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CASE COMMENT

PRESERVING LEGAL AVENUES FOR CLIMATE JUSTICE IN  
FLORIDA POST-AMERICAN ELECTRIC POWER

*American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011)

Allison Fischman\*

In *American Electric Power Co. v. Connecticut (AEP)*,<sup>1</sup> the U.S. Supreme Court held that “the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants,”<sup>2</sup> foreclosing the use of federal common law rights of action in climate change litigation. The Court left unanswered the question of whether the Clean Air Act also displaces state common law tort actions,<sup>3</sup> suggesting that state-based claims such as public nuisance could play some part in future climate change litigation. The opinion, however, conveys the Court’s preference to confine climate change litigation to agency- and regulatory-focused actions, as opposed to common law tort actions.<sup>4</sup> After briefly summarizing the case, this Comment considers the implications of that preference with regard to the “climate vulnerable”—populations that are disproportionately impacted by the effects of climate change—with a focus on Florida.

In 2004, two groups of plaintiffs—one group consisting of eight states<sup>5</sup> and New York City, and the other consisting of three nonprofit land trusts<sup>6</sup>—filed separate complaints in the U.S. District Court for the Southern District of New York against five major electric power companies, which the plaintiffs alleged were “the five largest emitters

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1. 131 S. Ct. 2527 (2011).

2. *Id.* at 2537.

3. *Id.* at 2540.

4. *Id.* at 2539–40; see also Hari M. Osofsky, *AEP v. Connecticut’s Implications for the Future of Climate Change Litigation*, 121 YALE L.J. ONLINE 101, 103 (2011), <http://yalelawjournal.org/2011/09/13/osofsky.html>.

5. *Am. Elec. Power Co.*, 131 S. Ct. at 2533–34. The eight states were California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin. *Id.* at 2533 n.3. New Jersey and Wisconsin declined to participate in the appeal. *Id.* (citing Brief for Respondents Connecticut et al. at 3, *Am. Elec. Power Co.*, 131 S. Ct. 2527 (No. 10-174), 2011 WL 915093, at \*3).

6. The trusts were Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire. *Id.* at 2534 n.4.

of carbon dioxide in the United States.”<sup>7</sup> Those companies were four private corporations and the Tennessee Valley Authority, “a federally owned corporation that operates fossil-fuel fired power plants in several states.”<sup>8</sup> Collectively, the defendants’ emissions constituted “25 percent of emissions from the domestic electric power sector, 10 percent of emissions from all domestic human activities, and 2.5 percent of all anthropogenic emissions worldwide.”<sup>9</sup>

The plaintiffs argued that the defendants violated the federal common law of interstate nuisance or, in the alternative, state tort law, because the defendants’ carbon dioxide emissions contributed to global warming and thus created a “substantial and unreasonable interference with public rights.”<sup>10</sup> The states and New York City pointed to the risk that climate change imposed on public lands, infrastructure, and health, while the trusts alleged that climate change would irreparably harm fauna and rare species of flora on trust-owned and operated conservation lands. Both groups sought an injunction against the defendants that would require each defendant “to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade.”<sup>11</sup>

The district court dismissed the complaints as barred by the political question doctrine.<sup>12</sup> The U.S. Court of Appeals for the Second Circuit reversed, finding that the suits presented justiciable issues and that the plaintiffs had established Article III standing.<sup>13</sup> On the merits, the Second Circuit held that the plaintiffs had “stated a claim under the federal common law of nuisance,”<sup>14</sup> recognized by the Supreme Court in a series of decisions including *Illinois v. City of Milwaukee (Milwaukee I)*,<sup>15</sup> which affirmed that “States may maintain suits to abate air and water pollution produced by other States or by out-of-state industry.”<sup>16</sup> The Second Circuit relied on the Supreme Court’s reasoning in *City of Milwaukee v. Illinois (Milwaukee II)*,<sup>17</sup> which held that by adopting amendments to the Clean Water Act, “Congress had

7. *Id.* at 2534 (internal quotation marks omitted).

