2016

The Brave New Path of Energy Federalism

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For much of the past eighty years, courts have fixated on dual sovereignty as the organizing federalism paradigm under New Deal-era energy statutes. Dual sovereignty's reign emphasized a jurisdictional "bright line," a fixed and legalistic boundary between federal and state regulators. This Article explores how three recent Supreme Court decisions limit dual sovereignty's role as the organizing federalism principle under energy statutes.

These recent decisions do not approach federal–state jurisdiction as an either/or proposition, but instead recognize it is concurrent for many energy transactions. Concurrent jurisdiction opens up a brave new path of possibilities for energy federalism but also has been a target of criticism, including in Justice Scalia's last published dissent. This Article defends concurrent jurisdiction as consistent with the language, history, structure, and primary purposes of energy statutes.

At the same time, energy federalism's path continues to navigate a trove of doctrinal relics from dual sovereignty's reign, such as field preemption. These doctrines must be cleared from federalism's path if regulators are to successfully address the challenges presented by modern energy markets: expanding clean-energy resources, integrating those resources into the grid, protecting reliability, addressing energy security, and monitoring anticompetitive conduct that is harmful to consumers, to name a few. The Article concludes by calling on courts and regulators to be attentive to opportunities for promoting democratically-accountable agency preemption while addressing the challenges of new forms of energy federalism.

* Professor of Law and Director, Program in Law & Government, Vanderbilt University. Thanks to participants at the Harvard Electricity Policy Group discussion forum (organized by the Harvard Kennedy School), the Harvard/Duke forum at the National Association of Regulatory Utility Commissioners 2015 annual meeting in Washington D.C., and law school faculty workshop participants at Vanderbilt University and the University of Miami. Thanks also to Joel Eisen, Emily Hammond, Sam Kalen, Felix Mormann, David Spence, and Amy Stein for their comments on a previous draft.

Introduction

Federalism has always structured the regulation of domestic energy markets. It has now been eighty years since Congress first began the regulation of interstate energy markets with the adoption of the Federal Power Act (FPA) in 1935[1] followed by the Natural Gas Act (NGA) in 1938.[2] Each of these statutes gave the Federal Power Commission (FPC), which later would become the Federal Energy Regulatory Commission (FERC), jurisdiction to regulate wholesale energy sales but preserved state authority over retail transactions. Courts traditionally refer to this allocation of authority between wholesale (federal) and retail (state) energy sales as the jurisdictional "bright line" that defines spheres of exclusive authority based on a fixed, legalistic inquiry.[3]

For many decades following the New Deal, dual sovereignty[4] coexisted rather peacefully with traditional utility-rate regulation in energy industries. The jurisdictional bright line proved useful for sorting out jurisdictional disputes where both state and federal regulators set energy prices under similar cost-of-service principles. Aided by field-preemption doctrine, judicial recognition of comprehensive federal authority over wholesale

1. Federal Power Act, ch. 687, 49 Stat. 838 (1935) (codified as amended at 16 U.S.C. §§ 824–824w (2012)).

2. Natural Gas Act, ch. 556, 52 Stat. 821 (1938) (codified as amended at 15 U.S.C. §§ 717–717w (2012)).

3. *See, e.g.*, FPC v. Southern Cal. Edison Co., 376 U.S. 205, 215 (1964); *see also* Robert R. Nordhaus, *The Hazy "Bright Line": Defining Federal and State Regulation of Today's Electric Grid*, 36 ENERGY L.J. 203, 206 (2015).

4. By "dual sovereignty," I mean the principle that "the nation and the states were each authorized to control autonomous and distinct domains of social life." Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513, 1518 (2002).

energy sales helped to minimize the dysfunctions presented by state regulators' insulation of energy utilities from the interstate energy market.[5] During this era, judicial resolution of federalism disputes helped to minimize the problems presented to energy firms by having two potential regulators and eased regulators' implementation of traditional rate regulation. Legal formalities such as the "filed rate doctrine" (which served as a form of federal preemption) helped to reinforce the jurisdictional bright line.[6]

However, as these New Deal-era statutes enter their octogenarian phase, new developments in the energy industry have revealed serious cracks in the foundational facts behind dual sovereignty.[7] Today, energy firms face a dynamic economic environment. Energy markets, previously were insulated from the pressures of competition, now face volatility from new entrants and technologies.[8] An electric-power sector once dominated by the staid, vertically integrated utility has evolved into a diverse range of energy suppliers and related service providers, many lacking the same service obligations as utilities.[9] Customers who were once captive to regulated utilities now face choices of energy suppliers and are exposed to price volatility.[10] New technologies such as digital metering interfaces, rooftop solar, and energy storage have also enabled customers to become energy

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5. As the Supreme Court has observed:

> [W]hen the FPA became law, most electricity was sold by vertically integrated utilities that had constructed their own power plants, transmission lines, and local delivery systems. Although there were some interconnections among utilities, most operated as separate, local monopolies subject to state or local regulation. Their sales were "bundled," meaning that consumers paid a single charge that included both the cost of the electric energy and the cost of its delivery. Competition among utilities was not prevalent.

New York v. FERC, 535 U.S. 1, 5 (2002). For examples where the Court deployed field preemption vis-à-vis the NGA and FPA to invalidate state regulations, see *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988), and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).

6. *See* Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591, 1642, 1645 (2003) (criticizing the filed tariff doctrine for producing a kind of implied preemption that "simply would not survive the appropriate preemption analysis").

7. *Cf.* Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 146–47 (observing how changes in legal doctrine track changes in underlying factual assumptions).

8. *See* PETER KIND, DISRUPTIVE CHALLENGES: FINANCIAL IMPLICATIONS AND STRATEGIC RESPONSES TO A CHANGING RETAIL ELECTRIC BUSINESS 3, 7 (2013), http://www.eei.org/ourissues/finance/documents/disruptivechallenges.pdf [https://perma.cc/N2DD-AA3Y] (observing that the "electric utility sector has not previously experienced a viable disruptive threat" but that could change due to "technological innovation" and "disruptive forces").

9. *See* David B. Spence, *Can Law Manage Competitive Energy Markets?*, 93 CORNELL L. REV. 765, 769–70, 772–75 (2008) (chronicling the unbundling of the vertically integrated monopolistic American energy market since the 1980s).

10. Emily Hammond & David B. Spence, *The Regulatory Contract in the Marketplace*, 69 VAND. L. REV. 141, 156 (2016).

resources.[11] A once-predictable sector now faces disruption from rapid innovation and the onset (and occasional failure) of new technologies.[12] With the rise of interstate energy markets since the 1990s, coupled with the transformation of the traditional public utility, state regulation of the energy sector can no longer operate in isolation of broader regional and national energy policies.[13] The emergence of new environmental regulations of carbon emissions from existing power plants also calls into question the efficacy of any neat separation of federal and state spheres of authority. As one recent agency report observes, any federal regulation of carbon emissions will require the Environmental Protection Agency (EPA) to coordinate its policies with state and federal energy regulators, depending on their support to ensure that environmental regulations do not interfere with reliable generation and transmission.[14]

While it was once believed, at least by some, that federalism conflicts would begin to disappear with the rise of competitive energy markets,[15] in fact the opposite has occurred. The competitive threat of new technologies has seriously blurred the clear jurisdictional lines of dual sovereignty.[16] Litigants routinely invoke dual sovereignty as they ask courts to step in and referee any time regulators are perceived as stepping outside of their predefined bounds.[17] At the extreme, dual sovereignty's legacy can bind regulators by reinforcing judicially-defined limits on their authority. This approach hamstrings agency regulators from adopting proactive regulatory approaches that can adapt as they seek to balance important goals in the regulation of energy markets, such as expanding clean-energy resources, integrating those resources into the grid, protecting reliability, addressing

11. Nordhaus, *supra* note 3, at 212; Amy L. Stein, *Distributed Reliability*, 87 U. COLO. L. REV. 887, 888–90 (2016) (documenting the capacity of customers to both satisfy electricity demand as well as contribute to reliability resources—energy storage and demand response); *see* KIND, *supra* note 11, at 3–6 (predicting that the rise of new technologies may allow consumers to exit the grid).

12. KIND, *supra* note 11, at 3.

13. *See* James J. Hoecker & Douglas W. Smith, *Regulatory Federalism and Development of Electric Transmission: A Brewing Storm?*, 35 ENERGY L.J. 71, 73–74 (2014) (defending the necessity of increased coordination between state and federal regulators in light of changes in electricity markets over the last two decades).

14. *See* Press Release, FERC, EPA-DOE-FERC Coordination on Implementation of the Clean Power Plan 1–5 (Aug. 3, 2015), https://www.ferc.gov/media/headlines/2015/CPP-EPA-DOE-FERC.pdf [https://perma.cc/6GT6-RFYM]. For a discussion of the need for policy alignments between the EPA and FERC, see generally Todd S. Aagaard, *Energy-Environment Policy Alignments*, 90 WASH. L. REV. 1517 (2015).

15. *See, e.g.*, Charles G. Stalon & Reinier H.J.H. Lock, *State-Federal Relations in the Economic Regulation of Energy*, 7 YALE J. ON REG. 427, 431 (1990) (concluding that "in the long run the evolution of competition, in both the electric and gas industries, should do more to relieve than to exacerbate state/federal tensions").

16. Nordhaus, *supra* note 3, at 212.

17. *See infra* subpart II(C) (discussing cases from the Third, Fourth, and D.C. Circuits).

energy security, and monitoring anticompetitive conduct that is harmful to consumers.[18]

But in law as in life, sometimes "[e]nding is better than mending."[19] In this Article, I argue that, for all practical purposes, three recent Supreme Court decisions abandon dual sovereignty as the primary organizing principle for resolution of federalism disputes under energy statutes. As an alternative, the Court has recognized agency authorization for concurrent federal–state jurisdiction over many energy transactions. Concurrent jurisdiction challenges regulators and courts to address anew basic questions about the *nature* of regulatory jurisdiction, rather than fixating almost entirely on defining the *scope* of spheres of sovereignty. Recognition of statutory authorization for concurrent jurisdiction, an approach akin to what Abbe Gluck calls "statutory federalism,"[20] opens up possibilities for new energy federalism arrangements such as dynamic federalism and cooperative federalism.[21] While there is little doubt that jurisdictional overlaps can sometimes create problems of their own, the Supreme Court's recent opinions also clarify the statutory objective of closing regulatory gaps, namely avoiding a "no man's land" where neither federal nor state regulators can effectively address problems in energy markets. Still, concurrent jurisdiction will also present important new challenges for courts and energy markets as new federalism institutions emerge. Adapting federal preemption doctrine to this brave new world of energy federalism can help ease the transition to new regulatory approaches and ensure that courts do not lose sight of the core objective behind these statutes.

Part I introduces New Deal-era energy statutes, such as the FPA and the NGA.[22] At the time these statutes were adopted, it was widely perceived that

18. *See* Sharon B. Jacobs, *Bypassing Federalism and the Administrative Law of Negawatts*, 100 IOWA L. REV. 885, 890 (2015) (noting that FERC's recent initiatives "have run up against limits on federal jurisdiction in the FPA"); *see also* Steven Ferrey, *Restructuring a Green Grid: Legal Challenges to Accommodate New Renewable Energy Infrastructure*, 39 ENVTL. L. 977, 1005 (2009) (noting that states run into similar limits).

