As Ann has just written the Supreme Court's decision today in the *EME Homer* case was a big victory for EPA and for air pollution control. In an opinion by Justice Ginsburg, the Court upheld EPA's interstate transport rule. Ann focused on the potential implications of the decision for the other big environmental case pending before the Court, which deals with greenhouse gases. I'd like to add a little more about the case itself.

Although I think the dissenters were completely wrong, I do understand why EPA's approach to interstate pollution can seem disconcerting. The statute requires emission controls in each state to ensure that no source emits "any air pollutant in amounts which will . . . contribute significantly" to violation of air quality standards in another state. This sounds on the face of it like a physical determination about the amount of pollution from each source that goes to another state. Yet, EPA interpreted it to require emissions reductions by states based on the availability of cost-effective control methods, which seems different than the direction of the statute.

The problem is that no one state causes downwind air quality violations by itself; rather, the violations are the cumulative result of emissions from many upwind sources. So whether any one state is contributing to a downwind violation depends on what all the other sources are doing. There's no obvious answer about how to allocate the necessary reductions between sources so as to obtain the goal. In this respect, the task of dealing with interstate pollution involves the same kind of allocation problem between states as each state must face internally in allocating emissions between sources to attain its own air quality standards. The statute simply doesn't give any guidance about which of the many possible allocation schemes to choose. So EPA decided to pick the most cost-effective approach. The majority very sensibly upheld this as a reasonable exercise of EPA's responsibility to implement the statute.

Justice Scalia's dissent is a bit peculiar. It begins, as Ann noted, with a concern about unelected agency officials making policy rather than Congress. Since Scalia is a big fan of executive power, that seems a little odd coming from him. In addition, as he surely must know, the White House is very much involved in regulations of this importance, so the transport rule wasn't exactly under the control of unelected agency workers.

Scalia's dissent also contains a hugely embarrassing mistake. He refers to the Court's earlier decision in *American Trucking* as involving an effort by EPA to

smuggle cost considerations into the statute. But that’s exactly backwards: it was industry that argued for cost considerations and EPA that resisted. This gaffe is doubly embarrassing because Scalia wrote the opinion in the case, so he should surely remember which side won! Either some law clerk made the mistake and Scalia failed to read his own dissent carefully enough, or he simply forgot the basics of the earlier case and his clerks failed to correct him. Either way, it’s a cringeworthy blunder.

[NOTE: After this was posted, the opinion on the Court’s website was revised to eliminate Scalia’s error. Of course, as corrected, the case no longer fits Scalia’s overall thesis of the “unelected officials” trying to override Congressional policy.]