8. *Id.* The four private companies were American Electric Power Company, Inc. and its wholly-owned subsidiary Southern Company, as well as Xcel Energy Inc. and Cinergy Corporation. *Id.* at 2534 n.5.

9. *Id.* at 2534 (citation omitted).

10. *Id.* (internal quotation marks omitted).

11. *Id.* (internal quotation marks omitted).

12. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) (citing *Baker v. Carr*, 369 U.S. 186 (1962)).

13. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 332, 349 (2d Cir. 2009).

14. *Id.* at 358, 371.

15. 406 U.S. 91, 107 (1972).

16. *Am. Elec. Power Co.*, 131 S. Ct. at 2534 (citing *Milwaukee I*, 406 U.S. at 93).

17. 451 U.S. 304 (1981).

displaced the federal common law right of action recognized in *Milwaukee I.*<sup>18</sup> The legislation at issue in *Milwaukee II* constituted “an all encompassing regulatory program, supervised by an expert administrative agency, to deal comprehensively with interstate water pollution. The legislation itself prohibited the discharge of pollutants into the waters of the United States without a permit from a proper permitting authority.”<sup>19</sup> In contrast, at the time of the Second Circuit’s decision in *AEP*, neither Congress nor EPA had yet promulgated any statute or rule limiting greenhouse gas emissions.<sup>20</sup> Thus, the Second Circuit found no displacement of federal common law.<sup>21</sup>

An equally divided Supreme Court affirmed the Second Circuit’s exercise of jurisdiction,<sup>22</sup> finding that the plaintiffs had standing and that the political question doctrine did not bar their claims.<sup>23</sup> The Court then addressed the merits of the plaintiffs’ federal common law nuisance claim in three parts, ultimately reversing the Second Circuit’s decision.

First, the Court considered whether the plaintiffs could state a federal common law nuisance claim to abate out-of-state air pollution.<sup>24</sup> Calling the issue “academic,” the Court found that “[a]ny such claim would be displaced by the federal legislation authorizing EPA to

18. *Am. Elec. Power Co.*, 131 S. Ct. at 2534.

19. *Id.* at 2534–35 (citing *Milwaukee II*, 451 U.S. at 310–11).

20. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 379–81 (2d Cir. 2009). The Supreme Court held in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that the Clean Air Act requires EPA to set greenhouse gas emission standards. *Id.* at 534–35; *Am. Elec. Power Co.*, 131 S. Ct. at 2532–33.

21. 582 F.3d at 387–88.

22. The Court’s decision on the merits, however, was 8–0; Justice Sonia Sotomayor recused herself. *Am. Elec. Power Co.*, 131 S. Ct. at 2531.

23. *Id.* at 2535. Four justices found that “at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge EPA’s refusal to regulate greenhouse gas emissions,” *id.* at 2535 (citing *Massachusetts*, 549 U.S. at 520–26), and dismissed the petitioner–defendants’ argument that a “prudential” bar—distinct from the Article III bar—should prevent the federal courts from exercising jurisdiction. *Id.* at 2535 & n.6 (internal quotation marks omitted). Implicit in the Court’s determination that “no other threshold obstacle bars review,” *id.* at 2535, is an indication that the political question doctrine presents no barrier. Significantly, the Court did not consider ripeness as a jurisdictional or prudential issue, perhaps because at the time of the decision, EPA was already “engaged in a § 7411 rulemaking to set standards for greenhouse gas emissions from fossil-fuel fired power plants,” with May 2012 as the agreed-upon deadline. *Id.* at 2538 (citing Notice, Proposed Settlement Agreement, Clean Air Act Citizen Suit, 75 Fed. Reg. 82,392 (Dec. 30, 2010)).

While the justiciability issues certainly merit debate—see, for example, Daniel A. Farber, *Standing on Hot Air: American Electric Power and the Bankruptcy of Standing Doctrine*, 121 YALE L.J. ONLINE 121 (2011), <http://yalelawjournal.org/2011/09/13/farber.html>, and James R. May, *AEP v. Connecticut and the Future of the Political Question Doctrine*, 121 YALE L.J. ONLINE 127 (2011), <http://yalelawjournal.org/2011/09/13/may.html>—an in-depth discussion of these issues is beyond the scope of this Comment.