19. ALDOUS HUXLEY, BRAVE NEW WORLD 33 (Amereon House 1979) (1932).

20. Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1998 (2014).

21. *See* William Boyd & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law*, 63 UCLA L. REV. 810, 883–84 (2016) (emphasizing experimentation and innovation benefits of horizontal-regulatory nonuniformity in the energy sector); Felix Mormann, *Clean Energy Federalism*, 67 FLA. L. REV. 1621, 1679–80 (2015) (presenting a model that operationalizes dynamic federalism theory in the climate- and clean-energy-policy context); Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773, 807–40 (2013) (calling for a dynamic federalism model in the context of energy law); Jim Rossi & Thomas Hutton, *Federal Preemption and Clean Energy Floors*, 91 N.C. L. REV. 1283, 1288, 1331 (2013) (arguing that cooperative federalism is consistent with the FPA); Giovanni S. Saarman González, Note, *Evolving Jurisdiction Under the Federal Power Act: Promoting Clean Energy Policy*, 63 UCLA L. REV. 1422, 1466–69 (2016) (arguing that leaving some jurisdictional room over energy regulation to the states is advantageous for clean-energy policy).

22. This Article focuses its discussion on federalism principles in the regulation of energy markets. A related debate concerns energy federalism in energy production. For a terrific

Congress was legislating to close the "*Attleboro*[23] gap" attributed to dormant commerce clause limits on state regulation. Congress gave federal regulators substantive and remedial tools to address this gap in interstate energy markets, charging federal regulators with the task of prohibiting discriminatory activities that harm consumers. But Congress also did not intend to entirely displace state regulation. These statutes also contain specific provisions that recognize the importance of preserving state authority over activities such as electric power generation and distribution, though courts have consistently interpreted these clauses narrowly rather than applying a presumption against preemption.

Part II discusses the rise and historical reign of dual sovereignty in the regulation of energy markets. Dual sovereignty reflected the constitutional federalism principles against which Congress was legislating in the 1930s and was reinforced by later judicial interpretations of the resulting statutes. Taking inspiration from the Interstate Commerce Commission's regulation of railroad rates, the Supreme Court's earliest decisions interpreting energy statutes recognized comprehensive federal jurisdiction over wholesale energy markets. Federal authority under these statutes was not only recognized as plenary. Courts also began to treat it as exclusive,[24] giving rise to a jurisdictional divide between federal and state regulators. This bright-line approach purported to promote clarity, consistency, and uniformity, with courts routinely refereeing the balance of power in federal–state jurisdictional disputes by identifying formalistic boundaries.[25]

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discussion, see generally David B. Spence, *Federalism, Regulatory Lags, and the Political Economy of Energy Production*, 161 U. PA. L. REV. 431 (2013).

23. Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 89 (1927).

24. The distinction between "plenary" and "exclusive" authority is important, but the two terms are often conflated in federalism discussions. Plenary power is absolute and comprehensive, but an entity with plenary power may or may not choose to treat that power as exclusive. It may choose to delegate power, as Congress often does in areas where it possesses plenary power (such as the Commerce Clause), or not to exercise it at all. *See, e.g.*, Cal. Bankers Ass'n. v. Shultz, 416 U.S. 21, 59 (1974) (acknowledging the well-established authority of Congress to delegate its plenary powers to regulate foreign commerce). If a court treats plenary authority as exclusive, it effectively takes away an important feature of plenary power, which is the option to delegate it elsewhere or to share it through inaction. The only other substantive area where courts have treated the national government's plenary authority as exclusive appears to be the federal power over immigration matters. *See* Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 637, 639 (2013) (identifying a phenomenon similar to exclusive authority in the context of immigration matters, but labeling it "plenary power preemption").

25. As Justice Brennan once observed:

> Maintaining the proper balance between federal and state authority in the regulation of electric and other energy utilities has long been a serious challenge to both judicial and congressional wisdom. On the one hand, the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States. On the other hand, the production and transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests.

In Part III, I argue that, while dual sovereignty has had a long reign, recent Supreme Court decisions abandon it as the primary federalism principle under energy statutes. The Court first signaled fading of the jurisdictional bright line in *New York v. FERC*,[26] a 2002 opinion that observed that changes in the landscape of the electric industry call into question whether the electricity universe is "'neatly divided in spheres of retail versus wholesale sales.'"[27] *ONEOK, Inc. v. Learjet, Inc.*,[28] decided in 2015, puts it even more starkly when it calls a "clear division between areas of state and federal authority" a "platonic ideal" that eludes modern natural-gas markets.[29] The Court's 2016 opinion in *FERC v. Electric Power Supply Ass'n* (*EPSA*),[30] upheld FERC's rules for compensating demand response while departing from a strict notion of dual sovereignty and instead favoring a concurrent jurisdiction framework.[31]

Justice Scalia vigorously dissented from this approach, claiming that the majority's shift away from dual sovereignty in *ONEOK* smudges the line for determining jurisdiction and makes a "snarl" out of the Court's precedents.[32] His last published dissent in *EPSA* also takes issue with the basic idea of concurrent jurisdiction.[33] Still, I maintain, nothing in the structure or language of New Deal-era energy statutes requires dual sovereignty for all energy transactions that affect wholesale sales. Moreover, I maintain, for many modern energy transactions related to wholesale energy markets, recognizing agency authorization for concurrent jurisdiction better advances the primary objective of these statutes, which is to close regulatory gaps rather than eliminate jurisdictional overlaps.

In Part IV, I address the new challenges that concurrent jurisdiction and cooperative federalism under energy statutes present for courts. First and most importantly, as the Supreme Court stated in its 2016 *EPSA* decision, regulation of modern energy markets can benefit from recognition that concurrent jurisdiction is sometimes necessary to prevent new forms of

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Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983) (citation omitted).

26. 535 U.S. 1 (2002).

27. *Id.* at 16 (quoting Transmission Access Policy Study Grp. v. FERC, 225 F.3d 667, 691 (D.C. Cir. 2000)).

28. 135 S. Ct. 1591 (2015).

29. *Id.* at 1601.

30. 136 S. Ct. 760 (2016).

31. *Id.* at 776, 784 ("It is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other. . . . When FERC sets a wholesale rate, when it changes wholesale-market rules, when it allocates electricity as between wholesale purchasers—in short, when it takes virtually any action respecting wholesale transactions—it has some effect, in either the short or the long term, on retail rates. That is of no legal consequence.").

32. *ONEOK*, 135 S. Ct. at 1603, 1606 (Scalia, J., dissenting).

33. *EPSA*, 136 S. Ct. at 787–88 (Scalia, J., dissenting) ("I cannot imagine a more irrational interpretive principle than the following, upon which the majority evidently relies . . . .").

regulatory gaps. Some maintain that resolution of these energy federalism disputes will ultimately require courts to fit energy transactions into a fixed category of either federal or state jurisdiction.[34] But an either/or mindset in approaching federalism can also undermine the legislative purpose of avoiding a regulatory "no man's land." Although recent cases such as *EPSA* draw on this purpose to recognize expansive federal power, they also provide a symmetry for energy federalism. Since federal authority is not exclusive, it supports state experimentation in many instances too. For example, in many energy markets where FERC actively regulates wholesale transactions, states still retain considerable authority to adopt incentives for clean-energy resources, even after the Supreme Court's decision finding preemption of state incentives for natural-gas plants last term in *Hughes v. Talen Energy Marketing, LLC*.[35] I also argue that *EPSA*'s novel endorsement of FERC's demand response rules as "a program of cooperative federalism"[36] recognizes a considerable range of institutional options for federalism, from providing states an opportunity to "opt out" of federal programs (as has occurred with demand response) to allowing federal regulators to preempt state regulations that impede interstate energy markets.

For concurrent jurisdiction to enable agency efforts like these, courts approaching energy preemption issues must also be attentive to dual sovereignty's doctrinal relics. Cases such as *ONEOK* and *EPSA* reveal the folly of field-preemption approaches for modern energy markets and the need to fundamentally rethink preemption analysis. In recognizing that jurisdiction can expand or contract based on factual and pragmatic considerations, and is not a fixed legal category, courts must more clearly address how these statutes limit the scope of federal authority, without appealing to empty fictions of sovereignty that can crowd out state and local incentives for new energy resources. While the Court's recent decision in *Hughes* found federal preemption of state incentives for new power generation, importantly it did not adopt a categorical approach to preemption. Rather, it only prohibits state regulation that targets or aims directly at a per

34. *See, e.g.*, Ferrey, *supra* note 21, at 1003–08 (assuming that states will have to skate around the bright line created by the FPA in order to effectively regulate carbon emissions and develop feed-in tariffs to promote renewable energy); Jacobs, *supra* note 18, at 889 (advocating that federal regulators strategically bypass traditional jurisdictional lines set up by the FPA); Nordhaus, *supra* note 3, at 213 (advocating "legislative changes that redraw the Bright Line in a fashion that better accommodates today's regulatory needs").

35. 136 S. Ct. 1288, 1297 (2016) (striking down Maryland's program to incentivize investments in natural-gas plants on the grounds that it "invades FERC's regulatory turf" by "adjusting an interstate wholesale rate"); *id.* at 1299 (distinguishing Maryland's program from other state programs which encourage "production of new or clean generation through measures 'untethered to a generator's wholesale market participation'").

36. *EPSA*, 136 S. Ct. at 780.

se just and reasonable wholesale rate.[37] Thus, even after *Hughes*, courts should be wary of extending categorical approaches to preemption to state regulation of modern energy transactions, absent a careful assessment of the foundational facts regarding the interoperation of federal and state regulation. Finally, the significance of these foundational facts in resolving jurisdictional questions underscores a need to encourage institutional arrangements and procedures that enable agency (rather than judicial) preemption decisions. Agency decision-making functions as a more democratic and dynamic way of coordinating federal and state regulation of energy markets.

My ultimate claim is not that jurisdictional lines that avoid regulatory overlaps are a bad idea or are always inconsistent with energy statutes. Rather, the foundational facts that once sustained a clear jurisdictional separation between federal and state regulators in the energy sector have simply changed. Given these new factual conditions, it is more important than ever before that courts recognize that dual sovereignty no longer serves as the primary organizing paradigm for all energy transactions closely tied to the wholesale market. Concurrent jurisdiction can serve as the organizing principle for many modern energy transactions, especially as new technologies and new kinds of energy resources are providing value for the energy system. Such an approach can encourage state policy innovation while also allowing federal-agency regulators an expansive role in setting guiding principles, including the authority to preempt state regulation that impedes federal market policies. Unlike former judicial precedents that rely on dual sovereignty, the Court's recent decisions do not dictate a single federalism approach for all problems in energy regulation. Rather, concurrent jurisdiction emboldens political institutions, rather than courts, to consider and make decisions about the federalism balance in regulation of interstate energy transactions.

