2011 WL 396515 (U.S.) (Appellate Brief)
Supreme Court of the United States.

AMERICAN ELECTRIC POWER COMPANY INC., et al., Petitioners,
v.
CONNECTICUT, et al., Respondents.

No. 10-174.
February 7, 2011.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief Amicus Curiae of Center for Constitutional Jurisprudence in Support of Petitioners

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*i QUESTION PRESENTED

For several years, Congress and the President have actively studied and debated the appropriate balance between avoiding environmental harm that may result from climate change and the economic dislocation that may result from new regulations to halt or reverse climate change. In light of this ongoing debate this case raises the following question:

1. Do federal courts have the constitutional authority to establish rules regarding domestic emission standards for greenhouse gases, under the "federal common law tort of public nuisance," in response to claims of injury due to global climate change?

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***1 IDENTITY AND INTEREST OF AMICUS CURIAE**

Amicus, Center for Constitutional Jurisprudence [1] is dedicated to upholding the principles of the American Founding, including separation of powers and due respect for the proper limit on those powers, including the judicial power. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1 (2004); *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs,* 531 U.S. 159 (2001); *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000); and *United States v. Morrison,* 529 U.S. 598 (2000). The Center also filed a brief in support of review in this action.

The Center believes that the issue presented in this case raises critical questions regarding the scope of the judicial power. The Constitution assigns the lawmaking power to Congress. The Framers saw the legislative branch as best able to balance the ***2** competing needs of the nation, especially in a case such as this that calls for a balance between harm prevention and economic dislocation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents, a coalition of state and private parties, are asking this Court to authorize each federal district court to adopt its own emission standards for carbon dioxide and other gasses that Respondents believe will cause global climate change. Yet, Respondents seek to accomplish this not through the enforcement of any act of Congress. Instead, they seek this new level of regulation through the device of a federal common law tort of public nuisance.

Congress is currently debating what standards, if any, it should mandate. The Environmental Protection Agency is also exploring the reach of its current regulatory authority as a means of addressing respondents' concerns. The Second Circuit acknowledged these efforts of the legislative and executive branches, but deemed them insufficient.

For two reasons, Amicus maintains that federal court interference would exceed the bounds of federal judicial power. First, policy-making was committed to Congress under the Constitution and this case does not fit within the narrow exception to the rule against creation of federal common law by the courts. Second, any authority for federal courts to create the federal common law tort sought by Respondents has been displaced by Congress in its active ***3** consideration of an appropriate response to climate change.

ARGUMENT

Although not expressly mentioned in the Constitution, the doctrine of separation of powers is implied from its structure: the exclusive and separate vesting of the legislative, executive, and judicial power in the Congress, the President, and in the Court, respectively, by Article I, section 1; Article II, section 1; and Article III, section 1, of the Constitution of the United States. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 130 S. Ct. 3138, 3146 (2010).

The legislative power is vested in Congress. U.S. Const. art. I, § 1. This makes Congress the primary policy-making branch of the federal government. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 589 (1952). The structure of our federal system thus disallows the judiciary from usurping the legislature's function to create new laws. *Mistretta v. United States,* 488 U.S. 361, 383 (1989) (noting that it is a "danger" when the "Judicial Branch [is] assigned [or] allowed [to take on] 'tasks that are more properly accomplished by [other] branches' ") (quoting *Morrison v. Olson,* 487 U.S. 654, 680-81 (1988)). This is significant since the respondents are asking the Court to create a new law that necessitates settling a truly remarkable number of policy decisions.

More specifically, separation of powers bars the relief sought by respondents for two reasons. First, both constitutional and statutory authority precludes the judiciary from creating this cause of action. ***4** Second, congressional consideration and action concerning climate change generally, and greenhouse gas emissions specifically, displaces any authority a federal court may have to fashion this federal common law.

I. CONSTITUTIONAL AND STATUTORY AUTHORITY PRECLUDES THE JUDICIARY FROM CREATING FEDERAL COMMON LAW OF THE SCOPE AND BREADTH DEMANDED BY RESPONDENTS

The federal government is one of enumerated powers. *United States v. Lopez,* 514 U.S. 549, 552 (1995); *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 405 (1819). Any exercise of federal power must be authorized by the Constitution. *McCulloch,* 17 U.S. at 405. The legislature is charged with the responsibility for enacting substantive law that creates, defines, and regulates rights. U.S. Const. art. I.

