1) Well, Obama got what he wanted. And it's a good thing, too: by attempting to short-circuit public nuisance suits, he established his good faith on climate change and paved the way for bipartisan cooperation.

2) It is absurd to argue that a common-law tort claim runs afoul of the political question doctrine. I'm not an expert on it, but I know of no appellate opinion holding as much, and for a good reason, too: if a claim is committed to the political branches, then in the common-law context the political branches can displace it. The political question doctrine deals with big-picture constitutional issues such as equal protection (redistricting), executive/legislative balance in foreign affairs, and so on.

3) The Second Circuit's holding on standing for *private* parties seemed silly on its face: it ruled, *inter alia,* that private nonprofits have standing under *Masachusetts V. EPA* because they foster the same sorts of public benefits as do state governments. I'm pretty lenient on standing, and even ***I*** didn't buy that one. It is almost as if the Second Circuit was asking for it.

4) That said, the argument that some conservatives are now making on standing, i.e. that *Massachusetts v. EPA* only came out the way it did because Congress granted standing in the Clean Air Act, also doesn't hold water…uh…air. *AEP* is a common-law claim; thus, to same degree that Congress can establish certain forms of standing in a statute, the courts would establish similar standing in a common-law claim. It is nonsensical to expect Congress to create standing on a substantive claim that it didn't establish in the first place.

5) Bad news: I think that there are actually good grounds for holding federal common law displaced. I've been arguing this for years.

6) Good news: simply because *federal* common law is *displaced,* that hardly implies that *state* common law is *pre-empted.* Indeed, the standards for the two are quite different. *Erie* makes federal common law suspect, but does nothing to state common law. Scalia and Thomas are at times somewhat principled on federalism issues (e.g. here), so that might be the way to go. I argued this several years ago and was laughed at by all those who confidently stated that it *has* to be a federal common law claim. They aren't laughing now.

7) I disagree with Ann re Sotomayor: she actually wasn't on the panel that finally decided *Connecticut v. AEP:* the panel was quite clear that she did not participate in the consideration or decision of the case. So she doesn't need to recuse herself. And if you take the position the key vote is Kennedy's, then it doesn't matter: if he votes to affirm then it's 4-4 and it's upheld, and if he votes to reverse it wouldn't matter where Sotomayor was.

8) But I don't think Kennedy will be a key vote on this case. I could easily see Breyer voting to reverse. Breyer likes logical, rational, synoptic, administrative regulation. He doesn't like common-law courts fumbling their way through things. His positions on the constitutionality of punitive damages is a good example of this, as well as his opinions on things like asbestos litigation.

My prediction: 6-3 (or maybe 7-2, with Kagan), to reverse. I hope that the states will now entertain common law nuisance claims.