24. *Am. Elec. Power Co.*, 131 S. Ct. at 2535–37.

regulate carbon-dioxide emissions.”<sup>25</sup> Second, the Court explained its holding that “the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.”<sup>26</sup> The Court found that the Clean Air Act satisfies “[t]he test for whether congressional legislation excludes the declaration of federal common law” by “speak[ing] directly to [the] question’ at issue”—limitations on carbon dioxide emissions from fossil fuel-fired power plants.<sup>27</sup> Finally, the Court rejected the plaintiffs’ argument that federal common law cannot be displaced until EPA exercises its regulatory authority by setting carbon emission standards.<sup>28</sup>

In addition to the federal common law claims, the plaintiffs also stated common law claims under state nuisance laws. The Court held that the availability of such claims would depend on the preemptive effect of the Clean Air Act.<sup>29</sup> Because the parties had not “briefed preemption or otherwise addressed the availability of a claim under state nuisance law,” the Court left the matter “open for consideration on remand.”<sup>30</sup> This final point—the potential availability of state common law tort claims—represents a window of opportunity for climate-vulnerable Floridians to combat climate injustice.

In their continuing work to develop a regulatory framework for climate change, Congress and EPA doubtless serve fundamental roles in shaping the future of climate change litigation; however, total reliance on Congress and EPA to limit greenhouse gas emissions presents clear drawbacks.<sup>31</sup> Agency rulemaking poses bureaucratic difficulties, not the least of which is the typically lengthy and rigid process required for even informal rulemaking.<sup>32</sup> President Barack Obama’s recent rejection

25. *Id.* at 2537.

26. *Id.*

27. *Id.* (final alteration in original) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

28. *Id.* at 2538. The plaintiffs argued that unlike in *Milwaukee II*, which considered legislation that put in place “a panoply of actual remedies” to abate water pollution produced by other states or out-of-state industry, the existence of EPA authority, without more, has no effect on the defendants’ emissions. Brief for Respondents Connecticut et al., *supra* note 5, at 49.

29. *Am. Elec. Power Co.*, 131 S. Ct. at 2540 (citing *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 392 (2d Cir. 2009)).

30. *Id.*

31. The opinion does not suggest total reliance on Congress and EPA, but simply emphasizes regulatory suits over common law ones. It is worthwhile, however, to imagine a scenario in which the Court’s preference is the only option.

32. See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1386 (describing the informal rulemaking process as “increasingly stiff and formalized”).

of EPA's new air pollution rule provides an illustration.<sup>33</sup> The rule would have lowered the allowable level of ozone in ambient air, requiring stricter enforcement of ozone emission controls nationwide.<sup>34</sup> Perhaps bowing to political pressure,<sup>35</sup> the President stated that he "did not support asking state and local governments to begin implementing a new standard" when EPA must reconsider the current standard in 2013 pursuant to the Clean Air Act.<sup>36</sup>

Consider a similar scenario for a proposed greenhouse gas rule.<sup>37</sup> *AEP* requires potential plaintiffs either to wait until EPA has promulgated a regulation and then challenge it in court or to participate in the rulemaking process during the public notice-and-comment period; they cannot use federal common law avenues to enjoin emissions.<sup>38</sup> Even if a potential plaintiff participates in the rulemaking process and is satisfied with the final rule, the President can still prevent it from becoming law. Post-*AEP*, fewer avenues for relief are available to such a plaintiff.

The Court's decision has important environmental justice implications. As Professor Maxine Burkett argues, "[T]he common law nuisance claims rejected by the Court in *AEP* provide an important mechanism for the climate vulnerable to achieve corrective justice."<sup>39</sup> Addressing Professor Burkett's point requires a brief discussion of climate justice and an examination of the makeup of the climate vulnerable.

