This One Will Show Up

I like New York in June. The Supreme Court, not so much.

June is when the Court finishes up its term and releases any decisions still pending. This year, that means we will soon get a ruling on *Connecticut v. AEP,* the public nuisance climate case, which was argued in April. Just so you can keep score at home, here are the possibilities:

1) *Affirmance*. Great on policy, but questionable on the law. (The displacement claim, in my view, is quite strong).

2) *Dismissal on displacement grounds*. Worse on policy, but probably right on the law.

3) *Dismissal on standing grounds*. Worse on law and policy, because it would indicate that standing for states under *Massachusetts v. EPA* is very narrow; it would represent a retreat from that decision, and probably cause other mischief, as right-wing lower courts use it to slam the courthouse door on more claimants.

4) *Dismissal on displacement grounds and providing guidance on how to handle state common law claims*. This would handle the problem presented in *Int'l Paper Co. v. Ouellette,* the 1987 Supreme Court decision that held that the Clean Water Act did not displace state common-law nuisance claims. *Ouellette* also held, however, that such state claims must be decided under the *sending* state's common law, a bizarre result that should not be replicated here. In any event, because the displacement of federal common law would resuscitate state common law and raise statutory pre-emption questions, the Court could rule on this matter even if it has not been briefed.

5) *Dismissal on displacement grounds and a ruling holding that state common law actions are also pre-empted*. In my view, this would be the worst both on law and policy, although a couple of justices appeared to discuss it at oral argument. The state law pre-emption issue was not briefed, and in any event, it would be a seriously flawed reading of the Clean Air Act. This sort of reactionary activism, however, is just the sort of thing that Chief Justice Roberts loves.

And after all of this, the Blue Plate Special, which could occur no matter what the end result:

Plurality games. Because Justice Sotomayor heard this case while on the Second Circuit

even though she did not participate in the decision, she has taken the high road and recused herself from the case (a road that Justice Thomas has refuses to take for challenges to health reform despite a far more egregious conflict-of-interest). But an 8-person court missing one of the sane justices means that the Four Horseman can write a horrific opinion that might not gain a majority, but could technically be considered a plurality if there is not a unified opinion on the other side. This occurred in *Stop the Beach Renourishment v. Florida Dept. of Environmental Protection*, last term's major takings case (with Stevens recusing himself there), and we can expect more mischief here.

Any predictions?