. R. Civ. P. 12(b)(6) distinguishes the case because the 12(b)(6) standard of review is more plaintiff-friendly. The court must proceed with the presumption that all factual allegations made are true, assume all inferences in the plaintiff's favor, and the plaintiff need only show that the complaint is legally feasible, without having to demonstrate any burden of proof regarding the weight of evidence. *Id.* at 295. To warrant dismissal, the court must find the claim is clearly and "inextricably linked" to a political question and must distinguish mere political cases from political questions. *Id*. If this link is too attenuated, the court will avoid finding political questions. *Id.*

246. *See id.* at 297–305.

247. *Id.* at 300.

248. *Id.*

whether the defendants were liable for the harm their products caused.[249] At the time of suit, Congress had not preempted or comprehensively regulated this use; therefore, the court determined that allowing tort claims would not interfere with a federal agenda.[250] The court further noted that, even if the use of these additives was federally regulated or could foreseeably be banned by Congress in the future, tort claim liability is not precluded "absent a congressional injunction prohibiting such suits."[251] The court held that congressional "regulation is relevant to tort liability," but it is not dispositive on the issue.[252]

The *MTBE* court also recognized the relevance of the scope and nature of the remedy sought.[253] In *American Electric Power*, the plaintiffs sought an injunction to cap emissions and for the court to determine a specific percentage of annual emissions reduction.[254] The court in *American Electric Power* reasoned that such a remedy would force the court to make initial policy determinations regarding the percentage of emissions reductions, a policy determination more appropriately left to Congress.[255] In *MTBE*, however, the plaintiffs merely sought to prevent the defendants from "engaging in further releases of MTBE," contending that such public nuisance common law tort claims, which provided the court with adequate guidelines, were historically within the judiciary's domain.[256]

The *MTBE* court concluded that the plaintiffs' tort claims, including the public nuisance claim, were not precluded by the political question doctrine.[257] The court recognized that the issues arose within a political context, but absent any contradictory actions or statements from the legislature or executive branches, the case did not present a political question under the two *Baker* factors that defendants pled.[258] The court denied the defendants' motion to dismiss.[259]

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249. *Id.*

250. *Id.* at 301.

251. *Id.* at 300.

252. *Id.* at 301.

253. *Id.*

254. *Id.* (citing Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009)).

255. *Id.* (citing *Am. Elec. Power Co.*, 406 F. Supp. 2d at 274).

256. *Id.* at 301 (emphasis omitted).

257. *Id.*

258. *Id.* at 303–04.

259. *Id.* at 294–95, 304.

Therefore, the decisions in *Barasich* and *MTBE* reinforce the Second and Fifth Circuits' political question doctrine reasoning in *American Electric Power* and *Comer*, and confirm the viability of *Kivalina*-like litigation. Public nuisance suits for climate change impacts like *Kivalina* would likely not be barred by the political question doctrine because compensating victims of climate change is not textually committed to another branch and because courts have judicially manageable standards at their disposal to address such damage claims.

2. *Climate Justice Plaintiffs Who Establish Geographical Nexus Can Overcome the Obstacle Posed by the Standing Doctrine*

In *Kivalina*-like public nuisance litigation, standing is another potential obstacle. When considering standing analysis in this context, an important issue is whether geographical nexus is necessary to establish standing to recover for alleged global environmental injury.[260] Geographical nexus refers to "the connection required to give an individual or government a legitimate interest in an environmental problem in a given locale."[261]

Several courts have determined that the geographical nexus requirement was satisfied and standing established in cases involving challenges under various environmental law statutes. In *City of Davis v. Coleman*,[262] one of the first cases to address the geographical nexus requirement, the Ninth Circuit concluded that a procedural injury from an agency's failure to comply with requirements under the National Environmental Policy Act (NEPA)[263] provided sufficient injury for standing purposes, as long as the plaintiff had a "geographical nexus" to the disputed conduct such that the continuation of such conduct may cause foreseeable harm to the plaintiff.[264]

In *Coleman*, the city alleged that a proposed highway interchange that would make a planned industrial development possible may adversely affect the quality and quantity of the city water supply. It further asserted

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260. *See generally* Blake R. Bertagna, *"Standing" Up for the Environment: The Ability of Plaintiffs to Establish Legal Standing to Redress Injuries Caused by Global Warming*, 2006 BYU L. REV. 415 (arguing that plaintiffs seeking redress for defendants' contributions to global climate change should allege procedural, rather than substantive, injury claims to overcome geographical nexus concerns).

261. Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV. 1247, 1247 (1996).

262. 521 F.2d 661 (9th Cir. 1975).

263. *See* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2006).

264. *Coleman*, 521 F.2d. at 671.

that the development would cause an influx of population that would frustrate the city's policy of "controlled growth" and render its planning efforts obsolete.[265] The court stated that in creating the environmental impact statement (EIS) requirement, "Congress intended to create procedural rights in people who have a sufficient geographical nexus to the site of the challenged project that they could be expected to suffer whatever environmental consequences the project may have."[266] The court further determined that "[t]he procedural injury implicit in agency failure to prepare an EIS . . . is itself a sufficient 'injury in fact' to support standing."[267] The court concluded that the City of Davis met the test in this case because the Federal Highway Administration's project was located between three and four miles south of the city,[268] and, because of this proximity, the city could be expected to suffer a wide variety of environmental consequences that it alleged would result from the interchange.[269]

In two subsequent procedural injury cases, the scope of viable geographical nexus claims enlarged considerably. In *Committee to Save the Rio Hondo v. Lucero*,[270] the plaintiffs alleged that their use and enjoyment of areas surrounding a ski resort would be harmed by the defendant's failure to comply with NEPA when carrying out a proposed expansion of the ski resort for use in summer months.[271] The Tenth Circuit confirmed that to establish injury in fact, the plaintiff must claim a geographical nexus with the area of alleged harm or an actual use of the area where the alleged harm occurs.[272] Here, the court concluded that the plaintiffs, who resided twelve to fifteen miles down the river from the ski resort, satisfied the geographical nexus requirement.[273] The plaintiffs maintained that they had used the waters of the Rio Hondo watershed throughout their lifetimes for irrigating, fishing, and swimming, and that they intended to continue such use.[274] The court reasoned that the plaintiffs had a sufficient connection to the area because the use of the ski resort caused an increased risk of harm to the

