A couple of folks have already written about the UARG decision, and there is surely more to understand about the implications of the Scalia majority decision for future EPA greenhouse gas regulatory efforts. But I want to highlight one key implication of the decision for EPA's overall greenhouse gas regulatory program.

First, it is important to remember that multiple EPA regulatory decisions were at issue in this litigation: EPA's determination that greenhouse gases required regulation under the Clean Air Act; EPA's setting standards for greenhouse gas emissions from motor vehicles under the Clean Air Act; EPA's determination that, once greenhouse gases required regulation under the Clean Air Act as an "air pollutant," regulation under the Clean Air Act's Prevention of Significant Deterioration (PSD) and Title V permitting programs was triggered for thousands or even millions of sources; and EPA's proposal in the Tailoring Rule to exclude the vast majority of those sources from at least initial regulation under the PSD and Title V programs.

Industry groups challenged all four decisions in the litigation, though only the last two ended up being at issue in the Supreme Court. These groups challenged the Tailoring Rule in this case not because they wanted more regulation – instead, it was a political and legal gamble that if EPA could not exclude the vast majority of sources of greenhouse gas emissions from immediate regulation and permitting under the Clean Air Act, EPA wouldn't do greenhouse gas regulation at all (or at least, might wait a very, very long time to do any regulation).

The problem is that the Clean Air Act established minimum emission thresholds above which regulation and permitting were mandatory for a range of new and existing air pollution sources. For "conventional" (i.e., non-greenhouse gas) pollutants, those thresholds mean that new permits under the PSD program number in the hundreds annually, and permitting of existing sources under Title V covers less than 15,000 sources. But because greenhouse gases are emitted in much larger amounts than "conventional" pollutants, the statutory thresholds would sweep in many, many more sources if Clean Air Act regulation was expanded to include greenhouse gases. New sources requiring PSD permitting might increase to 82,000/year and the number of existing sources requiring Title V permits might increase to as many as 6 million – for these additional sources, they would be included simply because of their greenhouse gas emissions.

The gamble by the plaintiffs in this case was that this massive increase in permitting and regulatory burdens would be infeasible for EPA to do – both administratively and politically. If the Tailoring Rule was struck down, EPA would be faced with an all or nothing choice, and EPA would choose "nothing." (Or the political reaction would force EPA to choose

"nothing.")

Scalia has eliminated this argument. His interpretation of the statute is that EPA can only reasonably expand Clean Air Act greenhouse gas permitting and regulation to "anyway" sources – sources that would have been regulated under the Clean Air Act's PSD and Title V permitting programs anyway, because of "conventional" pollutants. This ruling eliminates the possibility of massive increases in regulation of new or existing sources from greenhouse gas regulation. The "all or nothing" dilemma that EPA faced is gone.

Indeed, Scalia's opinion in many ways is a more definitive resolution of that "all or nothing" dilemma than EPA's Tailoring Rule. The Tailoring Rule was an EPA regulation; it might have been challenged in court by environmental groups seeking to force greater regulation. (That seems unlikely now, for the same reasons that industry wanted to challenge the Tailoring Rule, but it's not implausible in the future. Here's a press release from the Center for Biological Diversity criticizing the Tailoring Rule.) The D.C. Circuit had held that the industry groups in this case did not have standing to challenge the Rule, but that still left the Rule vulnerable to future challenges by someone who was able to find standing. And as Scalia's opinion (which held the Rule to be inconsistent with the Act) and even the Breyer dissent (which would have upheld the Tailoring Rule) make clear, whether the Tailoring Rule is consistent with the Clean Air Act is not a slam-dunk in terms of statutory interpretation.

Scalia's opinion states that any increase in regulation to cover greenhouse gases is barred by the statute. This is a resolution that is not vulnerable to future litigation (at least, it is much less vulnerable than the Tailoring Rule was). It gives EPA much more certainty that the "all or nothing" dilemma is behind it, and it can now proceed with the (difficult) task of figuring out how PSD, Section 111(d), and other provisions of the Clean Air Act apply to greenhouse gas emissions.