Climate justice (CJ) is part of the broader environmental justice movement, which seeks to ensure the equitable distribution of

33. See Letter from Cass Sunstein, OIRA Adm'r, to Lisa Jackson, EPA Adm'r (Sept. 2, 2011), available at [http://www.whitehouse.gov/sites/default/files/ozone\\_national\\_ambient\\_air\\_quality\\_standards\\_letter.pdf](http://www.whitehouse.gov/sites/default/files/ozone_national_ambient_air_quality_standards_letter.pdf); Press Release, White House Office of the Press Sec'y, Statement by the President on the Ozone National Ambient Air Quality Standards (Sept. 2, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards>; see also John M. Broder, *Obama Administration Abandons Stricter Air-Quality Rules*, N.Y. TIMES (Sept. 2, 2011), <http://www.nytimes.com/2011/09/03/science/earth/03air.html>.

34. Broder, *supra* note 33.

35. Representatives from major business groups and Republicans in Congress stood in firm opposition to the rule. As one reporter noted, "Imposing the new rule before the 2012 election would have created political problems for the administration and for Democrats nationwide seeking election in a brittle economy." *Id.*

36. Press Release, *supra* note 33.

37. EPA has already promulgated several rules limiting greenhouse gas emissions. See David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 FLA. L. REV. 17 n.3 (2012) (listing regulations). See generally Lisa Heinzerling, *Climate Change at EPA*, 64 FLA. L. REV. 1 (2012) (describing EPA's progress to date in regulating greenhouse gases).

38. See *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011).

39. Maxine Burkett, *Climate Justice and the Elusive Climate Tort*, 121 YALE L.J. ONLINE 115, 115 (2011), <http://yalelawjournal.org/2011/09/13/burkett.html>.

environmental harms and benefits across all populations.<sup>40</sup> Sea-level rise and other effects of climate change will disproportionately impact certain geographic areas, including the Arctic, Africa, Asian and African megadeltas, and small island nation-states.<sup>41</sup> Populations in these areas are among the world's poorest.<sup>42</sup>

Because climate change is a global phenomenon, scholars often discuss it in an international context, exploring how the actions individual nations may take to manage emissions—including entering into an international agreement—will affect other countries and global levels of greenhouse gases.<sup>43</sup> But climate change will also disproportionately affect vulnerable populations within the United States. For example, when Hurricane Katrina devastated New Orleans, the city experienced high death tolls among its elderly, poor, and disabled.<sup>44</sup> Climate change has the potential to increase the frequency of catastrophic storms like Hurricane Katrina.<sup>45</sup> Further, human activity

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40. See Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 802–03 (1998). EPA has defined environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” OFFICE OF ENVTL. JUSTICE, EPA, PLAN EJ 2014, at 3 (2011), available at <http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-2011-09.pdf> (quoting EPA, EPA’S ACTION DEVELOPMENT PROCESS: INTERIM GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF AN ACTION 3 (2010), available at <http://www.epa.gov/compliance/ej/resources/policy/considering-ej-in-rulemaking-guide-07-2010.pdf>).

41. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS 9 (2007), available at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr\\_spm.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf).

42. See Maxine Burkett, *Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 BUFF. L. REV. 169, 176–77 (2008). Most of these populations have contributed the least to global greenhouse gas emissions, an observation Jody Freeman and Andrew Guzman have called “an especially cruel twist of fate.” Jody Freeman & Andrew Guzman, *Climate Change and U.S. Interests*, 109 COLUM. L. REV. 1531, 1535 (2009) (citing Robert Mendelsohn et al., *The Distributional Impact of Climate Change on Rich and Poor Countries*, 11 ENV’T & DEV. ECON. 159, 173 (2006)). This phenomenon is true domestically, as well. See Burkett, *supra*, at 187–88.

43. See, e.g., Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565, 1611 (2008). But see Hari M. Osofsky, *Is Climate Change “International”?* *Litigation’s Diagonal Regulatory Role*, 49 VA. J. INT’L L. 585, 587–88 (2009) (arguing that efforts to manage emissions should take place at multiple and smaller scales than the international level and that a strong focus on international legal approaches can impede such multiscale approaches).