265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.* at 665.
269. *Id.* at 671.
270. 102 F.3d 445 (10th Cir. 1996).
271. *Id.* at 447.
272. *Id.* at 449.
273. *Id.* at 450.
274. *Id.*

plaintiffs from the river, which flows downstream from the resort to the plaintiffs' land.[275]

The Ninth Circuit similarly concluded that the geographical nexus requirement was satisfied in *Citizens for Better Forestry v. USDA*,[276] which involved a procedural injury claim under NEPA and the Endangered Species Act (ESA).[277] The plaintiffs alleged they were injured by harms to several natural parks throughout the country, which the plaintiffs' members used to observe nature and wildlife.[278] The plaintiffs asserted that their interests were impaired by the USDA's and U.S. Forest Service's failure to comply with procedural requirements of NEPA and the ESA before promulgating a new national forest management policy.[279] Although the USDA had prepared an Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI), the citizens were deprived of the opportunity to comment.[280] In addition, the USDA failed to complete a biological assessment under the ESA and did not engage in formal consultation with the Secretary of the Interior.[281] The court held that the plaintiffs had established an injury because they used the particular parks of interest, which established the geographical nexus to the alleged harm.[282] Furthermore, the Ninth Circuit concluded that the plaintiffs need only allege a geographical nexus with an area that is subject to an increased risk of harm from the defendants' conduct and need not specify exactly what harm would occur within any given national park.[283]

Geographical nexus has also been established in standing cases in which substantive injuries were alleged. For example, in *Friends of the Earth v. Laidlaw*,[284] the plaintiffs lived in the vicinity of the defendant's facility, which discharged various pollutants into a river in violation of the CWA.[285] The plaintiffs' members who had expressed concerns in

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275. *Id.* The court distinguished this case from *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), in that here, the plaintiffs' land downstream was specified, whereas in *National Wildlife Federation*, the geographical nexus was not established by simply alleging that the plaintiffs had an interest somewhere within the vicinity of harm that occurred on a large tract of land. *See id.* at 451.

276. 341 F.3d 961 (9th Cir. 2003).

277. *Id.* at 965. *See* Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

278. *Citizens for Better Forestry*, 341 F.3d at 972.

279. *Id.* at 970.

280. *Id.*

281. *Id.* at 967.

282. *Id.* at 971.

283. *Id.* at 971–72.

284. 528 U.S. 167 (2000).

285. *Id.* at 181–83.

affidavits lived one-quarter mile, one-half mile, two miles, twenty miles, and forty miles from the defendant's facility.[286] The Supreme Court concluded that the plaintiffs had adequately alleged injury in fact by asserting that they used the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity.[287]

Similarly, in *Covington v. Jefferson County*,[288] the plaintiffs lived across the street from a city landfill and suffered impacts both individually and to their property from the landfill's unsanitary operations.[289] The plaintiffs faced several risks from the landfill's operation including fires, explosions, vectors, scavengers, and groundwater contamination.[290] The Ninth Circuit held that the plaintiffs were directly affected by, or at a greatly increased risk, of such impacts due to their close proximity, which established a concrete risk of harm and sufficient injury in fact.[291] The court noted that a plaintiff need not prove damage has happened or will definitely happen, as long as there is an increased probability that the threatened harm will occur.[292] Therefore, to meet the injury-in-fact requirement for standing in their citizen suit under the Resource Conservation and Recovery Act (RCRA)[293] and the CAA,[294] the plaintiffs were not required to show that they would prevail on their challenge asserting that the landfill's operation violated these statutes, but only needed to show that the conduct they challenged sufficiently injured them.[295] In *Covington*, the court concluded that the plaintiffs adequately alleged injury-in-fact when they averred that they used the affected area, and that they are persons for whom the aesthetic and recreational values of the area would be lessened by the challenged activity.[296]

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286. *Id.*

287. *Id.* at 183 (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)). *But see* Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358, 361 (5th Cir. 1996) (requiring plaintiff to demonstrate a more specific geographic or causative nexus because an eighteen-mile distance between the point of discharge and the area of plaintiff's use of a waterway was deemed "too large to infer causation").

288. 358 F.3d 626 (9th Cir. 2004).

289. *Id.* at 638.

290. *Id.*

291. *Id.*

292. *See id.*

293. *See* Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992k (2006).

294. *See* Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006).

295. *Covington*, 358 F.3d at 639.

296. *Id.* (quoting Friends of the Earth v. Laidlaw, 528 U.S. 167, 183 (2000)).

Geographical nexus analysis for global environmental harms with local impacts is the analysis most relevant for purposes of evaluating *Kivalina*-like litigation. The courts' review of geographical nexus in global environmental harm cases also draws on causation concerns. In another challenge under the CAA, the plaintiffs in *Northwest Environmental Defense Center v. Owens Corning Corp.*[297] alleged that the defendant company was violating the CAA by emitting harmful ozone-depleting gases without a permit for its facility.[298] The plaintiffs, who resided, worked, and recreated near the partially completed facility, feared future harm to their health and environment.[299] The plaintiffs alleged that they would suffer direct health impacts from emissions entering into the atmosphere from the defendant's facility, and that the local ecosystem with which these individuals constantly interact could be damaged.[300]

The court in *Owens Corning Corp.* concluded that the plaintiffs had standing to bring the suit.[301] While recognizing that global warming is a general problem for the entire world, the court determined that the injuries that the plaintiffs alleged concerned their locality and had already manifested themselves in their vicinity.[302] The court further noted that the complaint need only establish an individualized injury to the plaintiffs.[303] The plaintiffs did not need to prove with scientific certainty that the defendant's emissions, and only those emissions, were the cause of their apprehensions.[304]

Courts have determined that plaintiffs lacked sufficient geographical nexus to support standing in several cases; however, these courts so concluded on factually distinguishable grounds. The first two of these cases illustrate the proposition that "bad facts make bad law," and are easily distinguishable from *Kivalina*-like litigation scenarios. The

297. 434 F. Supp. 2d 957 (D. Or. 2006).

298. *Id.* at 959–60.

299. *Id.* at 960–61.

300. *Id.* at 965.

301. *Id.* at 971.

302. *Id.* at 970.

303. *Id.* at 967.