I. The New Deal-Era Statutory Framework

Congress adopted the FPA in 1935 and the NGA in 1938 to close the regulatory gaps the Constitution imposed on states regulating interstate energy markets beyond their borders. In this section, I present the primary historical problem Congress was aiming to solve in these statutes. I also introduce the primary statutory authority and regulatory tools Congress gave federal regulators to address interstate energy markets. Congress recognized substantial state authority in these statutes too, but the Supreme Court has narrowly interpreted any authority reserved exclusively to states.

37. *See Hughes*, 1326 S. Ct. at 1298 (noting states may not achieve ends through "measures *aimed directly* at" FERC-regulated wholesale markets) (quoting *ONEOK*, 135 S. Ct. at 1599); *id.* at 1299 ("We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC.").

A. *Closing Regulatory Gaps*

The FPA and NGA were adopted to address the regulatory void presented if interstate energy markets (primarily served at the time by state-regulated electric utility and gas-supply monopolies) were left unregulated by the federal government. Section 201 of the FPA extends federal jurisdiction to the FPC (FERC's predecessor) to regulate "the sale of electric energy at wholesale in interstate commerce . . . ."[38] Almost identical language appears in the NGA, which provides that its provisions "shall apply to the transportation of natural gas in interstate commerce" and to "the sale in interstate commerce of natural gas for resale . . . ."[39]

Based on this language, federal jurisdiction over wholesale sales of energy is the starting point for understanding the statutory framework that governs the operation of energy markets. Importantly, by granting federal regulators authority to regulate wholesale sales, these statutes do not authorize federal regulation of retail sales of energy. Thus, it is important to note that in adopting both the FPA and the NGA, Congress did not give a federal agency comprehensive authority to set rates to protect all consumers, both wholesale and retail. Instead, Congress was aiming to extend federal jurisdiction in order to avoid what at the time was a well-understood regulatory void in interstate energy markets.

Prior to the adoption of the FPA in 1935, state commissions were powerless to regulate any interstate transactions by electric utilities. The Supreme Court recognized this limit on state power explicitly in *Public Utilities Commission v. Attleboro Steam & Electric Co*. In that case, Rhode Island's Narragansett Electric Lighting Company had entered a twenty-year contract to supply the full electricity requirements of the Massachusetts-based Attleboro Steam and Electric Company.[40] The parties filed the contract rate with the Public Utilities Commission of Rhode Island.[41] Several years later, Narragansett obtained a rate increase from the Rhode Island Public Utilities Commission, over Attleboro's objections.[42]

After this rate hike was appealed through the Rhode Island courts, the Supreme Court granted certiorari.[43] The majority rejected Rhode Island's

38. Federal Power Act, ch. 687, sec. 213, § 201(b), 49 Stat. 838, 847 (1935) (codified as amended at 16 U.S.C. § 824(b)(1) (2012)). The FPA also extended federal jurisdiction to "the transmission of electric energy in interstate commerce," indicating that federal jurisdiction over transmission is more expansive than federal jurisdiction over energy sales. *Id.*

39. Natural Gas Act, ch. 556, § 1(b), 52 Stat. 821, 821 (1938) (codified as amended at 15 U.S.C. § 717(b) (2012)).

40. Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 84 (1927).

41. *Id.*

42. *Id.* at 85–86.

43. *Id.* at 83, 86.

regulation of the rate for the sale of energy to a Massachusetts utility, citing the Commerce Clause.[44] Specifically, the Court highlighted:

> [I]f Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island.[45]

According to the majority, the rate between Narragansett and Attleboro is "not subject to regulation by either of the two states in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress."[46] Thus, the Court's decision effectively disqualified both Massachusetts and Rhode Island from regulating the rate of the electricity contract, leaving any regulation of such prices to a nonexistent federal regime.

Less than a decade later, Congress would address this with the adoption of the FPA. The statute's legislative history makes clear that closing the "*Attleboro* gap"—a regulatory void where neither the forwarding state nor the receiving state could regulate the pricing of electricity sold across state lines—was the legislation's primary impetus.[47] As the Supreme Court has

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44. *Id.* at 89.

45. *Id.* at 90.

46. *Id.*

47. S. REP. NO. 74-621, at 17 (1935); H.R. REP. NO. 74-1318, at 7–8 (1935). The general consensus was that, under *Attleboro*, the Commerce Clause denied the States power over any wholesale transaction in interstate commerce. For confirmation, see generally *Public Utility Holding Company Act of 1935: Hearings on S. 1725 Before the S. Comm. on Interstate Commerce*, 74th Cong. (1935) [hereinafter *Senate Hearings*] and *Public Utility Holding Companies: Hearings on H.R. 5423 Before the H. Comm. on Interstate and Foreign Commerce*, 74th Cong. (1935) [hereinafter *House Hearings*]. The General Solicitor of the National Association of Railroad and Utilities Commissioners said during the House hearings: "[*Attleboro*] has been accepted by everybody as establishing . . . the fact that the State cannot regulate wholesale transactions, although it can regulate retail service and rate." *House Hearings*, *supra*, at 1657 (statement of John E. Benton, General Solicitor, National Association of Railroad and Utilities Commissioners). At the Senate hearings he said:

> The second part of the bill [section 201(b)] provides for regulation by the Federal Government of wholesale transactions in electric power. Those are transactions which the United States Supreme Court has held are beyond the reach of the States under the Constitution. The States have long regulated the rates charged by the local distributing companies to consumers; but they cannot reach the interstate producer supplying the distributing company.

Senate Hearings, *supra*, at 756–57 (statement of John E. Benton, General Solicitor, National Association of Railroad and Utilities Commissioners). "It therefore follows that if there is to be any regulation of the wholesale part of the electric and gas business which passes over State lines it must be supplied by the Federal Government." *Id.* at 768.

noted, "Congress interpreted [*Attleboro*] as prohibiting state control of wholesale rates in interstate commerce for resale."[48]

In the 1920s, the Supreme Court imposed a similar constitutional limit on state regulation of natural-gas sales,[49] leading to the passage of the NGA by Congress in 1938. Of course, modern-Dormant Commerce Clause analysis does not follow the same formalisms that characterized the Court's pre-New Deal approach and is more likely to rely on pragmatic balancing.[50] Despite this, the Court has continued to recognize closing regulatory gaps as a primary objective behind (and the immediate impetus for) the FPA[51]—a statutory purpose that has taken on a heightened importance in disputes in modern energy markets.[52]

B. Substantive and Remedial Regulatory Tools

In order to address this interstate regulatory void in energy markets, Congress gave federal regulators a specific set of tools. A significant problem associated with leaving interstate energy markets unregulated is the risk of monopolistic market-pricing abuses by suppliers, which can harm

48. United States v. Pub. Util. Comm'n, 345 U.S. 295, 308 (1953).

49. *See* Missouri *ex rel.* Barrett v. Kan. Nat. Gas Co., 265 U.S. 298, 307 (1924) (holding that the Commerce Clause "restrains the states from imposing direct burdens upon interstate commerce").

50. *See* Post, *supra* note 4, at 1629–30 (relating the judicial method advanced by Justice Stone during the New Deal era, balancing all relevant circumstances and governmental interests, comparing that method to the approaches actually employed by the New Deal-era Court, and observing that "Stone's perspective on judicial technique has become our own"); *see also* Frank R. Lindh, *Federal Preemption of State Regulation in the Field of Electricity and Natural Gas: A Supreme Court Chronicle*, 10 ENERGY L.J. 277, 314 (1989) (noting that "the mechanical approach to Commerce Clause questions in the older cases could produce seemingly arbitrary restrictions on the otherwise lawful regulatory powers of the states"). For a discussion of modern-Dormant Commerce Clause jurisprudence and its application to the energy sector, see generally Alexandra B. Klass & Jim Rossi, *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, 100 MINN. L. REV. 129 (2015).

51. *See, e.g.*, New York v. FERC, 535 U.S. 1, 6 (2002) ("When it enacted the FPA in 1935, Congress authorized federal regulation of electricity in areas beyond the reach of state power, such as the gap identified in *Attleboro* . . . .") (footnote omitted); Jersey Cent. Power & Light Co. v. FPC, 319 U.S. 61, 67–68 (1943) ("The primary purpose of Title II [of the FPA] . . . was to give a federal agency power to regulate the sale of electric energy across state lines. Regulation of such sales had been denied to the states by [*Attleboro*]."); *see also* Duke Power Co. v. FPC, 401 F.2d 930, 934 (D.C. Cir. 1968) ("[I]t was primarily to fill the '*Attleboro* gap' that Congress . . . passed the Federal Power Act as its first exertion of national authority over the operating electric utilities.") (footnote omitted). For a critical discussion of *Attleboro*, see Sam Kalen, *Muddling Through Modern Energy Policy: The Dormant Commerce Clause and Unmasking the Illusion of an* Attleboro *Line*, 24 N.Y.U. ENVTL. L.J. (forthcoming 2016) (manuscript at 3), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2674292 [https://perma.cc/6T9E-RFGZ] (arguing that *Attleboro* was dubious at the time it was decided and is especially dubious as a basis for drawing jurisdictional lines today).

52. *See* discussion *infra* subpart IV(A).

both competitors and consumers.[53] Concerned with a similar issue in the railroad context, Congress had previously vested the Interstate Commerce Commission with broad authority to reject unjust, unreasonable, or discriminatory rates.[54]

The FPA and NGA adopt a similar approach for energy markets, assigning a federal agency—the FPC, FERC's predecessor—the obligation to ensure that utility or pipeline rates are not unjust, unreasonable, or discriminatory. Section 205 of the FPA provides that "[a]ll rates" subject to FERC's jurisdiction along with "all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable" and declares that rates that do not meet this standard are unlawful.[55] That section also requires any utility subject to FERC's jurisdiction to file any change in its rates or related practices with FERC,[56] and prohibits utilities from granting an "undue preference or advantage," subjecting any person to "undue prejudice," or maintaining any "unreasonable difference" in rates or "in any other respect."[57] Section 206 provides that whenever FERC finds that a rate for a jurisdictional sale or a "practice . . . affecting" the rate is "unjust, unreasonable, unduly discriminatory or preferential," FERC is obligated to determine the appropriate rate.[58]

FERC's sections 205 and 206 regulatory jurisdiction clearly extends to the transmission as well as some sales of electricity (wholesale energy sales under section 201).[59] I refer to this as FERC's *substantive* jurisdiction over wholesale energy sales. Importantly, however, the "practice . . . affecting" rates language in both sections 205 and 206 indicates that Congress also

53. For a discussion of these harms, see Erwin L. Davis, *The Influence of the Federal Trade Commission's Investigations on Federal Regulations of Interstate Electric and Gas Utilities*, 14 GEO. WASH. L. REV. 21, 23 (1945).

54. *See* Hepburn Act, ch. 3591, sec. 4, § 15, 34 Stat. 584, 589 (1906). For discussion of how, in the adoption of the Interstate Commerce Act, Congress was also aiming to address a similar federalism problem with interstate railroad rates, see generally Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1054–70 (1988).