44. Sharona Hoffman, *Preparing for Disaster: Protecting the Most Vulnerable in Emergencies*, 42 U.C. DAVIS L. REV. 1491, 1494 (2009).

45. Kristen Halsnæs et al., *Framing Issues*, in INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: MITIGATION 128 (Bert Metz et al. eds., 2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4-wg3-chapter2.pdf>.

and development exacerbate the devastating effects of such events,<sup>46</sup> and U.S. coasts are highly developed.<sup>47</sup> Sea-level rise alone presents a major threat to domestic populations—by one estimate, ocean waters will submerge 9% of U.S. lands by the year 2100.<sup>48</sup>

Climate change has already acutely impacted some U.S. populations, notably the Native Village of Kivalina, an Inupiat Eskimo village situated at the tip of an Alaskan barrier reef. Kivalina depends on arctic sea ice to protect it from storm surges; due to global warming, the ice has become less prevalent and less effective in protecting against coastal erosion. The village is now uninhabitable, and relocation costs could reach between \$95 and \$400 million.<sup>49</sup>

With more than 1,200 miles of coastline,<sup>50</sup> Florida is particularly susceptible to sea-level rise. The Florida Keys will likely generate the state's first wave of "climate migrants"<sup>51</sup>—those forced to relocate due to the effects of climate change. Residents north of Miami could face displacement by the end of the twenty-first century.<sup>52</sup> Climate change introduces potentially vast economic and social costs to the state and its residents. Aside from displacement costs and real estate losses due to sea-level rise, climate change will force Florida to face decreases in tourism revenue; increases in hurricane damages, injuries, and deaths; rises in electricity costs; and priceless biodiversity and ecosystem loss.<sup>53</sup>

46. See Christine A. Klein, *The New Nuisance: An Antidote to Wetland Loss, Sprawl, and Global Warming*, 48 B.C. L. REV. 1155, 1175 (2007).

47. See KRISTEN M. CROSSETT ET AL., NAT'L OCEANIC & ATMOSPHERIC ADMIN., POPULATION TRENDS ALONG THE COASTAL UNITED STATES: 1980–2008, at 9 (2004), available at [http://oceanservice.noaa.gov/programs/mb/pdfs/coastal\\_pop\\_trends\\_complete.pdf](http://oceanservice.noaa.gov/programs/mb/pdfs/coastal_pop_trends_complete.pdf) (providing population and housing estimates along the coast and noting increased sprawl along coastlines).

48. S. Neil Larsen, *Sea Level Rise a Threat to U.S. Coastal Cities*, PROJECT GROUNDSWELL (Feb. 16, 2011), <http://projectgroundswell.com/2011/02/16/sea-level-rise-a-threat-to-u-s-coastal-cities> (reporting the results of a University of Arizona study).

49. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal 2009), appeal docketed, No. 09-17490 (9th Cir. Nov. 6, 2009).

50. *Florida Geological Survey—Coastal Research Program*, FLA. DEP'T OF ENVTL. PROT., <http://www.dep.state.fl.us/geology/programs/coastal/coastal.htm> (last updated Sept. 6, 2011)

51. See Maxine Burkett, *In Search of Refuge: Pacific Islands, Climate-Induced Migration, and the Legal Frontier*, ASIAPACIFIC ISSUES (East-West Ctr., Honolulu, Haw.), Jan. 2011, at 3, available at <http://www.eastwestcenter.org/sites/default/files/private/api098.pdf> (defining and discussing the terminology of climate migration).

52. Greg Allen, *Florida Faces Drastic Change from Sea Level Rise*, NPR, Dec. 11, 2009, <http://www.npr.org/templates/story/story.php?storyId=120498442> (stating that under a model predicting a sea-level rise of two feet by 2060, "Florida stands to lose almost 10 percent of its land area and the homes of 1.5 million people"); GARY T. MITCHUM, FLA. CLIMATE INST. & SE. CLIMATE CONSORTIUM, SEA LEVEL CHANGES IN THE SOUTHEASTERN UNITED STATES: PAST, PRESENT, AND FUTURE i (2011), available at [http://coaps.fsu.edu/~mhannion/201108mitchum\\_sealevel.pdf](http://coaps.fsu.edu/~mhannion/201108mitchum_sealevel.pdf) (estimating thirty-two inches in sea-level rise in south Florida by 2100).