304. *Id.* Regarding prudential concerns, the defendant argued that the zone of interest would be too large because worldwide emissions cannot be monitored, and a worldwide zone of interest is unreasonable. *Id.* at 969. The court determined that the plaintiffs' claims asserted their own rights and that the zone of interest concern was satisfied. *Id*. Moreover, in response to the defendant's position that the plaintiffs' allegations constituted a generalized grievance, the court concluded that just because an injury is widespread does not mean it is generalized or beyond the court's authority. *Id.*

combination of *Lujan v. National Wildlife Federation*[305] and *Lujan v. Defenders of Wildlife*[306] heralded the onset of a new and more restrictive era in environmental standing. The plaintiffs i*n National Wildlife Federation* alleged that their use and enjoyment of land in a general vicinity of large tracts of lands was harmed.[307] The Supreme Court concluded that this general proximity was not specific enough to establish standing.[308]

One of the areas alleged as a vicinity of interest, known as the "Arizona Strip," was 5.5 million acres.[309] As such, the plaintiffs' proximity to the harm was not established.[310] The Supreme Court explained that such general conclusions do not meet the geographical requirements to survive a motion for summary judgment.[311] The Court reasoned that "Rule 56(e) is assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action."[312] According to the Court, allegations that "presume" missing facts are insufficient because, without them, the affidavits would not establish the alleged injury.[313] Unlike the speculative allegations in *National Wildlife Federation*, the plaintiffs in *Kivalina* have alleged concrete harm—coastal erosion—that is linked to the defendants'

305. 497 U.S. 871 (1990).

306. 504 U.S. 555 (1992).

307. *National Wildlife Federation*, 497 U.S. at 887.

308. *Id.* at 889.

309. *Id.* at 887.

310. *Id.*

311. *Id.* at 889.

312. *Id.*

313. *Id.* The Court distinguished its standard of review from the one at issue in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP*), 412 U.S. 669 (1973), noting that the standard in *SCRAP* differed because it involved a motion to dismiss and not a Rule 56 motion for summary judgment. *National Wildlife Federation*, 497 U.S. at 889. Subsequently, in *United States v. AVX Corp*., the First Circuit further qualified the relevance of *SCRAP*. 962 F.2d 108, 117 (1st Cir. 1992). The court stated that "it is not enough, at least in the post-*Lujan* era, that a plaintiff possesses some generalized, undifferentiated interest in preserving those resources." *Id*. at 118. Rather, as Professor Erwin Chemerinsky has concluded, a plaintiff, to secure standing, "must show that he or she uses the specific property in question." *Id.* (quoting Erwin Chemerinsky, FEDERAL JURISDICTION § 2.3.2 (Little, Brown & Co. Supp. 1990)). The *AVX* court interpreted the geographical nexus requirement strictly by suggesting that living within a state is not enough; the plaintiffs' proximity to the alleged harm must be more localized. *Id*. at 117. In *SCRAP*, on the other hand, the plaintiffs lived in and used land within a 5564 square-mile area that encompassed Virginia, Maryland, and West Virginia. *Id.*

contributions to climate change as manifested by sea level rise, which is one of the principal impacts of climate change.

A similarly defective brand of non-specific allegations on an even larger environmental scale was at issue in *Lujan v. Defenders of Wildlife*. This case involved an ESA claim regarding actions taken abroad that the plaintiffs claimed affected their ability to enjoy endangered species of wildlife that they had observed in foreign countries.[314] The Supreme Court held that the plaintiffs lacked standing because they did not show a particularized and individual injury.[315] The Court noted that to assert an individual injury, the plaintiff must show more than just a general injury to the ecosystem based on conduct far away from the plaintiffs' location.[316] An injury is not concrete and particularized enough if it is merely a general injury that may affect anyone anywhere on the globe who has an interest in observing and studying wildlife.[317] Furthermore, a special interest in the action is not sufficient to allege injury; the plaintiffs' injury must still be direct.[318] The Court also held that "some day" intentions to return to the sites where the plaintiffs had observed the endangered species in question were not sufficient to satisfy the actual or imminent requirement for injury.[319] The Court conceded, however, that failing to prove a geographical proximity to the harm, based on distance alone, would not necessarily defeat an injury claim.[320]

The D.C. Circuit reached a similar conclusion on similar non-specific allegations in *Florida Audubon Society v. Bentsen*.[321] In that case, the plaintiffs opposed a tax change on the gas additive ETBE, claiming that the new tax would increase the production of ethanol in their vicinities, leading to an increase in agriculture, which in turn would harm the environment of the plaintiffs' agricultural areas.[322] The plaintiffs alleged

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314. *See Defenders of Wildlife*, 504 U.S. at 562–63.

315. *Id.* at 563.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.* at 564. The court rejected the plaintiffs' additional attempts to show individualized injury. The Court found the first attempt, the "ecosystem nexus," insufficient because the plaintiff must prove they actually use the area affected and not simply an area "roughly in the vicinity of" it. *Id.* at 565–66. The plaintiffs' second attempt, the "animal nexus," was also found insufficient because it would give standing to anyone anywhere in the world who wanted to claim injury. *Id.* at 566–67. The last attempt, the "vocational nexus," was also held insufficient because it would give the same general right to sue to everyone with a professional interest, regardless of individualized factors. *Id.*

320. *Id.* at 567 n.3.

321. 94 F.3d 658 (D.C. Cir. 1996).

322. *Id.* at 666.

that this increase in agriculture would affect wildlife in the areas that bordered the agricultural developments.[323] The D.C. Circuit denied standing for this claim, stating that there was insufficient evidence that the tax would harm the particular agricultural areas and that, if anything, the plaintiffs merely alleged a hypothetical harm that was common to all and not specific to the area at issue.[324] Consequently, the court concluded that plaintiffs did not allege a sufficient geographical nexus for the alleged harm.[325]

The only case involving geographical nexus that could undermine plaintiffs' ability to establish geographical nexus in *Kivalina*-like litigation is a 2009 case from the D.C. Circuit, *Center for Biological Diversity v. U.S. Department of the Interior*.[326] The Center for Biological Diversity challenged the Department of the Interior's (DOI's) approval of a new five-year oil and gas leasing program, which included an expansion of previous lease offerings in the Beaufort, Bering, and Chukchi Seas off the coast of Alaska.[327] Among several claims, the plaintiff argued that DOI violated both the Outer Continental Shelf Lands Act and NEPA for failing to take into consideration both the effects of climate change on outer continental shelf areas and the leasing program's effects on climate change.[328] The court distinguished the substantive standing claim in this case from the claim at issue in *Massachusetts v. EPA*.[329] The court noted that in *Massachusetts v. EPA*, the state was allowed to sue as a sovereign on behalf of its individually affected citizens for the impacts of loss of coastal land from sea level rise.[330] In this case, however, the D.C. Circuit noted that the claim alleged climate change impacts in general without any direct and personal injury to the citizens of the Village of Point Hope, Alaska.[331]

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323. *Id.* at 667.

