Okay, so it's bad enough that the Obama Administration has decided to unilaterally disarm itself in the struggle against climate change. For you law geeks out there (and you know who you are), the SG has gone even further to make these suits impossible in the future.

It does this by arguing that the state attorneys general do not have *prudential standing* to bring this suit. Now, you might say, "wait a minute! Didn't the Supreme Court already decide, in Massachusetts v. EPA, that states have standing to bring these claims?" Patience, grasshopper: Mass. v. EPA decided Article III, or constitutional standing. It declared that states could sue the EPA because such a suit would constitute a "case or controversy" under Article III of the Constitution.

The SG couldn't very well argue in its brief that the states don't have constitutional standing, because Mass. v. EPA already foreclosed that. So it said in effect, "Yes, the Constitution gives them a right to plead their case but it's a bad idea on policy grounds." In other words, it is asking the Court to create another procedural hoop for the states to jump through.

If one was being cynical, one could argue that the SG is asking the Court to overrule Massachusetts v. EPA sub silentio. In the future, if the SG gets its way, states' lawsuits against carbon emitters will get kicked on prudential grounds, so it doesn't matter whether there is Article III standing or not. Now, the SG's brief is careful to argue against prudential standing on the basis that so many lawsuits would prevent the formation and application of centralized policy, so theoretically lawsuits against EPA itself could still go forward. So more accurately, the SG is arguing that Massachusetts v. EPA should be held to its facts.

But if you then look at the substantive side of the SG's brief, it is arguing that federal common law is displaced due to some positive, but really quite minimal actions that EPA has taken since the Second Circuit delivered its opinion: regulations on light-duty trucks, the endangerment finding, the New Source Review regulations — all of which themselves are or will be under legal attack. In any event, the SG's brief sets up a world in which the EPA can do little or nothing about climate change — and no one can challenge them about it because any action, no matter how minimal, will displace common law.

A friend of mine suggested that this is really just about power: the Administration doesn't want anyone getting in its way, and that includes the states. Maybe, but then it is going to get a lot of utilities in its way. That's a pretty bad deal.

Or maybe it’s just easier to follow the money: it will be interesting to see the campaign contribution reports from utilities over the next three months.