The Constitution does not assign any similar power to the federal courts, and this has long been seen as a barrier to fashioning federal common law. This Court has repeatedly recognized this proposition, holding in 1816 that no federal common law of crimes exists, *United States v. Coolidge,* 14 U.S. (1 Wheat.) 415 (1816), and later ruling that no federal common law whatsoever exists:

> It is clear, there can be no common law of the United States …. There is no principle which pervades the Union and has the authority of law, that is not embodied in the constitution or laws of the Union. *The* ***5** *common law could be made a part of our federal system, only by legislative adoption.*

Wheaton v. Peters, 33 U.S. 591, 658 (1834) (emphasis added). *See also Kendall v. United States,* 37 U.S. 524 (1838).

This principal was reaffirmed in *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938). More recently, this Court has noted: "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *Milwaukee v. Illinois,* 451 U.S. 304, 312 (1981) (*Milwaukee II*).

These decisions comport with the Framers' view of judicial power, evidenced by their response to an Anti-Federalist argument. The Anti-Federalists feared that if the judiciary were independent of the political process, it would become "superior to that of the legislature" since it would "constru[e] the laws according to the *spirit* of the Constitution." *The Federalist*, No. 81, at 481 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis retained), which would "enable that court to *mold them* into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body." *Id.* (emphasis added).

Hamilton, speaking for the Federalists, had a two-fold reply. First he noted that federal courts must confine themselves to the letter, not the spirit of the law. "[T]here is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution." *Id.* Second, he affirmed ***6** that the judiciary "will always be the least dangerous to the political rights of the Constitution" because the judiciary "has no influence over either the sword or the purse … [it has] neither FORCE nor WILL, but mere[] judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." *The Federalist*, No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). He elaborated that "the judiciary is beyond comparison the weakest of the three departments of power." *See also id.* ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them"). For these reasons Hamilton argued that the "danger of judiciary encroachments on the legislative authority … is in reality a phantom." *The Federalist*, No. 81, at 484. (Alexander Hamilton) (Clinton Rossiter ed., 1961).

However, Hamilton's second reply required the critical proposition that the judiciary refrain from assuming the roles of any other branch - particularly the legislature. *The Federalist*, No. 78. Unlike the courts in Britain, the Judiciary "remains truly distinct from both the legislature and the Executive." *Id.* at 465. Indeed, liberty, Hamilton said, requires this proposition, and were it negated, and the judiciary were to engage in legislation, we "would have every thing [sic] to fear." *Id. See also id.* at 466 ("there is no liberty, if the power of judging be not separated from the legislative and executive powers") (internal quotes omitted).

***7** So important to the Framers was the proposition that the judiciary refrain from legislative-like activity that the First Congress enacted the Rules of Decision Act. This Act excludes federal common law from list of permissible controlling authority for rules of decision in civil actions filed in federal court. The Rules of Decision Act provides that "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (2010). A straightforward reading of this Act indicates that only state law or a congressional enactment may govern federal cases. Yet here we lack both. No statute speaks directly to the issue of greenhouse gas emissions. Thus, the Rules of Decision Act bars this Court from creating the Respondent's sought-for cause of action. *See also* Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 Nw. U. L. Rev. 761 (1989).

While recognizing that the Constitution assigns to Congress the policy-making power, this Court has also recognized very narrow enclaves where federal common law may be appropriate. This Court describes these exceptions to the general rule "unusual," *Milwaukee II,* 451 U.S. at 314, but at times a "necessary expedient," *id.* (quoting *Comm. for Consideration of Jones Falls Sewage Sys. v. Train,* 539 F.2d 1006, 1008 (4th Cir. 1976) (en banc)), that exists in only a "few and restricted" instances, *Wheeldin v. Wheeler,* 373 U.S. 647, 651 (1963), and applies it only if the court is "compelled" to do so. ***8** *Milwaukee II,* 451 U.S. at 314. Further, the Court has announced that it restricts federal common law to "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international

disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

The present action, however, does not fall into one of these "narrow" exceptions where the application of federal common law may be appropriate. *Id.* Federal common law has arisen chiefly in the context of disputes between nearby States where the application of State law would frustrate the federal objective of providing a neutral forum for resolving their disputes peacefully.

In *Illinois v. City of Milwaukee, Wisconsin,* 406 U.S. 91 (1972) (*Milwaukee I*), four cities sued the state of Illinois to enjoin its pollution of Lake Michigan. The Court held that federal common law covered the interstate pollution issue, but stressed that "Congress has enacted numerous laws" on the issue in the past, and "recently" had "reinforced and broadened" them. *Id.* at 101. The Court was careful to ensure that the federal common law was "not inconsistent" with legislative intent. *Id.* at 104. Nine years later the Court declared that legislative action displaced the newly minted cause of action: When "Congress addresses a question previously governed by a decision rested on federal common law," then "the need for such an unusual exercise of lawmaking by federal courts disappears." *Milwaukee II,* 451 U.S. at 314.