53. See ELIZABETH A. STANTON & FRANK ACKERMAN, FLORIDA AND CLIMATE CHANGE: THE COSTS OF INACTION iii (2007), available at [http://ase.tufts.edu/gdae/Pubs/rp/Florida\\_lr.pdf](http://ase.tufts.edu/gdae/Pubs/rp/Florida_lr.pdf).

Florida may not have to face the complex and difficult ethical issues involved with relocating indigenous Inupiat in Kivalina,<sup>54</sup> but CJ issues will nonetheless multiply as a disproportionate amount of climate change-induced harms and costs will likely fall on the state's poor, of-color, elderly, and disabled residents. Florida's average annual temperature by 2100 could climb nearly ten degrees higher than the average temperature in 2000,<sup>55</sup> causing heat stress—"a public health nightmare for the poor and of-color."<sup>56</sup> These groups will also bear a heavier burden for increases in costs of goods and services and for "employment restructuring within and across industries" that will come with climate change.<sup>57</sup> The lack of insurance only exacerbates the problem.<sup>58</sup>

Florida's future raises the question of what legal avenues exist to redress climate change-induced harms suffered by the state's most vulnerable populations. The Supreme Court endorsed the regulatory litigation pathway in *AEP*: petition for, or participate in, the rulemaking process to set emissions limits, and file a citizen suit if the state or EPA fails to enforce those limits.<sup>59</sup> As discussed above,<sup>60</sup> this approach has definite drawbacks. For instance, the regulatory scheme fails to provide any significant assistance to the climate vulnerable.<sup>61</sup> Perhaps most fundamentally, although regulatory suits may "help to lessen the impacts of climate change, they provide limited opportunities for victims to obtain redress."<sup>62</sup> If the role of the Legislative and Executive Branches is to prevent future harms caused by the largest carbon emitters, the role of the courts must be to "provide recourse to those who have been wronged" by climate harms.<sup>63</sup> Protecting the rights of vulnerable populations from infringement by the Legislative and Executive Branches is a core purpose of the Judiciary.<sup>64</sup> No court has yet addressed the merits of a state common law public nuisance action

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54. Florida could, however, face similar issues with respect to its two federally recognized tribal entities—the Miccosukee Tribe and the Seminole Tribe. Notice, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810, 60,811–12 (Oct. 1, 2010).

55. STANTON & ACKERMAN, *supra* note 53, at 8 tbl.4.

56. Burkett, *supra* note 42, at 178 (citing Brief of Amici Curiae Climate Scientists David Battisti et al. in Support of Petitioners at 14, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120), 2006 WL 2563377, at \*14).

57. *Id.* at 180–81.

58. *Id.*

59. *See Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2538 (2011).

60. *See supra* text accompanying notes 31–38.

61. Osofsky, *supra* note 4, at 106.

62. *Id.*

63. Burkett, *supra* note 39, at 118.

64. *See* Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 7 (1995).

for climate change-induced harms.<sup>65</sup> By preserving state common law tort actions for climate change harms, Florida courts<sup>66</sup> have an opportunity to provide a “means to achieve compensation for the loss of [victims’] property and to facilitate their relocation.”<sup>67</sup>

Of course, such “social policy tort” lawsuits face many hurdles.<sup>68</sup> In addition to standing, justiciability, and causation difficulties, plaintiffs and courts face complex issues concerning selection and conduct of defendants, issue preclusion, measure of damages, assumption of risk, insurance coverage,<sup>69</sup> venue, and discovery, among many other intricacies.<sup>70</sup> But these threshold issues are not insurmountable. Hawaii and Illinois state courts, for example, have adopted interpretations of the special injury rule that could allow plaintiffs in climate change public nuisance lawsuits like *AEP* to achieve standing without proof of physical injury.<sup>71</sup>