324. *Id.* at 668. The Court concluded that the plaintiffs failed to demonstrate that individual corn or sugar farmers in these areas would affirmatively respond to the tax credit by significantly increasing production. *Id.* at 667. Instead, the plaintiffs contended that the tax credit would create a general risk of serious environmental harm by encouraging farmers throughout the United States, and by implication, farmers near the wildlife areas that the plaintiffs visited, to increase production in a manner that would increase agricultural pollution, which in turn would damage the wildlife areas. *Id*.

325. *Id.* at 668.

326. 563 F.3d 466 (D.C. Cir. 2009).

327. *Id.* at 471.

328. *Id.* at 471–72.

329. *Id.* at 476 (citing Massachusetts v. EPA, 549 U.S. 497, 518–23).

330. *Id.* at 476–77.

331. *Id.* at 477. The Village of Point Hope, Alaska is a federally recognized tribal government whose members use the Chukchi Sea for hunting, fishing, whaling, and gathering.

Furthermore, even if the harm were not a general claim, the only climate change impacts that were occurring affected property owned by the federal government and not Point Hope's sovereign property.[332] Thus, even though the tribe's members use the affected area, the court denied Point Hope the opportunity to assert the "special solicitude" exception established in *Massachusetts v. EPA*.[333] Thus, the substantive injury claim in this case failed for lack of standing because the allegations were not individualized and particular, but general to humanity at large. It also failed because the court regarded the claim as hypothetical and lacking causation.[334]

While the court in *Center for Biological Diversity* arguably reached the correct conclusion on the facts before it, the scenario in that case is distinguishable from *Kivalina*-like litigation for climate change impacts. The Fifth Circuit in *Comer* addressed this distinction directly and effectively:

> [T]he D.C. Circuit [in *Center for Biological Diversity*] found that the plaintiffs could only speculate that the damages *will* occur only if many different actors . . . all acted in a way that would increase global warming to cause damage. Here, the plaintiffs, instead, make allegations, taken as true, that a past causation link led to their particularized damage—therefore, the alleged harms to the plaintiffs' specific property and persons are "traceable" to the Defendants without speculation as to the Defendants' and third parties' future actions and interactions.[335]

In a related vein, the Fifth Circuit in *Comer* also determined that the chain of causation at issue in *Comer* was "one step shorter than the one recognized in *Massachusetts*"; therefore, the plaintiffs in *Comer* did not need to rely on the special solicitude exception to establish standing.[336]

These standing cases demonstrate that public nuisance claims for climate change impacts face a challenging but not insurmountable obstacle in seeking to comply with the geographical nexus and causation requirements for standing. Based on the *Owens Corning Corp.* and *Center for Biological Diversity* cases discussed above, parties alleging claims that are closely analogous to the *Kivalina* scenario are likely to meet standing requirements because of the direct cause and effect relationship at issue. Scenarios like *Comer* have the potential to be

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332. *Id.*

333. *Id.*

334. *Id.* at 478.

335. Comer v. Murphy Oil USA, 585 F.3d 855, 863 n.3 (5th Cir. 2009) (citations omitted).

336. *Id.* at 865 n.5.

successful, but will prove more challenging to fulfill the geographical nexus and causation requirements. One impact of climate change is a mere increased likelihood of a severe storm event such as Hurricane Katrina, which in turn caused the devastating impacts that the plaintiffs suffered in *Comer*. By contrast, the increased coastal erosion in *Kivalina*, caused at least in part by climate change, directly caused the need to evacuate the village.

IV. PUBLIC NUISANCE LITIGATION IN THE UNITED STATES AS A SHORT- AND LONG-TERM SOLUTION FOR THE GLOBAL CLIMATE JUSTICE MOVEMENT

This Part evaluates the lessons learned from public nuisance suits for climate change impacts and how such lessons can be adapted for use on the international stage. It first examines the opportunities that public nuisance suits for climate change impacts offer as a short-term fix and a possible foundation for a long-term solution for populations disproportionately affected by climate change in the United States and throughout the world. It then provides some observations about the synergies between these suits and the evolution of citizen suits under U.S. environmental law.

A. Public Nuisance Suits as Viable Relief for the Present and Future

The crisis in the Native Village of Kivalina and situations like it throughout the world demand both a short-term remedy and a long-term solution. These desperate situations require an urgent and creative legal response because traditional international climate change treaty negotiations cannot develop and implement a viable remedy quickly enough. Such responses take years, if not decades, to evolve.

In the meantime, engaging the judiciary to secure common law relief through remedies such as public nuisance litigation may be a viable short-term remedy in that it is the most immediate way to redress the harm for victims in the United States. However, it is a limited and unreliable solution on its own terms because it is confined to case-by-case assessments of whether such a remedy exists, and it must overcome challenging jurisdictional obstacles such as the political question doctrine[337] and standing[338] for such claims to be heard. The publicity

337. For a discussion of the political question doctrine challenges that climate justice plaintiffs face, see *supra* Part III.B.1.

338. For a discussion of the standing doctrine challenges that climate justice plaintiffs face, see *supra* Part III.B.2.

from and potential victories in public nuisance suits can, in the long term, help lay a foundation for a future climate justice framework. Such an opportunity could mirror and capitalize on the evolution of citizen suits under federal environmental laws by institutionalizing a private right to be free from climate change impacts that threaten the sustainability of vulnerable communities in a post-Kyoto world.

1. Short-Term Relief

Important conditions and limitations need to be in place for future public nuisance suits for climate change impacts to be successful. First, Article III standing jurisprudence demands that only parties that meet injury, causation, and redressability requirements are eligible to seek the relief from the courts. Second, the suits must seek relief that the courts can grant. The political question doctrine can impose appropriate limits on the justiciability of these claims. Litigants should not ask courts to play the role of Congress, even when Congress has not responded to critical issues of national concern in a timely manner. For public nuisance cases to be justiciable, there must be an allegation of individual harm for which the court can fashion a remedy. Asking the court to determine an emission cap for power plants throughout the nation is not an appropriate theory of relief in a public nuisance case because such a remedy must be established and implemented in the legislative and executive branches through climate treaty negotiations and domestic implementing legislation.[339] Although the Second Circuit accepted this theory of relief in *American Electric Power*, it is very unlikely that the Supreme Court would embrace such a view if it grants review in the case.