***9** This action is significantly distinct from the local pollution issue in *Milwaukee I.* The conditions for breach, the scope of the duty, and the nature of the causation involved are imperceptible if not inscrutable, unlike the direct pollution of the lake abutting a sister state which, by comparison, is abundantly local and detectable. Climate change is a *global* issue, and alterations in the climate are not attributable to a particular source or even timeframe. Matthew Hall, *A Catastrophic Conundrum, But Not a Nuisance: Why the Judicial Branch Is Ill-Suited to Set Emissions Restrictions On Domestic Energy Producers Through the Common Law Nuisance Doctrine*, 13 Chap. L. Rev. 265 (2010). This is pertinent since the Respondents allege that Petitioners' carbon dioxide emissions directly and proximately contribute to their injuries and threatened injuries. However, such a claim is highly speculative at best: there is nothing "direct" or proximate when the parties are thousands of miles apart. Actual causation is also inscrutable: it is impossible to know whether the Respondents' injuries would have occurred, or will occur, "but for" the Petitioners' actions.

Further, unlike a direct pollution case, the issues implicated in climate change involve a highly complex weighing of many policy factors. Benjamin P. Harper, *Climate Change Litigation: The Federal Common Law of Interstate Nuisance and Federalism Concerns*, 40 Ga. L. Rev. 661 (2006). In the first place, this is partly because climate change is a global *externality problem*, which arises when someone makes a decision to use his resources without considering the full effects of the decision. Many types of solutions exist to solve externality ***10** problems.[2] Deciding which is best requires a complex "analysis of whether the market, common law concepts of nuisance or trespass, or governmental regulation is the most effective." Donald J. Kochan, *Runoff and Reality: Externalities, Economics, and Traceability Issues in Urban Runoff Regulation*, 9 Chap. L. Rev. 409 (2006). That analysis is multiplied when a global problem is implicated since it requires a *global* solution. Piecemeal, local solutions by federal courts may lead to inconsistent standards and, more importantly, will not ameliorate problems posed by climate change. For example, the official estimate of the effect of perfect compliance with the Kyoto Protocol is that, at best, it would slow the *acceleration* of the present warming by an undetectable 0.07 degrees centigrade by 2050. *Energy and Tax Policy: Capital Hill Hearing Testimony, Before the H. Ways and Means Comm.*, 110th Cong. 4 (2007) (statement of W. David Montgomery, CRA International). *See also Capitol Hill Update: Priorities and Possibilities in the 110th Congress*, SM083 ALI-ABA 175. By comparison, a local, piecemeal law created by a federal court to deal with this global externality problem would be even less effective, if not nugatory.

Yet, the situation is more complex still. Even after deciding on the *type* of externality solution, ***11** other questions remain. As the District Court correctly recognized, the enormity of specifying the relief in this case would also require the Court to

> (1) determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants; (2) determine the appropriate percentage reduction to impose upon Defendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the implications of such relief on the United States' energy sufficiency and thus its national security - all without an "initial policy determination" having been made by the elected branches.

Connecticut v. Am. Elec. Power Co., Inc., 406 F. Supp. 2d 265, 272-73 (S.D.N.Y. 2005).

The complexity of the competing policy questions amply demonstrates why the Framers left policymaking to the legislative branch. The courts have not been given the resources to take on these types of problems. In any event, congressional action on the issue displaces even the narrow exception to federal common-lawmaking that was recognized in *Milwaukee I.*

*12 II. ANY AUTHORITY FOR JUDICIAL CREATION OF FEDERAL COMMON LAW IS DISPLACED BY CONGRESSIONAL CONSIDERATION OF THE ISSUE

The unusual and narrow circumstances for creation of federal common law disappear once Congress has acted. *Milwaukee II.* This consideration prohibits judicial creation of a cause of action in this case because Congress and the EPA have *considered* the issue of climate change, thus displacing any judicial authority that might have existed. *Id.* at 313.

Indeed, Congress has also moved beyond "consideration" of the issue. It has also *enacted* statutes related to climate change. The most comprehensive regulatory scheme, however, is the Clean Air Act. 42 U.S.C. § 7401. *Massachusetts v. EPA,* 549 U.S. 497 (2007) (holding that the EPA may regulate carbon dioxide emissions under the CAA). When Congress acts, "the need for … lawmaking by federal courts disappears." *Milwaukee II,* 451 U.S. at 314. Judicial intervention at this point would encroach upon the legislature's prerogatives.