55. Federal Power Act, ch. 687, sec. 213, § 205(a), 49 Stat. 838, 851 (1935) (codified as amended at 16 U.S.C. § 824d(a) (2012)).

56. *Id.* at sec. 213, § 205(d), 49 Stat. at 851 (codified as amended at 16 U.S.C. § 824d(d) (2012)).

57. *Id.* at sec. 213, § 205(b), 49 Stat. at 851 (codified as amended at 16 U.S.C. § 824d(b) (2012)).

58. *Id.* at sec. 213, § 206(a), 49 Stat. at 852 (codified as amended at 16 U.S.C. § 824e(a) (2012)).

59. *Id.* at sec. 213, § 205(a), 49 Stat. at 851 (codified as amended at 16 U.S.C. § 824d(a) (2012)) ("All rates and charges made, demanded, or received by any public utility for or in connection *with the transmission or sale of electric energy subject to the jurisdiction of the Commission* . . . shall be just and reasonable . . . ." (emphasis added)); *id.* sec. 213 § 206(a), 49 Stat. at 852 (codified as amended at 16 U.S.C. § 824e(a) (2012)) ("Whenever the Commission . . . shall find that any rate . . . for *any transmission or sale subject to the jurisdiction of the Commission* . . . is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate . . . ." (emphasis added)).

intended FERC to have *remedial* jurisdiction over discriminatory market conduct that is not, itself, a wholesale energy sale.[60] This distinction between substantive jurisdiction over the rates for wholesale energy sales and remedial jurisdiction over "practices . . . affecting" rates is not unique to electricity regulation.

Nearly identical language appears in the NGA.[61] Courts have read the FPA and NGA *in pari materia* to suggest that this language provides extensive federal authority over the interstate energy markets.[62] Notably too, Congress was not writing on a blank slate when it adopted these statutes. As Joel Eisen has shown, the substantive and remedial provisions of these energy statutes were based on language of the Interstate Commerce Act, which also contained "practices . . . affecting" remedial jurisdiction.[63] Courts interpreted the FPA's and NGA's remedial provisions as allowing broad preemption of state regulation of utility investment and operational decisions, especially where state regulation threatened to contravene federally approved rates.[64]

C. *Impacts on State Regulation*

Congress adopted this structure for federal regulation of energy markets against the backdrop of existing (and, at the time, expanding) state regulation of energy sales. At the time, and even today, states regulate utility sales to retail consumers. While expansive federal power is undeniable under these statutes, it bears noting that in both the FPA and NGA Congress envisioned a significant, continued role for state regulation. These statutes contain general policy statements regarding continued state regulation, as well as

60. *See* Joel B. Eisen, *FERC's Expansive Authority To Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1795–96 (2016) (describing the ability to set wholesale rates and remedy discriminatory practices affecting wholesale rates as the pillars of FERC's authority under the FPA).

61. *See* Natural Gas Act, ch. 556, § 4(a), 52 Stat. 821, 822 (1938) (codified as amended at 15 U.S.C. § 717c(a) (2012)) ("All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful."); *id.* § 5(a), 52 Stat. at 823–24 (codified as amended at 15 U.S.C. § 717d(a)) ("Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . . .").

62. *See, e.g.*, Ky. Util. Co. v. FERC, 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985) ("It is, of course, well settled that the comparable provisions of the Natural Gas Act and the Federal Power Act are to be construed *in pari materia*.").

63. Eisen, *supra* note 60, at 1797–1812.

64. *See infra* subpart II(B).

more specific clauses that limit federal authorization and preserve state power.

For example, section 201(a) of the FPA states that federal regulation under the statute shall "extend only to those matters which are not subject to regulation by the States."[65] In its plain language, this clause might be taken to mean that, as of 1935, Congress meant to freeze in place the scope of existing state regulation. Since the 1940s, however, the Supreme Court has consistently interpreted section 201(a) as "prefatory" in nature, a "mere policy declaration" that "cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose."[66]

Elsewhere in the FPA, Congress spoke more directly to areas where state regulation can continue without any federal interference. For example, under section 201(b) of the FPA, Congress stated that, while FERC has jurisdiction over all "facilities" for the transmission or wholesale sale of energy, it does not have *any* jurisdiction over facilities "used for the generation of electric energy," or facilities "used in local distribution or only for the transmission of electric energy in intrastate commerce," or "facilities for the transmission of electric energy consumed wholly by the transmitter."[67] The language of the NGA is similar, clearly exempting specific facilities from the reach of federal regulation. For example, it states that federal regulation does not extend to "facilities" used for the "local distribution" or for "production or gathering" of gas.[68] These provisions, which address specific facilities, appear to speak to some sphere of exclusive state authority.

Beyond these specific facilities that are clearly reserved to the states, both the FPA and NGA limit the transactions that FERC is authorized to regulate. Section 201(b) of the FPA notes that its provisions do not apply to "any other sale," other than interstate transmission and the "sale of electric energy at wholesale."[69] The NGA also states that its provisions only apply to interstate transportation or wholesale sales.[70]

65. Federal Power Act, ch. 687, sec. 213, § 201(a), 49 Stat. 838, 847 (1935) (codified as amended at 16 U.S.C. § 824(a) (2012)).

66. New York v. FERC, 535 U.S. 1, 22 (2002) (quoting FPC v. S. Cal. Edison Co., 376 U.S. 205, 215 (1964)); *see also* Jersey Cent. Power & Light Co. v. FPC, 319 U.S. 61, 74–77 (1943) (rejecting section 201(a) as a limit on express authority granted to federal regulators elsewhere in the FPA).

67. Federal Power Act, ch. 687, sec. 213, § 201(b), 49 Stat. at 847–48 (codified as amended at 16 U.S.C. § 824(b) (2012)).

68. Natural Gas Act, ch. 556, § 1(b), 52 Stat. 821, 821 (1938) (codified as amended at 15 U.S.C. § 717(b) (2012)).

69. Federal Power Act, ch. 687, sec. 213, § 201(b), 49 Stat. at 847 (codified as amended at 16 U.S.C. § 824(b)).

70. Natural Gas Act, ch. 556, § 1(b), 52 Stat. at 821 (codified as amended at 15 U.S.C. § 717(b)).

In a case that has since been reversed by the Supreme Court, a D.C. Circuit panel recently interpreted section 201 of the FPA as providing states an exclusive sphere of jurisdiction over retail sales.[71] While a strong endorsement of dual sovereignty, this approach is inconsistent with other judicial decisions that interpret section 201 narrowly and refuse to find a clear reservation of exclusive authority for states over retail sales. For example, a 2002 Supreme Court decision upholding FERC's competitive restructuring of wholesale electric power markets refused to apply a presumption against preemption to limit federal jurisdiction under the FPA.[72] That opinion also recognized that the starting place for determining whether federal power may be exercised in an area of preexisting state regulation "is to examine the nature and scope of the authority granted by Congress to the agency"[73]—an approach that the Supreme Court endorsed even more strongly in its 2016 *EPSA* opinion, which I return to below.[74]

II. Dual Sovereignty's Reign

Courts have been repeatedly asked to address disputes surrounding the *scope* of federal regulatory authority over energy markets. Until recent years, judicial decisions addressing federalism did not dwell on the *nature* of federal jurisdiction under energy statutes. Rather, in the immediate years following enactment of these statutes, the Supreme Court quickly settled on a dual sovereignty approach that depended upon the judiciary to set a bright line separating spheres of federal and state jurisdiction. Courts applying this approach routinely characterized federal authority as "plenary," inviting many confused discussions of jurisdiction under the FPA and NGA.

Initial decisions drew on Interstate Commerce Act precedents to project a dual sovereignty approach onto these statutes. The common doctrinal reasoning used to support this was that federal regulators "occupy the field" of wholesale energy sales. Courts began to treat Congress's delegations of authority to agencies as not only plenary (or comprehensive), but as an endorsement of exclusive sovereignty. Applying this approach, federal courts rejected a broad range of subnational regulatory initiatives that conflicted with federally approved wholesale energy prices, including antitrust, tort, and breach of contract claims, under what is known as the "filed rate doctrine."[75] These courts also extended the reach of dual

71. Elec. Power Supply Ass'n v. FERC, 753 F.3d 216, 224 (D.C. Cir. 2014), *rev'd*, FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760 (2016).

72. New York v. FERC, 535 U.S. 1, 18, 25–28 (2002).

73. *Id.* at 18 (quoting La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986)).

74. *See infra* subpart III(B).

75. The filed rate doctrine "holds that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 962 (1986). For a critique of courts' tendency to invoke the filed rate doctrine, see Rossi, *supra* note 6, at 1642–46.

sovereignty beyond federal authority over actual wholesale energy sales, sometimes treating "practices . . . affecting" rates as within the exclusive authority of federal regulators.

After presenting dual sovereignty's reign and its implications for federalism under energy statutes, I present some prominent modern examples of how lower courts have continued to rely on bright-line jurisdictional analysis to make sweeping jurisdictional conclusions about energy statutes without any careful analysis of foundational facts surrounding the operation of energy markets. Dual sovereignty continues to cast a shadow upon regulation of modern energy markets, affecting state initiatives for customer energy resources and state incentives for new, low-carbon power generation facilities. These examples present an important opportunity for courts to clarify the role of foundational facts in sustaining federal regulation of energy markets.

A. The Tradition of "Bright Line" Jurisdiction

Following the adoption of New Deal-era energy statutes, courts initially interpreted the scope of federal regulatory authority in an expansive manner. Federal jurisdiction under energy statutes found a parallel in Justice Brandeis's interpretation of similar language from the Interstate Commerce Act, which held that state railroad regulation was field preempted. This rather formalistic approach endorsed dual sovereignty's premise that federal and state regulators occupy distinct spheres of regulatory jurisdiction.

A 1926 opinion written by Justice Brandeis—who six years later penned his famous dissent celebrating states as laboratories of democracy[76]—stands as one of the strongest field-preemption rulings under an economic-regulation statute. In *Napier v. Atlantic Coast Line Railroad Co.*,[77] the Supreme Court held that Congress intended to "occupy the field" of railroad safety when it delegated the authority to regulate it to the Interstate Commerce Commission under the Boiler Inspection Act (adopted in 1911).[78] In rejecting state safety regulations for railroad employees, Justice Brandeis wrote for a unanimous Court:

> It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the

76. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
77. 272 U.S. 605 (1926).
78. *Id.* at 611–13; Boiler Inspection Act, ch. 103, 36 Stat. 913 (1911) (amended 1915).