Public nuisance cases for climate change impacts also need to allege viable causal connections between the defendants' acts or omissions and the alleged victims' injuries. The allegations in *Comer* represent the outer limits of a potentially viable claim on causation grounds. As the Fifth Circuit noted, the *Comer* causation scenario is no more attenuated than the causal connection that was determined to be valid in *Massachusetts v. EPA* on special solicitude standing grounds.[340]

339. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (holding courts may refrain from hearing disputes on political question grounds if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department").

340. The Fifth Circuit in *Comer* held that it did not matter if the defendants were merely a few of many sources to cause harm to the plaintiffs. 585 F.3d at 865. To satisfy the "fairly traceable" element of standing, the court concluded that the relevant test is whether "the pollutant causes or *contributes to* the kinds of injuries alleged by the plaintiffs." *Id.* at 866 (quoting Sierra Club v.

Although the Fifth Circuit held that the plaintiffs' case could proceed, this scenario, like *American Electric Power*, is likely to fail if it reaches the Supreme Court.

The best source of hope is the "just right" factual circumstances reflected in the *Kivalina* scenario. While alleging proper injury in fact is often the most significant hurdle in environmental standing cases, the biggest potential standing hurdle in public nuisance claims for climate change impacts is causation. Even though the "fairly traceable" standard for causation is more plaintiff-friendly than the proximate causation requirement in negligence claims, the fairly traceable standard nevertheless can be a daunting hurdle in the context of global environmental harms. The causal connection in *Kivalina,* albeit broad, is tighter than what the Fifth Circuit approved in *Comer*. More importantly, the theory of relief in *Kivalina* is the best available in this sequence of public nuisance cases because individual victims of the impacts have been identified.

Therefore, the *American Electric Power-Comer-Kivalina* trilogy represents a "good-better-best" spectrum of refinement in public nuisance cases for climate change impacts. The theory of relief in *American Electric Power* was effective as an awareness-raising mechanism to goad the federal government into responding to the climate change problem with an effective federal system of regulation; however, it was not a viable theory upon which to base future remedies in public nuisance cases.[341] The *Comer* case also is effective as a goad for future government regulation of climate change impacts, but it too is not an ideal theory of relief for future public nuisance cases because it is potentially subject to abuse as a means to scapegoat the regulated community by extracting piecemeal relief from those entities for a regulatory failure that rests primarily with the federal government.[342]

However, the failure of the other common law claims in *Comer* underscores the potential ongoing validity of the public nuisance theory in that case. The Fifth Circuit in *Comer* held that the other common law claims in the case—unjust enrichment, civil conspiracy, and fraudulent misrepresentation—must be dismissed on prudential standing grounds as nonjusticiable grievances common to all of society.[343] Unlike the public nuisance claim in *Comer*, these other common law claims sought relief

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Cedar Point Oil Co., 73 F.3d 546, 557 (5th Cir. 1996)).

341. For a discussion of the *American Electric Power* case, see *supra* Part II.B.1.

342. For a discussion of the *Comer* case, see *supra* Part II.B.3.

343. *Comer*, 585 F.3d at 867–68.

for the failure of the government to properly regulate the emissions.[344] While those concerns are valid, they are more properly addressed by the legislative and executive branches. In contrast, the public nuisance claim is a strong basis for such suits because it is valid on both standing and political question grounds.

The *Kivalina* litigation builds on the viability of public nuisance theory from *Comer* in seeking relief for identified victims of cultural genocide in connection with climate change impacts. The public nuisance framework provides a useful structure for an individual, reactive, short-term remedy. The Native Village of Kivalina exemplifies the proper type of plaintiff for this kind of action. The nature and degree of harm to it is such that appropriate judicial parameters on the viability of future claims can be imposed because "cultural genocide" is a very difficult standard to meet. Public nuisance claims can succeed where disparate impact litigation failed in the environmental justice context. Like environmental justice, such claims can promote positive outcomes through enhanced awareness and proactive measures to protect such disproportionately affected communities. Unlike environmental justice litigation, however, climate justice litigation offers victims the possibility of sustaining their claims in the courts and obtaining the relief they deserve.

Although public nuisance litigation offers a viable mechanism through which human rights impacts from climate change can be remedied, this common law avenue of relief can be abused.[345] Especially at a time when the U.S. government has been slow to implement a federal response to climate change, the regulated community is especially vulnerable to public nuisance suits. Such suits run the risk of targeting the regulated entities as "scapegoats" of an impatient public's desire for tangible relief in addressing the climate change problem. Therefore, this approach is problematic over the long term and should be replaced with a top-down response to the climate change problem that can incorporate human rights concerns at both the domestic and international levels.

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344. *Id.*

345. *See generally* Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 CONN. L. REV. 591, 624–29 (2008) (discussing possible abuses of public nuisance litigation in environmental law matters); Faulk & Gray, *supra* note 14 (discussing lead paint litigation as an example of abuse of public nuisance suits). It is likely that there will be a similar evolution with respect to climate justice rights and remedies.