Both legislative activity and failed legislative activity supports these two points. Harper, *supra*, at 661. First, Congress enacted the Clean Air Act, which created a "comprehensive legislative scheme to protect and improve the nation's air quality." *Weiler v. Chatham Forest Prods., Inc.,* 392 F.3d 532, 534 (2nd Cir. 2004). This Court ruled that the Act gives the EPA the authority to regulate carbon dioxide emissions if the EPA Administrator forms the "judgment" that they contribute to climate change. *Massachusetts,* 549 U.S. at 528. EPA made such a ***13** finding on December 15, 2009. 74 Fed. Reg. 66,496 (2009). No room exists for federal common-lawmaking when Congress has addressed the issue, and, according to this Court's ruling in *Massachusetts*, gave authority the EPA, to deal with carbon dioxide emissions.

Second, the existence of *other congressional action* related to climate change counsels against the creation of federal common law in climate change litigation. A significant number of proposed statutes [3] exist related to climate change. Indeed, "more than 50 bills and provisions relating to climate change were introduced in the 107th Congress." J. Kevin Healy & Jeffrey M. Tapick, ***14** *Climate Change: It's Not Just a Policy Issue for Corporate Counsel - It's a Legal Problem,* 29 Colum. J. Envtl. L. 89, 97 (2004). While many of these acts only reinforce further climate change research, nevertheless it would be imprudent for the Court to rule on an issue Congress is explicitly considering. *Milwaukee II,* 451 U.S. at 354. Indeed, some pending legislation *directly* concerns regulation of greenhouse gases. H.R. 230, 112th Cong. (2011). Just days ago (January 25, 2011), for example, Congress considered whether to "prohibit the regulation of carbon dioxide emissions in the United States until China, India, and Russia implement similar reductions." S. 15, 112th Cong. (2011).

This is significant since "reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes." *Frontiero v. Richardson,* 411 U.S. 677, 692 (1973).

Third, even legislative action that has not (yet) resulted in an Act of Congress related to climate change cautions against a federal court usurpation of the power to regulate this issue. It is for the legislative branch, not a federal court, to decide what emission standards, if any, should exist. This is not just a scientific issue; it is a *policy* issue that will affect the American economy and political climate. As mentioned above, solving the global externality problem of climate change is a complex matter for which many possible types of solutions exist; it is a legislative decision which should be pursued.

CONCLUSION

State and private parties request this Court to create a new cause of action and remedy for ***15** contributing to a public nuisance, global warming, under "federal common law of public nuisance." This case raises the question whether federal courts have the authority to create such an action. Consideration of the separation of powers doctrine answers this question in the negative. A separation of powers violation would occur if the Court grants the Respondent's request since (i) constitutional and statutory authority precludes the creation of federal law of the of the scope and breadth they demand, and (ii) it would encroach upon the legislative branch, which has both considered and acted on the issue, leaving no authority for the Court to rule in the Respondents' favor. This Court should deny the Respondents' request.

Footnotes

1 Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.
Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

2 Correcting externalities can be approached in a number of different ways. "In general, these can be categorized as defining property rights and allowing bargaining, taxing negative externalities and subsidizing positive externalities, or establishing regulatory controls." Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 Journal of Legal Studies, S453-S489, S462 (2002).

3 A sampling of such activity includes the following: *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52,922, 52,927 (Sept. 8, 2003) (noting that some congresspersons have attempted to enact legislation similar to that proposed in the Kyoto Protocol to combat global warming), *id.* at 52, 926-28 (which outlines the history of congressional activity related to climate change); H.R. 5966, 101st Cong. (1990) (seeking to "amend the Clean Air Act to begin reducing the accumulation of greenhouse gases in the atmosphere"); *National Energy Policy Act of 1990*, S. 324, 101st Cong. (1990) (seeking to "establish a national energy strategy for the United States that reflects concern for the global environmental consequences of current trends in atmospheric concentrations of greenhouse gases, and for other purposes"); *Global Climate Change Research Act of 1990*, 15 U.S.C. § 2921 (which called for "a comprehensive and integrated United States research program which will assist the Nation and the world to under understand, assess, predict, and respond to human-induced and natural processes of global change." 15 U.S.C. § 2931(b) (2010)); S. 1224, 101st Cong. (1990) (seeking to enact automobile emissions controls); *Climate Stewardship Act*, S. 139, 108th Cong. (2003) (seeking to regulate greenhouse gas emissions).