> field. *The broad scope of the authority conferred upon the Commission leads to that conclusion.* Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose.[79]

Napier's form of field preemption finds exclusive federal jurisdiction based entirely on the delegation of broad regulatory authority to an agency without any additional evaluation of congressional intent or how an agency actually regulates an activity. Justice Brandeis considered this a groundbreaking decision, heralding it as a statutory-construction doctrine of preemption unless Congress states otherwise, something akin to a presumption favoring agency preemption.[80]

Napier has never been overruled. The decision influenced the post-New Deal Court's expansion of federal preemption under a number of statutes. *Rice v. Santa Fe Elevator Corp.*[81] echoed *Napier*'s basic principle, holding that the relevant test for the displacement of state law is "whether the matter on which the State asserts the right to act is *in any way* regulated by the Federal Act."[82]

Rice and later cases recognize additional factors that are also relevant to any judicial finding of federal preemption—including how "pervasive" the actual scheme of regulation is.[83] Under statutes such as the FPA and NGA, however, courts have made broad findings of preemption based on the simple fact of delegation, with little additional evidence that Congress intended regulation to be pervasive or that state regulation was inconsistent with the approach of federal regulators.[84] Under these statutes, courts recognized that Congress's broad delegation of authority to agency regulators created plenary federal jurisdiction over wholesale energy markets. A bright-line approach to the federal–state division reinforces this idea and has continued to

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79. *Napier*, 272 U.S. at 613 (emphasis added).

80. Justice Brandeis wrote to Felix Frankfurter the day after the *Napier* decision was issued:

> In [*Napier*] I have endeavored to make clear, as a matter of statutory construction, the "occupying the field" doctrine. I think the states could be taught, by a similar ABC article that, if they wish to preserve their police power, they should, through the "state block" in Congress, see to it in every class of Congressional legislation that the state rights which they desire to preserve be expressly provided for in the acts.

Letter from Louis Brandeis to Felix Frankfurter (Nov. 30, 1926), *in* "HALF BROTHER, HALF SON": THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER 262, 263 (Melvin I. Urofsky & David W. Levy eds., 1991).

81. 331 U.S. 218 (1947).

82. *Id.* at 236 (emphasis added).

83. As the Court stated in *Rice*, a purpose to preempt can be evidenced in many ways: the scheme of federal regulation may be "so pervasive so as to make reasonable the inference that Congress left no room for the States to supplement it," the federal interest may be "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." *Id.* at 230.

84. *See infra* subpart II(B).

encourage both courts and regulators to treat as exclusive the authority delegated to federal regulators.[85] This approach was widely perceived as reinforcing a fixed jurisdictional line that promised to resolve federalism questions "in a consistent and predictable manner."[86]

For example, one of the Supreme Court's earliest decisions interpreting the NGA claims that Congress "has given plenary authority [to a federal agency] to regulate extensions of gas transportation facilities and their physical connection with those of distributors, as well as the sale of gas to them."[87] The most famous formulation of this approach is what has come to be known as the bright-line jurisdictional test:

> The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed.[88]

This dual sovereignty approach endorsed a legalistic test that, in effect, gave federal regulators the exclusive authority to regulate wholesale sales of gas, while relegating state regulators jurisdiction over retail sales.[89]

Nearly two decades later, in interpreting the FPA, the Court elaborated that electric power markets also contain a jurisdictional bright line, dividing federal and state regulatory authority based on the nature of the activity:

> Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis [of conflicts]. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.[90]

Again, in describing federal authority as "plenary," the Court meant to describe federal authority under the statute as comprehensive, if not exclusive. On this approach, the effect of finding any federal authority over wholesale energy markets was typically to field preempt state regulation.

B. *Field Preemption of Traditional Rate Regulation*

One of the highest profile modern endorsements of field preemption is in the context of nuclear regulation. In *Pacific Gas & Electric Co. v. State*

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85. *See infra* subpart II(C).

86. Lindh, *supra* note 50, at 278.

87. Ill. Nat. Gas Co. v. Cent. Ill. Pub. Serv. Co., 314 U.S. 498, 510 (1942).

88. Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n, 332 U.S. 507, 517 (1947).

89. For a discussion of the competing views on this subject, see Clinton A. Vince & John S. Moot, *Federal Preemption Versus State Utility Regulation in a Post*-Mississippi *Era*, 10 ENERGY L.J. 1, 4–5 (1989).

90. FDC v. S. Cal. Edison, 376 U.S. 205, 215–16 (1964).

Energy Resources Conservation & Development Commission,[91] the Supreme Court held that a California statute authorizing state regulation of the economic aspects of nuclear generating plants was not preempted by the Atomic Energy Act of 1954.[92] The Court noted that under the Atomic Energy Act, federal regulators "maintain[] complete control of the safety and 'nuclear' aspects of energy generation."[93] "[T]he Federal Government has occupied the entire field of nuclear safety concerns," the Court reasoned, but "the [California] statute does not seek to regulate the construction or operation of a nuclear powerplant"[94] so it was not preempted. Unlike a state moratorium on nuclear construction for safety reasons, which would fall squarely within the prohibited field, the California law did not fall to preemption because, the Court concluded, it "was aimed at economic problems, not radiation hazards."[95]

As the Court's *Pacific Gas & Electric*'s analysis indicates, modern field preemption doctrine has departed from the approach Justice Brandeis endorsed in *Napier*. Rather than focusing on the sweeping *scope* of a congressional delegation to federal regulators as fixing an exclusive sphere of federal authority, modern preemption analysis focuses on the *aim* of state regulation.[96] From this alone, it might appear that the modern Court disfavors a strong presumption in favor of preemption, giving states considerable leeway to regulate without interfering with federal policies, as occurred with nuclear regulation. Yet, two subsequent decisions from the 1980s make broad field-preemption findings under energy statutes, showing how Justice Brandeis's approach in *Napier* has continued to wield influence. Close analysis of these cases reveals dual sovereignty's continued reign over energy federalism and a Court struggling with its fixation on divining a clear statutory divide between federal and state authority.

In its 1986 decision in *Nantahala Power & Light Co. v. Thornburg*,[97] the Supreme Court found field preemption of state retail-rate regulation that contravened FERC-approved wholesale power rates.[98] There, two wholly owned subsidiary companies, Nantahala and Tapoco, each sold hydroelectric power they produced to the Tennessee Valley Authority (TVA).[99] In exchange, Nantahala and Tapoco jointly received a fixed supply of low-cost "entitlement power" from the TVA.[100] In a wholesale ratemaking

91. 461 U.S. 190 (1983).
92. *Id.* at 205, 216.
93. *Id.* at 212.
94. *Id.*
95. *Id.* at 213.
96. *See* subpart III(b) and Part IV.
97. 476 U.S. 953 (1986).
98. *Id.* at 959–62, 966.
99. *Id.* at 954–55.
100. *Id.* at 955.

proceeding, FERC set the allocation of this "entitlement power" Nantahala would receive.[101] North Carolina regulators, for the purposes of calculating the rate that Nantahala could charge its retail customers, chose a different entitlement allocation, rejecting FERC's methodology.[102] This approach for setting retail rates was upheld by the North Carolina Supreme Court.[103]

On review the U.S. Supreme Court reversed, applying what is known as the "filed rate doctrine," an obscure regulatory principle aimed at "enforcing the Supremacy Clause."[104] *Nantahala* invoked precedents involving rate approval by the Interstate Commerce Commission, suggesting that federal regulation is "supreme and exclusive."[105] It also noted that precedents involving both electric and gas regulation "uniformly" recognize "the need to enforce the exclusive jurisdiction vested by Congress in FERC over the regulation of interstate wholesale utility rates."[106] Under the FPA, the Court reasoned, "FERC clearly has *exclusive jurisdiction* over the rates to be charged . . . interstate wholesale customers."[107]

Significantly, the *Nantahala* court observed, the pragmatic reach of the filed rate doctrine "is not limited to 'rates' *per se*"[108] but also includes practices that "directly affect[]" wholesale rates, such as the allocation of the amount of low-cost hydroelectric power.[109] Because the effect of the North Carolina ruling would be to "trap[]" FERC-approved wholesale costs, it would deny Nantahala the ability to fully recover its costs of purchasing at a FERC-approved rate.[110] Thus, the Supreme Court rejected the North Carolina ruling.[111]

A year later, the Court again relied on the filed rate doctrine to preempt a state proceeding in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*.[112] There, the Court held that an order requiring an electric utility to purchase a portion of the nuclear plant's output at FERC-determined rates preempted state inquiry into management decisions leading to the construction of the nuclear plant.[113]

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101. *Id.*
102. *Id.* at 959–60.
103. *Id.* at 961.
104. *Id.* at 963, 973.
105. *Id.* at 964 (citing Chicago & Nw. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) (quoting Mo. Pac. R.R. Co. v. Stroud, 267 U.S. 404, 408 (1925))).
106. *Id.* at 965–66.
107. *Id.* at 966 (emphasis added).
108. *Id.*
109. *Id.* at 967.
110. *Id.* at 970.
111. *Id.* at 971–73.
112. 487 U.S. 354 (1988).
113. *Id.* at 356–57, 369–70.

These applications of the filed rate doctrine to find plenary preemption of electric-power regulation involving wholesale rates were followed by an even more sweeping invocation of field preemption to FERC's regulation of interstate-gas markets. In *Schneidewind v. ANR Pipeline Co.*,[114] the Court also recognized that the NGA constitutes a "comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce.'"[115] The Court reasoned that FERC's authority to set just and reasonable rates "permits [the agency] to control, albeit indirectly, a natural-gas company's capital structure."[116] It also highlighted that the requirement that FERC issue a "certificate of public convenience and necessity" for any new facility for the transport or sale of gas in interstate commerce provides the agency broad authority to ensure a project is financed in accordance with the public interest.[117] To the extent that a Michigan law was intended to protect against overcapitalization and excessive rates for facilities that are "a critical part" of the transportation of and interstate market in natural gas, the Court reasoned, the law was "an attempt to regulate matters within FERC's exclusive jurisdiction."[118]

The Supreme Court's approach to field preemption in these decisions relied on a number of routine aphorisms that served to sustain dual sovereignty. For example, consider the oft-cited principle that FERC possesses "plenary" authority over wholesale energy markets. Somewhat dubiously, the Court took this to not only mean comprehensive (the standard meaning of plenary in jurisdictional analysis). It also equated plenary with "exclusive."

Notable too, with no analysis, *Nantahala* and *Schneidewind* extend FERC's "exclusive" jurisdiction beyond the setting of wholesale rates. These cases also include within the scope of field preemption any "practice . . . affecting" rates where the aim of state regulation encroaches onto FERC's "exclusive purview."[119] The Court's preemption findings under these statutes paid little attention to actual foundational facts regarding the operation of federal and state regulation in energy markets and made no effort to distinguish FERC's substantive jurisdiction over wholesale rates from its remedial jurisdiction over "practices . . . affecting" rates.

114. 485 U.S. 293 (1988).

115. *Id.* at 300 (quoting N. Nat. Gas Co. v. State Corp. Comm'n, 372 U.S. 84, 91 (1963) (quoting Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 682 (1954))).

116. *Id.* at 302.

117. *Id.* at 302–03.

118. *Id.* at 307–08.

119. *Id.* at 308; *Nantahala*, 476 U.S. at 956, 966. As the Court clarified in *Schneidewind*, "every state statute that has some indirect effect on rates and facilities of natural-gas companies is not preempted." *Schneidewind*, 485 U.S. at 308. Instead, such preemption only extends to those state laws with a "central purpose" of regulating "matters Congress intended FERC to regulate." *Id.* at 308–09.