2. Building a Long-Term Framework

Public nuisance litigation is a useful mechanism to spur "institutionalized" relief in the form of a federal statutory or treaty-based remedy in the near future for the victims of climate change impacts. The evolution of citizen enforcement of federal environmental laws is instructive in this regard. Prior to the 1970s, recovering for harm to shared resources such as mountains, rivers, and oceans was the sole province of the government. Concerned citizens could only urge their elected officials to respond to these crises but were otherwise powerless to respond directly. Common law remedies were the only legal recourse that these concerned citizens could turn to for relief. These legal theories were an extremely limited and largely ineffective means of seeking the broad-based relief for environmental harms that plaintiffs sought. Nevertheless, the creative use of common law remedies was an important precursor to raise awareness of the need for comprehensive federal and state statutory-based schemes to address these problems, and the need to allow citizens to play meaningful roles in enforcing new legislative schemes through citizen suit provisions.[346]

A similar recognition and evolution could occur through the creative use of public nuisance litigation to seek recovery for climate change impacts. The victims are clearly identifiable (i.e., the people who are forced to move from their communities), which is similar to the way in which the exploited resources were the clearly identified "victims" in the 1970s. This litigation would help raise awareness of the need for a comprehensive federal response, which would ultimately help the victims of climate change impacts. Eliminating the prudential considerations component for standing in citizen suit provisions under federal environmental laws has enhanced access to the courts for aggrieved plaintiffs to recover for environmental harm, and this progression of public nuisance suits could achieve a similar result here.[347]

Like the explosion of federal environmental law in the United States in the 1970s and 1980s, the use of public nuisance suits and other common law remedies for climate change impacts in the United States

346. "Environmental citizen suits seemed farfetched in the early 1970s, but by the early 1980s, they had become institutionalized." Randall S. Abate, *Kyoto or Not, Here We Come: The Promise and Perils of the Piecemeal Approach to Climate Change Regulation in the United States*, 15 CORNELL J. L. & PUB. POL'Y 370, 399 (2006) (citing MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS 1-9, 1-10 (1991)).

347. *See* Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1039 (8th Cir. 1988) (holding that Congress may eliminate the prudential requirements of standing by legislation).

could provide valuable guidance to the international community. For example, the Australian counterpart to the *Kivalina* litigation involves the Torres Straits Islanders. Australia is the sixteenth largest and fourth highest per capita greenhouse gas emitter.[348] In addition to its current and future climate change treaty commitments, common law litigation will be a potentially effective means to apply the legal, political, and moral pressure necessary to ensure the current Australian government will do all that is possible to address the problem.[349]

To date, the legal means for addressing such issues in Australia have been through judicial and merits review in administrative law.[350] A tort complaint based in negligence or nuisance could be more effective and would be highly relevant to the circumstances of the Torres Straits; however, asserting a tort claim against the government is difficult on causation grounds.[351] In the alternative, some countries have sought to apply international law in global warming cases, claiming that governments have failed to prevent transboundary harm.[352] Unfortunately, the Torres Strait Islanders would face a daunting challenge in proving standing, as the International Court of Justice is restricted to states, and Australia's courts cannot force a foreign government to comply with Australia's international obligations.[353]

A more realistic option for the Torres Strait Islanders would be to make an individual complaint to the United Nations Human Rights Commission (HRC). The HRC was established in 1947 to protect human rights.[354] It does not use judicial proceedings in human rights cases, but instead focuses on raising public awareness and implementing programs to address these issues in each of its member states.[355] Nevertheless, a favorable outcome at the HRC may put the necessary pressure on future governmental policy decisions.[356] Fortunately, human rights bodies such

348. *See supra* Part I.

349. *See supra* Part III.B.

350. *See supra* Part III.B.

351. *See supra* Part III.B.

352. Kalinga Seneviratne, *Tiny Tuvalu Steps up Threat to Sue Australia, U.S.*, INTER PRESS SERVICE, Sept. 5, 2002, http://www.commondreams.org/headlines02/0905-02.htm.

353. Press Release, International Commission of Jurists: Australian Section, ICJ Australia Opposes New Counter-Terrorism Laws 1 (Oct. 7, 2005), *available at* http://www.unhcr.org/refworld/country,,ICJURISTS,,AUS,,48a3f02ed,0.html.

354. Caroline Dommen, *How Human Rights Norms Can Contribute to Environmental Protection: Some Practical Possibilities Within the United Nations System*, *in* LINKING HUMAN RIGHTS AND THE ENVIRONMENT 105, 106 (Romina Picolotti & Jorge Daniel Taillant eds., 2003).

355. *Id.* at 106.

356. The Inuit advanced a similar theory in their petition against the United States before the

as the HRC have developed a link between human rights and the environment to allow for such an inquiry, particularly for indigenous peoples adversely affected by environmentally harmful activities.[357] The HRC has recognized rights to life, freedom of residence, and movement; the enjoyment of culture; the protection of privacy, family, and the home; property; and health.[358] In a similar case involving the Inuit, alleged infringement of these rights was also asserted.[359]

A Torres Straits complaint to the HRC would have to challenge Australia's compliance with its obligations under the International Covenant on Civil and Political Rights (ICCPR).[360] The plaintiffs could assert that the Covenant adopted by the government to protect citizens requires the government to adopt measures to prevent climate change.[361] The complaint would have to assert that Australia's current greenhouse gas emission levels are not in compliance with the Kyoto Protocol and post-Kyoto negotiations.[362] A complaint in Australian national courts would have to challenge the appropriateness of the government's emission reduction targets, and whether the government has adopted adequate policies to ensure those targets will be met in a timely manner.[363] Domestic remedies must be exhausted prior to application to the human rights body.[364] However, since this type of problem exists on an international level, this step can be accomplished easily.[365]

Such a complaint must also address causation issues. First, the complaint must show that anthropogenic greenhouse gas emissions are responsible for global warming.[366] Second, the specific impacts of climate change alleged to violate islanders' ICCPR rights must be attributed to anthropogenic greenhouse gases. Third, and most difficult, the harm to the islanders' ICCPR rights must be attributed to the acts or omissions of the Australian Government. Finally, standing must be addressed. So long as an applicant is considered a "victim," he or she

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Inter-American Human Right Commission. *See* Emily Gertz, *Inuit Fight Climate Change with Human-Rights Claim Against U.S.*, GRIST, July 26, 2005, http://www.grist.org/article/gertz-inuit.

357. *Id.*

358. *Id.;* Seneviratne, *supra* note 352.

359. Gertz, *supra* note 356.

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

will have standing.[367] Therefore, the complaint should allege actual injury to the islanders.[368]

The *Kivalina* litigation addresses all of these important questions and could provide a valuable reference point from which to spread the viability of this theory of relief throughout the international community. The case involves two essential elements for success: (1) identified victims who have suffered direct harm from climate change impacts; and (2) the degree of harm suffered constitutes cultural genocide because the need to relocate the population fundamentally alters the subsistence lifestyle of the community. Climate justice relief need not be limited to such extreme factual scenarios; however, compelling cases are necessary to establish precedent in the courts that can later be institutionalized in legislation.

