As I've been studying the opinions in *EME Homer*, I'm increasingly struck by the oddities of Justice Scalia's dissent. There was a flap last week about his blunder, later quietly corrected, in describing one of his own past opinions. But that's not the only peculiarity of the dissent.

As a quick reminder, *EME Homer* involved EPA's effort to deal with interstate pollution under the clean air act. Figuring out how to allocate the clean-up responsibility between plants in different states is complicated. Although the statute doesn't mention cost as a factor, EPA decided to base requirements for each plant on the plant's cost of compliance. The Supreme Court majority upheld EPA. Justice Scalia dissented. He argued that it was illegitimate for EPA to base the regulation on costs because the statute didn't include that as a factor. He also argued that it was an abuse of discretion for EPA to set the requirements itself rather than giving states a chance to do so first.

There's nothing unusual about a disagreement over the correct interpretation of a statute. But Justice Scalia's dissent was odd in a number of ways. He originally compared the situation to an earlier case in which he had written the majority opinion, where he said EPA had tried to do the same thing. When it was pointed out that he had the previous case backwards, that section of the dissent was amended on the Court's website. But other oddities remain.

For one thing, the Justice seems to have completely forgotten another one of his past opinions, even though it was discussed in the government's brief. The thrust of Scalia's dissent in the current case was that EPA had smuggled cost considerations into a statute that didn't refer to them. But in a 2009 case, he upheld another EPA regulation that did exactly the same thing.

Entergy v. Riverkeeper involved the role of cost in applying a water pollution statute. The statute mandated the "best technology available" to "minimize the adverse environmental impact." EPA decided not to require one extremely effective technology that was already in use in some places because the costs would be far too high compared to the additional environmental benefits. Just as in *EME Homer*, the statute in *Entergy* said nothing about costs. Yet Scalia had no trouble upholding EPA in that case, just the opposite of his view in *EME Homer.* Normally, a Justice would at least drop a footnote to address the apparent discrepancy between his positions in two such seemingly similar cases. This would seem especially appropriate since Scalia claimed the Court itself was violating precedent. But Scalia said nothing to explain the contradiction.

There's also an odd contradiction within the dissent itself. Half of the dissent argues that

the statute allows one and only one way of setting pollution controls for individual plants, based on their proportional contribution to downwind pollution. According to Scalia, it was outrageous of EPA to inject policy issues into this calculation. Instead, all that was needed were calculation by EPA's "skilled number-crunchers." The other half of the dissent argues that the states were arbitrarily deprived of their right to set pollution controls for individual plants. Scalia also considered this intrusion on state authority outrageous. But if setting the proportions was such a mechanical task, how were the states hurt when EPA did the number-crunching for them? The two halves of the dissent just don't gibe.

Aside from substance, there are questions of style and editorial judgement. There's the veiled comparison between EPA's approach and the Marxist adage "from each according to his abilities." In fact, Scalia likes the allusion so much he repeats it three times. Yet, it's a silly comparison because the beneficiary of EPA's approach is industry, not the proletariat. Milton Friedman would be a better reference point than Karl Marx. There's also a lot of unnecessary hyperbole, such as calling EPA's approach "utterly fanciful." Although that's not necessarily unusual for Scalia, it seems especially inapt in a case involving such an abstruse issue of statutory interpretation. Thus, the rhetoric seems to fall flat, whereas Scalia usually displays a keen aim in his invective.

Perhaps most strikingly, the tone of the dissent is sometimes startlingly casual. Consider these phrases from the dissent:

> "Look Ma, no hands!"
>
> "I am unimpressed, by the way, with the explanation . . . "
>
> "Wow, that's a hard one—almost the equivalent of asking who is buried in Grant's Tomb."

It's true that judicial opinions are somewhat less formal than they used to be, Scalia's more than many others. But still, I can't think of anything quite like this. "Wow, that's a hard one"?

It's not clear what to make of all this. The sloppiness of the opinion is all the more noteworthy because we are still nowhere near the end-of-the-term crunch, when things are more likely to slip through the cracks. Maybe the Justice and his clerks were just distracted by other matters, or maybe something else was at work. All very puzzling.