Such unreflective applications of field preemption over wholesale energy markets presumptively favored federal authority as a way of advancing many pragmatic regulatory objectives. For example, under the traditional approach to regulating vertically integrated utilities, both federal and state authorities set rates based on similar consumer-protection and cost-of-service principles.[120] Given these parallel policy goals, a presumption in favor of federal preemption helped to ensure that costs were not trapped (and left unrecoverable) while also making sure that utility shareholders did not receive a windfall through overcompensation of their expenses.[121]

But, even with traditional utility regulation, the ability of dual sovereignty to solve jurisdictional disputes based on a fixed-jurisdictional line proved somewhat elusive.[122] Contrary to Justice Brandeis's methodology in *Napier*, which eschews any case-by-case analysis, both *Nantahala* and *Schneidewind* ultimately required courts to evaluate some foundational facts regarding how specific state law interacts with federal regulation in energy markets prior to a preemption finding. Thus, while courts appealed to field preemption to support exclusive regulation of wholesale energy markets under energy statutes, courts were ultimately unable to avoid case-by-case determinations in addressing many of these energy-federalism disputes.[123]

C. *Dual Sovereignty's Modern Legacy*

As modern energy markets have evolved, many courts addressing federalism disputes continue to fixate on the formalisms of the jurisdictional bright line. Courts continue to rely on fixed jurisdictional categories, even as federal energy regulation has moved away from cost-of-service principles to focus instead on competitive markets. Courts have routinely treated the existence of a federally approved wholesale rate as categorically preempting any state regulation of the same activity.[124] Some courts have even found preemption based on nothing more than a delegation to a federal regulator, reasoning that federal authority forecloses the other regulator from

120. For descriptions of parallel-rate regulation of electric power until the 1980s, see generally RICHARD F. HIRSCH, POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM (1999); PAUL L. JOSKOW & RICHARD SCHMALENSEE, MARKETS FOR POWER: AN ANALYSIS OF ELECTRIC UTILITY DEREGULATION 13–20 (1983).

121. *See Nantahala*, 476 U.S. at 970–71 (observing the problem of "trapped" costs); Steven J. Ferrey, *Shaping American Power: Federal Preemption and Technological Change*, 11 VA. ENVTL. L.J. 47, 58–59 (1991) (same); Vince & Moot, *supra* note 89, at 29–30 (same).

122. A point highlighted nicely by Vince & Moot, *supra* note 89, at 4–5.

123. For further discussion of how courts had to develop exceptions and rely on case-by-case analysis of specific tensions between federal and state regulators, see *infra* section IV(C)(1).

124. *See* Rossi, *supra* note 6, at 1605–10 (discussing preemption in the context of filed rate claims).

addressing the same market activity at all.[125] These applications of dual sovereignty rarely rely on a careful assessment of foundational facts surrounding the operation of energy markets; rather, courts are more inclined to rely on sweeping jurisdictional conclusions that all regulatory authority lies on one side or the other of a fixed dividing line.

One high-profile illustration is the D.C. Circuit's 2014 opinion rejecting FERC's regulation of compensation for "demand response"[126] (commitments not to consume electricity, also known as "negawatts"[127]) in interstate-power markets, which was reversed by the Supreme Court in 2016.[128] FERC's rules defined demand response as "a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy."[129] Importantly, by its very definition, demand response is not a wholesale energy sale, which FERC clearly would have jurisdiction to regulate under section 201 of the FPA.[130] Instead, FERC based its statutory authority for these rules on its remedial authority to ensure that "all rules and regulations affecting . . . rates" in connection with the wholesale sales of energy are "just and reasonable" under sections 205 and 206 of the FPA.[131]

The D.C. Circuit did not buy this argument, striking down FERC's demand response rule as *ultra vires* under the FPA.[132] The panel decision, written by Judge Janice Rogers Brown and joined by Judge Laurence Silberman, reasoned that FERC's rationale for jurisdiction "has no limiting principle."[133] Without boundaries, sections 205 and 206 "could ostensibly authorize FERC to regulate any number of areas, including the steel, fuel, and labor markets."[134] FERC had maintained that a limit to the practices-affecting jurisdictional argument was based on demand response providers

125. *Id.* at 1610–15 (discussing agency deference in the context of antitrust and the filed rate doctrine).

126. EPSA v. FERC, 753 F.3d 216, 218 (D.C. Cir. 2014).

127. *Id.* at 225–30 (Edwards, J., dissenting).

128. FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760 (2016).

129. 18 C.F.R. § 35.28(b)(4) (2016).

130. *See* Federal Power Act, ch. 687, sec. 213, § 201(b), 49 Stat. 838, 847 (1935) (codified as amended at 16 U.S.C. § 824(b)(1) (2012)) ("The provisions of this Part shall apply to . . . the sale of electric energy at wholesale in interstate commerce . . . .").

131. *Id.* at sec. 213, §§ 205–06; *EPSA*, 753 F.3d at 221.

132. *EPSA*, 753 F.3d at 225. The D.C. Circuit also held that FERC's rule was arbitrary and capricious under the Administrative Procedure Act (APA) because FERC failed to provide a "direct response" to some of the arguments that FERC's rule would overcompensate demand response, resulting in discriminatory rates. *Id.* at 224–25. Importantly, the Supreme Court reversed the D.C. Circuit, finding in favor of FERC on jurisdiction as well as the arbitrary-and-capricious inquiry and upholding FERC's demand response rules. *EPSA*, 136 S. Ct. at 773. For a full analysis of this case, see *infra* subpart III(B).

133. *EPSA*, 753 F.3d at 221.

134. *Id.*

choosing to participate in wholesale markets, but the D.C. Circuit characterized this kind of effort to "lure" what would have been retail sales into the wholesale market as "the heart of" the jurisdictional challenge before the court.[135]

The D.C. Circuit panel went on to identify a specific jurisdictional limitation on FERC's authority in the FPA. Specifically, it referenced a clause in section 201(a) of the FPA, which states that FERC's reach "extend[s] only to those matters which are not subject to regulation by the States."[136] As a result of this clause, along with other language in 201(b) that makes the FPA inapplicable to "any other sale" (other than wholesale sales),[137] the D.C. Circuit reasoned that "[s]tates retain exclusive authority to regulate the retail market."[138] The court further explained that sections 205 and 206 do not constitute a "clear and specific grant of jurisdiction" that could trump the specific limits in section 201 and effectively "render the retail market prohibition useless."[139] Instead, the D.C. Circuit concluded, "[b]ecause FERC's rule entails direct regulation of the retail market—a matter exclusively within state control—it exceeds the Commission's authority."[140]

In another recent series of decisions surrounding state incentives for power generation, lower courts have relied on dual sovereignty to support sweeping federal preemption of state regulation. Traditionally, FERC directly set rates for the sale of energy at wholesale. However, the interstate energy market has shifted away from local monopolies, which dominated the industry at the time of the FPA's passage, to a system of interstate competition.[141] Under this approach, FERC has authorized the creation of various "regional transmission organizations" (RTO)—multistate institutions, which serve to coordinate organized energy markets in the most populated areas of the United States.[142] One of these is PJM Interconnected (PJM), a voluntary RTO which administers a regional market that includes

135. *Id.* at 221–22.

136. *Id.* at 221 (quoting Federal Power Act, ch. 687, sec. 213, § 201(a), 49 Stat. 838, 847 (1935) (codified as amended at 16 U.S.C. § 824(a) (2012))).

137. Federal Power Act, ch. 687, sec. 213, § 201(b), 49 Stat. 838, 847 (1935) (codified as amended at 16 U.S.C. § 824(b)(1) (2012)).

138. *EPSA*, 753 F.3d at 221.

139. *Id.* at 222.

140. *Id.* at 224. In a dissent, Judge Harry Edwards treated the jurisdictional issue as ambiguous under the FPA and indicated that he would have deferred to FERC's interpretation of the statute. *Id.* at 227 (Edwards, J., dissenting).

141. *See* New York v. FERC, 535 U.S. 1, 5–8 (2002) (identifying legislative changes, technical advances, and an increased number of electricity suppliers as the causes of the shift).

142. 18 C.F.R. § 35.28(g) (2016).

Maryland.[143] PJM operates a "real-time" energy market (enabling PJM to buy and sell electricity for delivery to distributors within the next hour) and a "day-ahead" market for power-generation capacity.[144]

In addition PJM operates a "capacity" market,[145] which gives buyers an option to purchase electricity in the future.[146] In operating it, PJM sets a quota based on how much capacity it predicts will be needed three years into the future, and then relies on what is known as a Reliability Pricing Model (RPM) to determine the appropriate per-unit price.[147] This price reflects the high-priced bid, based on a PJM-managed auction.[148] In approving PJM's initial capacity market, FERC endorsed a minimum-offer-price rule that required new generators to bid at or above a specified price in certain circumstances, in order to prevent the manipulation of market clearing prices through the exercise of buyer market power; this decision potentially exempted certain state-mandated power generators and allowed them to bid at zero.[149] However, following a complaint lodged by several generators, FERC eliminated the exemption for state-supported power plants and required these plants to bid at the agency-specific minimum price.[150] The agency reasoned that this adjustment was necessary to protect the integrity of wholesale capacity markets against below-cost bids by subsidized plants.[151]

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143. PPL EnergyPlus, LLC v. Nazarian, 974 F. Supp. 2d 790, 801 (D. Md. 2013), *aff'd* 753 F.3d 467 (4th Cir. 2014), *aff'd sub nom.* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016).

144. *Id.* at 804.

145. Capacity is "a standby commitment made by a capacity resource to either produce electric energy or to consume less electric energy at a time in the future when called upon by PJM to do so." *Id.* at 806. Importantly, a capacity market is not the same as an energy market.

> In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases from a generator an option to buy a quantity of energy, rather than purchasing the energy itself. Accordingly, the purchase of capacity is the purchase of a capacity resource's *availability* either to supply energy . . . or to reduce the demand for electric energy on the transmission system at some defined future time. A purchase of capacity is not a purchase of actual electric energy, but is instead a purchase of a resource capable of producing, or reducing demand for, electric energy in the transmission system when requested.

Id. (internal quotations, footnotes, and citations omitted). Notably, both the FPA and NGA speak only to FERC having direct jurisdiction over the wholesale sale of *energy*. Federal Power Act, ch. 687, sec. 213, § 201, 49 Stat. 838, 847 (1935) (codified as amended at 16 U.S.C. § 824 (2012)); Natural Gas Act, ch. 556, § 1(b), 52 Stat. 821, 821 (1938) (codified as amended at 15 U.S.C. § 717(b) (2012)). Still, even if capacity does not itself constitute a wholesale sale of energy, FERC can potentially use its remedial jurisdiction over practices affecting energy rates to regulate the capacity market.

146. *PPL EnergyPlus*, 974 F. Supp. 2d at 806.

147. *Id.* at 805–06.

148. *Id.* Under the RPM, auction participants bid to sell capacity for a single year, three years in the future, and then PJM ranks the bids from highest to lowest and, starting at the bottom, accepts bids until it has sufficient capacity to meet its quota. *Id.* at 806–12.

149. *Id.* at 809; PJM Interconnection, L.L.C., 119 FERC ¶ 61,318, at para. 163 (2007).