The success of a small number of these suits under these limited circumstances could help the climate justice field grow by replicating the evolution of citizen suits under federal environmental law. The foundation for citizen suits under federal environmental laws was a series of successful, albeit piecemeal and uncoordinated, lawsuits applying creative common law theories. The recognition of the need for meaningful public participation and enhanced governmental and private sector environmental accountability prompted Congress to respond with a comprehensive framework of citizen suit provisions in federal environmental laws. Similarly, climate justice claims that once were only viable in the courts on a piecemeal basis can become more "institutionalized" and likely to succeed when authorized pursuant to a federal legislative scheme. Once a federal regulatory system is in place, however, public nuisance suits for climate change impacts should remain available as a viable gap-filler remedy for limited and extreme scenarios like the *Kivalina* plaintiffs. This approach is transferable to the international context as part of a post-Kyoto framework as the international community moves forward from Copenhagen.

B. Incorporating Climate Justice Principles into the Post-Kyoto Regime

As *Kivalina*-like litigation theories gain support in the courts in the United States, Australia and elsewhere, they may prompt nations to develop legislation recognizing such human rights-based protections for climate change impacts. The next step would be to integrate such a

367. *Id.*

368. *Id.*

theory at the international level in a treaty or pre-treaty agreement, such as the recent Copenhagen Accord.[369] A similar progression occurred in the context of environmental impact assessment, which took hold in the United States in the late 1960s[370] and was subsequently integrated into international environmental law treaties in the ensuing decades.[371]

Developing countries' interests are now commanding more attention than ever before in international climate change negotiations.[372] The need for climate justice provisions as part of a post-Kyoto regime is likely to gain a similar stronghold with possible victories at the domestic level in cases like *Kivalina* and the Torres Strait Islanders. One goal of the climate justice movement is that the cultural genocide these victimized populations are facing or may face in the immediate future should begin to trigger domestic and international human rights protections.[373]

Some of the publicity regarding the need for climate justice provisions has already taken hold in international climate diplomacy. In December 2009, at the Fifteenth Conference of the Parties to the Kyoto Protocol in Copenhagen, climate justice concerns were considered as part of the negotiation for the provisions of the Copenhagen Accord. For example, Article 1 of the Accord provides, "We recognize the critical impacts of climate change and the potential impacts of response measures on countries particularly vulnerable to its adverse effects and stress the need to establish a comprehensive adaptation programme including international support."[374] The Accord also establishes specific mechanisms to promote climate change adaptation assistance to vulnerable populations. For example, Article 6 recognizes the crucial role of reducing emissions from deforestation and forest degradation (REDD) to "enable the mobilization of financial resources from developed countries" to reduce global greenhouse gas emissions.[375] In

369. Copenhagen Accord, *supra* note 4.

370. *See* National Environmental Policy Act, 42 U.S.C. §§ 4321–4370f (2006).

371. *See* DINAH SHELTON & ALEXANDRE KISS, JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW 38 (2005).

372. For example, seven of the twelve articles of the Copenhagen Accord address the role of developing nations or the adaptation needs of populations most vulnerable to climate change. *See* Copenhagen Accord, *supra* note 4, arts. 1, 2, 3, 6, 7, 8, 10.

373. *See generally* Chukwumerije Okereke & Heike Schroeder, *How Can Justice, Development, and Climate Change Mitigation Be Reconciled for Developing Countries in a Post-Kyoto Settlement?*, 1 CLIMATE & DEV. 10 (2009); Mark Stallworthy, *Environmental Justice Imperatives for an Era of Climate Change*, 36 J. L. & SOC'Y 55 (2009).

374. *See* Copenhagen Accord, *supra* note 4, art. 1.

375. *See* Copenhagen Accord, *supra* note 4, art. 6. For a critique of the adequacy of the REDD

addition, Article 8 calls for thirty billion dollars for the period 2010–2012 in adaptation funding from the developed countries to the "most vulnerable developing countries, such as the least developed countries, small island developing States and Africa."[376] Article 8 further calls for 100 billion dollars a year by 2020 to address developing countries' efforts to mitigate greenhouse gas emissions.[377]

But Copenhagen was a disappointment to many who sought stronger protections for vulnerable populations.[378] First, the Accord is only a political agreement—the hope to negotiate a binding treaty text at Copenhagen was abandoned as impossible prior to the start of the meeting.[379] The international community now seeks to negotiate such a binding text at the Sixteenth Conference of the Parties (COP 16) in Mexico City in 2010. Second, the negotiations were highly contentious, largely because the developing countries were dissatisfied with the mitigation and adaptation proposals that the developed countries were offering.[380] Finally, the Accord's final language lacked any reference to "human rights" and existing human rights obligations set forth in other international treaties and instruments.[381] For a post-Kyoto treaty to fully respond to the climate-change-adaptation era of the present, a marriage of international environmental law and international human rights must occur in that treaty's text.[382] Anything less would further victimize vulnerable populations who lie in the path of devastating climate change impacts.

Despite its shortcomings, the Copenhagen Accord reflects an important paradigm shift in the international community's approach to

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language in the Copenhagen Accord, see *REDD May Yet Survive Copenhagen Failures*, CARBONPOSITIVE.NET, Dec. 21, 2009, http://www.carbonpositive.net/viewarticle.aspx?articleID=1786, and see also Chris Lang, *What Came out of Copenhagen on REDD?*, Dec. 22, 2009, http://www.redd-monitor.org/2009/12/22/what-came-out-of-copenhagen-on-redd/.

376. *See* Copenhagen Accord, *supra* note 4, art. 8.

377. *Id.*

378. *See* Media Release, Inuit Tapirit Kanatami, Copenhagen Accord Excludes Inuit but Contains Promise of Hope, (Dec. 21, 2009), http://www.itk.ca/media-centre/media-releases/copenhagen-accord-excludes-inuit-contains-promise-hope.

379. *See* Suzanne Goldenberg & John Vidal, *US Scales Down Hopes of Global Climate Change Treaty in Copenhagen*, GUARDIAN, Nov. 4, 2009, http://www.guardian.co.uk/environment/2009/nov/04/us-climate-change-copenhagen-treaty.

380. *See* Mohammed Abdul Baten, *Whither Agreements?*, DAILY STAR, Nov. 7, 2009, http://www.thedailystar.net/story.php?nid=112961.

381. *See generally* Copenhagen Accord, *supra* note 4.