Even if Florida courts refuse to consider the merits of such a claim or rule in favor of the defense, climate tort litigation could encourage the enactment of emissions regulations that more effectively address CJ concerns.<sup>72</sup> Apart from litigation, other legal tools may exist to help the climate vulnerable. For instance, CJ advocates could lobby the state legislature to enact progressive climate change-related regulations, such

65. Markell & Ruhl, *supra* note 37, at 22.

66. This includes federal courts in diversity actions.

67. Burkett, *supra* note 39, at 117.

68. See James W. Shelson, *The Misuse of Public Nuisance Law to Address Climate Change*, 78 DEF. COUNS. J. 195, 195 (2011). *But see* David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 3 (2003) (arguing that public nuisance climate torts “might prove to be legally viable”).

69. The Supreme Court of Virginia recently held that Steadfast Insurance Company had no duty to defend AES Corporation, a defendant in the *Kivalina* litigation. *AES Corp. v. Steadfast Ins. Co.*, No. 100764, 2011 WL 4139736, at \*6 (Va. Sept. 16, 2011). Even if corporations cannot use insurance dollars to cover litigation expenses, such defendants likely still have far greater resources than potential climate-vulnerable plaintiffs.

70. Michael B. Gerrard, *What Litigation of a Climate Nuisance Suit Might Look Like*, 121 YALE L.J. ONLINE 135, 136–41 (2011), <http://yalelawjournal.org/2011/09/13/gerrard.html>; see also Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 294–306 (2005). A court might also bar such a suit under the Dormant Commerce Clause. See Tracy Hester, *A New Front Blowing In: State Law and the Future of Climate Change Public Nuisance Suits*, 31 STAN. ENVTL. L.J. (forthcoming 2012) (manuscript at 32) (on file with author).

71. See James R. Drabick, Note, “Private” Public Nuisance and Climate Change: Working Within, and Around, the Special Injury Rule, 16 FORDHAM ENVTL. L. REV. 503, 511 (2005).

72. Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197, 244 (2010) (“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.”).

as incentivizing emissions reductions.<sup>73</sup> Another possibility may be to require fossil fuel-fired power plants to conduct human rights impact assessments as a prerequisite to obtaining a necessary permit.<sup>74</sup> These options, however, fail to provide CJ claimants with an opportunity “to confront major emitters and gain redress for their particular—and disproportionate—injuries.”<sup>75</sup>

This Comment argues that state common law tort actions such as public nuisance represent an important pathway for redressing climate change harms and avoiding climate injustice in Florida. A strong argument exists that the social benefits of preserving state law climate tort claims outweigh the difficulties associated with allowing them, but only time will tell what limitations courts will place on these claims. More broadly, *AEP* brings to the forefront normative questions about the role of the courts in addressing climate change impacts. Do the vulnerable, or any affected individuals, have a right to redress climate change impacts or a right to seek damages from the largest emitters? And how should plaintiffs and courts identify defendants—is “2.5 percent of all anthropogenic emissions worldwide,”<sup>76</sup> as in *AEP*, an appropriate threshold to establish responsibility? As judges struggle to answer these questions in future cases, they should consider that common law tort claims may more satisfactorily address injuries to the climate vulnerable as compared to regulatory lawsuits or other remedies.

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73. Professor Burkett has argued for a domestic Clean Development Mechanism (CDM) modeled on the Kyoto Protocol CDM. Such a mechanism would “introduce an infrastructure that provides incentives for economically depressed and of-color communities to become venues for emissions abatement” and include a fund for climate change adaptation. Burkett, *supra* note 42, at 170–71. Importantly, the Clean Air Act could preempt a state-level domestic CDM.

74. See generally Tarek F. Maassarani et al., *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment*, 40 CORNELL INT’L L.J. 135 (2007) (presenting a model for a human rights impact assessment). Again, such an action may risk running afoul of the Clean Air Act.

75. Burkett, *supra* note 39, at 116.

76. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2534 (2011).