150. PJM Interconnection, L.L.C., 137 FERC ¶ 61,145, at para. 93, 96 (2011).

151. *Id.*

The state of Maryland adopted competitive retail markets in 1999 and authorized its utilities to participate in the PJM RTO.[152] However, portions of Maryland and D.C. are located in an area that the state of Maryland believed to be at heightened "risk for reliability problems," creating a need for generation sources in these particular areas.[153] Thus, the Maryland Public Service Commission solicited proposals for a new power plant, offering the successful bidder a twenty-year revenue stream secured by contracts for differences.[154] Competitors of the winning bidder for Maryland's incentives sued, alleging federal preemption of the Maryland incentives.[155] A federal district court agreed, finding that FERC's order field preempts the Maryland scheme, because the contracts-for-differences prices have the effect of setting the ultimate price that the winning Maryland generator receives in the PJM market.[156]

In a unanimous panel decision for the Fourth Circuit, Judge James Harvie Wilkinson III affirmed the lower court holding that FERC regulation of the interstate capacity market preempts the Maryland incentive program.[157] The court reasoned that the breadth of the grant of authority to federal regulators, as stated in the FPA's declaration of policy, "is confirmed by the FPA's similarly capacious substantive and remedial provisions" in sections 205 and 206.[158] Citing a "wealth of case law [that] confirms FERC's exclusive power to regulate wholesale sales of energy in interstate commerce,"[159] the court reasoned that "if FERC has jurisdiction over a subject the States cannot have jurisdiction over the same subject."[160] The court also highlighted that the Supreme Court has expressly rejected the notion that the "scope of [FERC's] jurisdiction . . . is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest."[161] Instead, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction. . . . This was done in the [FPA] by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States."[162]

152. *PPL EnergyPlus*, 974 F. Supp. 2d at 814–15.

153. *Id.* at 819–20.

154. *Id.* at 821–24.

155. *Id.* at 796.

156. *Id.* at 840.

157. PPL EnergyPlus, LLC v. Nazarian, 753 F.3d 467, 471 (4th Cir. 2014), *aff'd sub nom.* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016).

158. Federal Power Act, ch. 687, sec. 213, § 201(a), 49 Stat. 838, 847 (1935) (codified as amended at 16 U.S.C. § 824(a) (2012)); *PPL EnergyPlus*, 753 F.3d at 474–75.

159. *PPL EnergyPlus*, 753 F.3d at 474–75.

160. *Id.* at 475 (quoting Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 377 (1988) (Scalia, J., concurring in the judgment)).

161. *Id.* (quoting Nantahala Power & Light Co. Thornburg, 476 U.S. 953, 966 (1986)).

162. *Id.* (quoting *Nantahala*, 476 U.S. at 966).

Applying these principles, the Fourth Circuit concluded that the Maryland generation scheme was field preempted because it "functionally sets the rate" that the winning bidder "receives for its sales in the PJM auction."[163] Maryland regulators argued that the state does not actually set a rate because it "does not directly affect the terms of any transaction in the federal market."[164] However, in the view of the Fourth Circuit, allowing the state's scheme to stand "compromises the integrity of the federal scheme and intrudes on FERC's jurisdiction."[165] In support of this conclusion, the court cited Supreme Court precedents that found federal preemption of state laws that would have barred passing FERC-approved wholesale rates through to customers.[166] It also reasoned that conflict-preemption analysis reinforces a finding of field preemption, because in its view the Maryland scheme presents a "direct and transparent impediment to the functioning of the PJM markets."[167]

New Jersey, another state in PJM, with some of the highest power prices in the country, adopted a similar set of incentives for new generators, known as its Long-Term Capacity Agreement Pilot Program.[168] These incentives offered contracts to provide new electric generators fifteen years of revenue from local utilities, which would be passed through to local ratepayers.[169] As with the Maryland scheme, New Jersey's incentives resulted in a lawsuit by competitors and a district court judgment in favor of the plaintiffs finding conflict preemption.[170] The Third Circuit, in a panel decision written by Judge Julio Fuente, agreed with this result, and couched its decision in a field-preemption analysis.[171] It noted that its decision is limited to "capacity prices" in an "exclusively federal field" and does not speak to the issue of conflict preemption.[172] Despite the Third Circuit's claim that capacity is exclusively within the sphere of federal authority, it also mysteriously notes that states still "may select the type of generation to be built[:] wind or solar,

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163. *Id.* at 476.

164. *Id.*

165. *Id.*

166. *Id.* (citing Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354 (1988); *Nantahala*, 476 U.S. 953).

167. *Id.* at 479–80. However, the court also suggested that its conflict preemption holding is narrow and "not every state regulation that incidentally affects federal markets is preempted." *Id.* at 479.

168. Everest Schmidt, Note, *A Call for Federalism: The Role of State Government in Federally Controlled Energy Markets*, 65 RUTGERS L. REV. 573, 591–92 (2013).

169. *Id.* at 598–600.

170. PPL EnergyPlus, LLC v. Hanna, 977 F. Supp. 2d 372 (D.N.J. 2013), *aff'd on other grounds sub nom.* PPL EnergyPlus, LLC v. Solomon, 766 F.3d 241 (3d Cir. 2014).

171. *PPL EnergyPlus*, 766 F.3d at 255.

172. *Id.* at 254.

gas or coal" and that "states may elect to build no electric generation facilities at all."[173]

Much like the D.C. Circuit's rejection of FERC's demand response regulations, these appellate court cases strongly embrace the traditional dual sovereignty paradigm for resolving federalism issues under the FPA. They both fixate on a jurisdictional bright line under the FPA and characterize FERC's jurisdiction over interstate wholesale markets as "plenary" and, in effect, exclusive. Their reasoning relies on an expansive notion of field preemption even where the agency itself did not make any transparent finding in a regulatory proceeding that the state incentives are discriminatory in nature—a point I return to below.[174] As Robert Nordhaus observes (in criticizing the approach of the Third Circuit), "These cases are significant because they go far beyond excluding 'subsidized' resources from capacity markets—they bar their construction and operation altogether."[175] In its 2016 *Hughes* decision, the Supreme Court upheld the Fourth Circuit's conclusion that Maryland's incentives are preempted, but, as I discuss below, this case and other recent decisions by the Court call into question whether a bright-line approach to jurisdiction can resolve the federalism disputes confronting modern energy markets.[176]

III. The Recent Rise of Concurrent Jurisdiction

Dual sovereignty has continued to create uncertainty and confusion surrounding energy federalism in modern energy markets, calling into question its ability to promote uniformity and certainty. This Part explores how recent Supreme Court decisions reject dual sovereignty as the organizing principle for energy federalism. These recent decisions endorse statutory authorization for concurrent jurisdiction as the presumptive starting place for addressing many federalism disputes in modern energy markets. Contrary to

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173. *Id.* at 255. Although the court did not cite to the FPA as a basis for distinguishing between incentives that are explicit and those that indirectly result from generation mandates, it appears to be referencing a portion of the FPA that indicates that states, not the federal government, regulates the generation of electricity. Federal Power Act, ch. 687, sec. 213, § 201(b), 49 Stat. 838, 847 (1935) (codified as amended at 16 U.S.C. § 824(b)(1) (2012)); *see PPL EnergyPlus*, 766 F.3d at 255.

174. *See infra* section IV(C)(3).

175. Nordhaus, *supra* note 3, at 211.

176. Highlighting the significance of field preemption to these cases, the Solicitor General's invited brief opposing certiorari cited *Kurns v. Railroad Friction Product Corp*., 132 S. Ct. 1261 (2012). Brief for the United States as Amicus Curiae at 14, Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (Nos. 14-614, 14-623). In *Kurns*, the Court found field preemption based on Justice Brandeis's *Napier* opinion. *Kurns*, 132 S. Ct. at 1264 (citing *Napier v. Atl. Coast Line R.R. Comm'n.,* 272 U.S. 605 (1926)). However, in upholding the Fourth Circuit, the Supreme Court did not rely on this sweeping form of field-preemption analysis, which would preclude any state regulation at all of the issue. Instead, it recognized that the problem was Maryland's disregard for an interstate wholesale rate approved by FERC. *Hughes*, 136 S. Ct. at 1299. For further discussion, see *infra* section IV(C)(1).

objections raised by Justice Scalia, the decline of the bright-line approach and rise of concurrent jurisdiction is not inconsistent with the text and history of energy statutes, and case law construing energy statutes.

A. *Dual Sovereignty's Crumbling Foundation*

The Supreme Court's 2002 decision in *New York v. FERC*, upholding FERC's landmark electric-power-market restructuring rules, provided the first sign that dual sovereignty was destined to fall.[177] "Since 1935, and especially beginning in the 1970's and 1980's," the Court observed, "the number of electricity suppliers has increased dramatically."[178] Many of these new entrants lacked access to transmission and thus faced anticompetitive conditions in interstate energy markets.[179] In response to dysfunctional monopoly control of the industry and traditional rate regulation, in the 1990s FERC proposed a landmark set of rules to restructure the electric power industry (known collectively as Order No. 888), replacing cost-of-service regulation of wholesale utility sales.[180] FERC's rules proposed to "functionally unbundle[]" wholesale power sales from transmission and provide "equal access" to transmission lines through the filing of open-access tariffs with the agency.[181]

Although Congress had addressed evolving conditions in the electric-power industry on multiple occasions since 1935,[182] FERC claimed it had jurisdiction to adopt Order No. 888 under the original language of sections 205 and 206 of the FPA: "[T]he provisions concerning FERC's power to remedy unduly discriminatory practices . . . ."[183] After making a finding that utilities were discriminating in "bulk power markets," in violation of section 205 of the FPA, FERC invoked its authority to address "practice[s] . . . affecting" rates under section 206 to devise the remedy of open access.[184] Below, the D.C. Circuit had upheld FERC's factual findings of "a fundamental systemic problem in the industry."[185] FERC had recognized that the FPA's "jurisdictional lines change" when retail energy products were broken into two different products, such as power supply and

177. New York v. FERC, 535 U.S. 1 (2002).

178. *Id.* at 7.

179. *Id.* at 8–9, 9 n.6.

180. *Id.* at 10–11.

181. *Id.*

182. *Id.* at 11.