382. *See generally* Marc Limon, *Human Rights and Climate Change: Constructing a Case for Political Action*, 33 HARV. ENVTL. L. REV. 439 (2009) (discussing UN Human Rights Council Resolution 7/23, which recognizes that climate change has human rights implications).

climate change as compared to the existing approach in the Kyoto Protocol. While climate change mitigation strategies remain important, they are no longer the exclusive focus of international climate change regulation. The text of the Copenhagen Accord is laced with urgency regarding the need to implement meaningful climate change adaptation measures for vulnerable populations.[383]

But the Copenhagen Accord is only a small step forward. The climate justice field, both domestically and internationally, needs to build on the progress from Copenhagen and develop action mechanisms and affirmative rights for these vulnerable populations to ensure that their interests are given top priority as the international community confronts the daunting challenges posed by climate change in the decades to come. Formally recognizing the need for action is an indispensable first step. But the devil is in the details and the needs of vulnerable populations must come first in moving forward. Human rights impact assessments[384] and actionable individual rights as part of a post-Kyoto regime on climate change are examples of a new, human-centered strategy to combat international environmental problems. Treaty-based protections addressing climate change can no longer focus exclusively on state sovereignty and protection of natural resources. The focus now must shift to ensure protection of vulnerable populations affected by climate change.

Perhaps the most shocking illustration of this need for enhanced protections for vulnerable populations is in the Maldives, a country that faces certain inundation from sea level rise within decades unless drastic mitigation and adaptation measures are undertaken very soon. This crisis

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383. *See, e.g.*, Copenhagen Accord, *supra* note 4, art. 1 ("We recognize the critical impacts of climate change and the potential impacts of response measures on countries particularly vulnerable to its adverse effects and stress the need to establish a comprehensive adaptation programme including international support."); *id*. art. 3 ("Enhanced action and international cooperation on adaptation is urgently required to ensure the implementation of the Convention by enabling and supporting the implementation of adaptation actions aimed at reducing vulnerability and building resilience in developing countries . . . . ").

384. Like an environmental impact assessment under NEPA, a human rights impact assessment is a "proactive procedural mechanism that evaluates human rights threats posed by climate change impacts before permanent adverse impacts are experienced." Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 26A STAN. ENVTL. L.J. 3, 71 (2007). This mechanism "seeks to prevent abuses, improve policy, increase corporate accountability, and ultimately to increase knowledge of and respect for human rights." *Id.* (citing Diana Bronson, Coordinator, Globalisation and Human Rights, Presentation to the Parliamentary Subcommittee on Human Rights and International Development and Canadian Investment: Human Rights as Due Diligence (June 1, 2005) *available at* http://:www.dd-rd.ca/site/what-we-do/index/.php?subsection=documents &lang=en&id=1610).

is compellingly conveyed through the eloquent words of the President of the Maldives, Mohamed Nasheed, in his inaugural address to the "Climate Vulnerable Forum" meeting on November 9, 2009.[385]

> We gather in this hall today, as some of the most climate-vulnerable nations on Earth.
>
> We are vulnerable because climate change threatens to hit us first; and hit us hardest.
>
> And we are vulnerable because we have modest means with which to protect ourselves from the coming disaster.
>
> We are a diverse group of countries.
>
> But we share one common enemy.
>
> For us, climate change is no distant or abstract threat; but a clear and present danger to our survival.
>
> ***
>
> We are the frontline states in the climate change battle.
>
> ***
>
> So what can we do about it?
>
> ***
>
> Members of the G8 rich countries have pledged to halt temperature rises to two degrees Celsius.
>
> Yet they have refused to commit to the carbon targets, which would deliver even this modest goal.
>
> ***
>
> At two degrees my country would not survive.
>
> As a president I cannot accept this.
>
> ***
>
> I refuse to believe that it is too late. . .
>
> Copenhagen is our date with destiny.[386]

If the Copenhagen Accord represents the outcome of these nations' "date with destiny," there is little hope for these nations' survival in the coming decades. These "frontline" nations must press for more comprehensive and aggressive mechanisms to authorize climate justice relief in both domestic and internationals law instruments and forums.

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385. For a compelling account of the desperate situation that the Maldives now confronts in the face of rising sea levels caused by climate change, see Nicholas Schmidle, *Wanted: A New Home for My Country*, N.Y. TIMES MAGAZINE, May 10, 2009, at 38.

386. Mohamed Nasheed, President of the Maldives, Inaugural Address to the Climate Vulnerable Forum (Nov. 9, 2009), *available at* http://bdpollution.blogspot.com/2009/11/climate-vulnerable-forum-maldives.html.

CONCLUSION

Regardless of the ultimate outcomes in the public nuisance cases for climate change impacts in U.S. federal courts, this litigation strategy has been an enormous step forward in the climate justice movement. It has drawn attention to vulnerable populations that have been victimized by climate change impacts and it has underscored the urgent need for a viable remedy. These cases were well-timed in that each drew attention to these issues at a critical juncture in the international diplomacy on climate change law and policy in the negotiations leading up to Copenhagen. Developing nations' need for mitigation and adaptation measures have taken center stage in the post-Kyoto era, and negotiating a viable system of compensation for victims of climate change impacts will be an indispensable component of these negotiations in the years ahead. Of course, the nature and degree of these remedies will continue to be tested in domestic courts and in international negotiation sessions.

Ken Alex, Supervising Deputy Attorney General for the State of California and counsel for the plaintiffs in *California v. General Motors Corp.*, has faith in the promise of public nuisance and other common law remedies to effect change and promote justice for victims of environmental problems. He writes:

> But in many ways, this environmental challenge is no different from the clouds of 'sulphurous acid gas' streaming from the stacks of Tennessee copper companies into Georgia a century ago, where the federal common law rose to protect the interests of the harmed state. The genius of environmental common law is its ability to address new pollution problems using long-established principles validated by decades of judicial precedent to effect sometimes profound changes. The challenge for attorneys handling today's innovative cases is how to best use those common law tools to reach beyond the constraints of current politics to a new era of responsibility and hope.[387]

The *Kivalina* case, and a narrow class of future cases like it, could be the bridge toward an era of increased hope for the victims of climate change impacts and a transition toward increased responsibility for the public and private entities that are principally responsible for those harms.

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387. Kenneth P. Alex, *California's Global Warming Lawsuit: The Case for Damages*, *in* CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 165, 171 (Clifford Rechtschaffen & Denise Antolini, eds., 2007) (citations omitted).