183. *Id.*

184. *Id.*

185. *Id.* at 14 (quoting Transmission Access Policy Study Grp. v. FERC, 225 F.3d 667, 683 (D.C. Cir. 2000) (per curiam)). The Court also noted how FERC here was relying on a "marketwide" remedy similar to what it had used in restructuring the natural gas industry. *Id.* (citing Associated Gas Distrib. v. FERC, 824 F.2d 981 (D.C. Cir. 1987)).

transmission.[186] The Supreme Court agreed, adding that "the landscape of the electric industry has changed since the enactment of the FPA, when the electricity universe was 'neatly divided into spheres of retail versus wholesale sales.'"[187]

Of greater legal significance, the Court rejected the argument that Order No. 888 exceeds FERC's authority because it reaches too far into a sphere of exclusive state authority.[188] While FERC's authority to unbundle wholesale transmission and sales and require open-access transmission is not without limit, the Court refused to apply a "presumption against pre-emption."[189] Rather, the Court reasoned, the key question under the statute "is to examine the nature and scope of the authority granted by Congress to the agency."[190]

States challenging Order No. 888 quoted section 201(a)'s text, which provides that federal regulation is "to extend only to those matters which are not subject to regulation by the States."[191] However, as the Court's precedents address, section 201(a) is a mere "policy declaration" that "cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose."[192] This "prefatory" language, the Court reasoned, "does not undermine FERC's jurisdiction."[193] States also referenced section 201(b), which states that FERC has no jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce."[194] However, the Court reasoned that Order No. 888 did nothing to "even arguably" affect state jurisdiction over these things.[195]

The FPA not only authorizes FERC to "close the gap in state power identified in *Attleboro*," according to the Court, but also authorizes both "the regulation of wholesale sales that had been *previously subject* to state regulation" and the regulation of transmissions.[196]

While "there is no language in the statute limiting FERC's *transmission* jurisdiction to the wholesale market," the Court observed that "the statute does limit FERC's *sale* jurisdiction to that at wholesale."[197] Still, the Court

186. *Id.* at 12.

187. *Id.* at 16 (quoting *Transmission Access*, 255 F.3d at 691).

188. *Id.* at 18–20.

189. *Id.* at 17–19.

190. *Id.* at 18 (quoting La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986)).

191. *Id.* at 20 (quoting Federal Power Act, ch. 687, sec. 213, § 201(a), 49 Stat. 838, 847 (1935) (codified as amended at 16 U.S.C. § 824(a) (2012))).

192. *Id.* at 22 (quoting FPC v. S. Cal. Edison Co., 376 U.S. 205, 215 (1964)).

193. *Id.*

194. *Id.* (quoting Federal Power Act, ch. 687, sec. 213, § 201(b), 49 Stat. at 847–48 (codified as amended at 16 U.S.C. § 824(b)(1) (2012))).

195. *Id.*

196. *Id.* at 21.

197. *Id.* at 17.

rejected the argument that the FPA fixed jurisdiction based on the constitutional formalisms at the time of the statute's enactment. Rather, after this decision, the scope of FERC's jurisdiction will depend on pragmatic concerns surrounding the operation of energy markets reflected in the agency's factual and policy findings. The FPA "extended federal coverage to some areas that previously had been state regulated,"[198] but the Court also noted "*Attleboro* does not define the outer limits of the statute's coverage."[199] Referencing the "changes in the electricity industry that have occurred since the FPA was enacted in 1935," the Court concluded that there "is no evidence that if Congress had foreseen the developments to which FERC has responded, Congress would have objected" to FERC Order No. 888.[200]

B. Recognition of Concurrent Jurisdiction

New York v. FERC reveals significant cracks in dual sovereignty's foundational facts,[201] but decisions from the Supreme Court's past two terms reject dual sovereignty altogether as the organizing principle for addressing jurisdictional conflicts under energy statutes. These decisions also recognize statutory authorization in both the NGA and FPA for concurrent regulation of many issues confronting modern energy markets, inviting federal and state regulators to coordinate their efforts in innovative federalism approaches.

1. Justice Breyer's ONEOK Opinion.—ONEOK v. Learjet, decided during the 2014 term, held that state antitrust suits aimed at pipeline price manipulation are not field preempted by the NGA.[202] This case made its way

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198. *Id.* at 7.

199. *Id.* at 21.

200. *Id.* at 23. Justice Thomas penned a dissent, which was joined by Justices Scalia and Kennedy. *Id.* at 28 (Thomas, J., concurring in part and dissenting in part). The dissent agreed FERC had jurisdiction under sections 205 and 206 of the FPA, *id.* at 28–29, but objected to other portions of the majority opinion because, in the views of the dissenters, FERC did not go far enough in regulating transmission. *See id.* at 42 (disagreeing with the Court's deference "to FERC's decision not to regulate transmission connected to bundled retail sales" and instead favoring remand to FERC to explain whether there was discrimination in the marketplace requiring FERC to provide a remedy addressing "all transmission within its jurisdiction").

201. Suzanna Sherry insightfully observes:

> [T]he Supreme Court often structures and develops doctrine in ways that reflect its unstated assumptions about these foundational facts, and changes in these hidden factual assumptions may lead to unacknowledged changes in doctrine. We can use the part we see—a sudden, unacknowledged, and apparently inexplicable change in doctrine—to uncover the foundational assumptions hidden within the doctrine.

Sherry, *supra* note 7, at 184–85.

202. ONEOK, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1594 (2015). Justice Breyer's majority opinion was joined by a somewhat unusual line-up: Justices Kennedy, Ginsburg, Alito, Sotomayor, and Kagan. Justice Thomas joined most of the majority opinion, especially its analysis of precedents under the NGA. *Id.* at 1603 (Thomas, J., concurring). He wrote separately, however, to underscore his longstanding view that implied preemption doctrine wanders from the Constitution. *Id.*; *see also* Wyeth v. Levin, 555 U.S. 555, 582 (2009) (Thomas, J., concurring) (describing Justice Thomas's increasing skepticism about the Court's implied preemption doctrine).

to the Supreme Court following several state antitrust lawsuits brought by retail buyers of natural gas, alleging that gas traders manipulated prices by reporting false information to private price-index publishers and engaging in wash trades.[203] It presented a thorny legal question because the alleged market manipulation affected both wholesale sales—the traditional purview of federal regulators—and retail sales—which FERC is not authorized to regulate.[204]

A core legal issue presented to the Supreme Court in *ONEOK* is whether, in adopting the NGA, Congress intended to "occupy the field" of antitrust remedies concerning pipelines' pricing behavior in natural-gas markets.[205] The Ninth Circuit had found no preemption, construing the scope of federal jurisdiction under the NGA narrowly and allowing the state law antitrust claims to proceed.[206] Pipelines seeking review of this decision argued that the NGA preempts state antitrust-law challenges by retail customers to practices that also affect wholesale gas rates regulated by FERC.[207]

The Supreme Court agreed with the Ninth Circuit that the state law antitrust claims are not preempted and should be allowed to proceed.[208] Justice Breyer's majority opinion emphasized that the NGA "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way."[209] Under section 1(b) of the NGA, wholesale transactions fall squarely within the jurisdiction of federal regulators.[210] For nearly seventy years, judicial precedents have reaffirmed the sharp clarity of this federal–state division of authority over wholesale and retail sales, sometimes even calling it a jurisdictional bright line.[211] Yet the majority also distinguished a number of previous cases finding field preemption under the NGA, repeatedly emphasizing that Congress did not intend to dilute altogether state regulatory power and that such a finding should only be made "where detailed examination convinces us that a matter falls within the pre-empted field as defined by our precedents."[212] As the majority reasoned, Congress has consistently favored competitive natural-gas markets, and states also have a long history of providing "common-law and statutory

203. *ONEOK*, 135 S. Ct. at 1597–98 (2015) (majority opinion).
204. *Id.* at 1594.
205. *Id.* at 1595.
206. *Id.* at 1599.
207. *Id.*
208. *Id.* at 1594.
209. *Id.* at 1599 (quoting Panhandle E. Pipeline Co. v. Pub. Serv. Comm'n, 332 U.S. 507, 517–18 (1947)).
210. *Id.* at 1596; Natural Gas Act, ch. 556, § 1(b), 52 Stat. 821, 821 (1938) (codified as amended at 15 U.S.C. § 717(b) (2012)).
211. *Id.* at 1607 (Scalia, J., dissenting) (quoting Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986)).
212. *Id.* at 1599 (majority opinion).

remedies against monopolies and unfair business practices" that reinforce these markets.[213]

Indeed, in *ONEOK*, the majority questioned whether the NGA contains a strict dividing line at all: "Petitioners and the dissent argue that there is, or should be, a clear division between areas of state and federal authority in natural-gas regulation. But that Platonic ideal does not describe the natural gas regulatory world."[214] The majority emphasized too that, despite the Solicitor General supporting the pipelines' preemption arguments, FERC had not made an agency determination that field preemption would bar the antitrust claims.[215] Accordingly no deference to the agency was due.[216] In upholding the Ninth Circuit, the majority left any questions regarding conflict preemption of state antitrust regulation to be resolved by lower courts.[217]

ONEOK stops well clear of finding field preemption of state regulation, contrasting with the result of *Schneidewind*.[218] In rejecting the "forceful" argument of the pipelines that exclusive federal jurisdiction should control,[219] the majority reveals its reluctance to extend a preemptive effect to those transactions that are not purely wholesale. Section 5(a) of the NGA authorizes FERC to also address practices affecting wholesale rates, while the statute also recognizes that retail sales are primarily in the purview of the states.[220] The difficult question this case presented was what to do when a practice affects both types of sales. Justice Breyer's majority opinion provided a test for evaluating when state law will cross impermissibly into the sphere of federal regulation: courts must consider "the *target* at which the state law *aims* in determining whether [the] law is pre-empted."[221] With the particular antitrust claims at issue in this case, however, the state regulation was primarily aimed at practices "affecting" retail rates, so the majority reasoned that it was "firmly on the States' side of that dividing line."[222]

ONEOK is significant for broader debates surrounding energy federalism. It rejects dual sovereignty as the organizing principle for addressing jurisdictional issues under the NGA. In some ways the majority's test for preemption—which focuses on the federal regulatory target at which state law is aiming—takes inspiration from and is entirely consistent with

213. *Id.* at 1601 (quoting California v. ARC Am. Corp., 490 U.S. 93, 101 (1989)).

214. *Id.* at 1601 (citations omitted).

215. *Id.* at 1602.

216. *Id.* at 1602–03.

217. *Id.* at 1595, 1603.

218. *See supra* subpart II(B).

219. *ONEOK*, 135 S. Ct. at 1599.

220. *Id.*; Natural Gas Act, ch. 556, § 5(a), 52 Stat. 821, 823 (1938) (codified as amended at 15 U.S.C. § 717d (2012)).

221. *ONEOK*, 135 S. Ct. at 1599.

222. *Id.* at 1600 (quoting Nw. Cent. Pipeline Corp. v. State Corp. Comm'n 489 U.S. 493, 514 (1989)).

Schneidewind's attention to specific facts surrounding the tension between federal and state regulation.[223] Yet, unlike the Court's previous energy preemption precedents, *ONEOK* does not ground this analysis in a field preemption framework. Rather, by calling into question whether field preemption doctrine is necessary or desirable in approaching preemption under the NGA, the majority's decision endorses concurrent state regulation of anticompetitive conduct in interstate gas markets.

2. Justice Kagan's EPSA Opinion.—While *ONEOK* strongly endorsed state antitrust regulation of energy markets, the Supreme Court's decision last term in *EPSA* embraced expansive federal authority over wholesale energy markets. This pathbreaking decision upheld FERC's rules for demand response compensation in wholesale energy markets.[224] Instead of grounding its analysis in the field preemption framework of previous precedents, *EPSA* squarely rejected the dual sovereignty approach, which the D.C. Circuit had applied below to hold FERC's demand response rules *ultra vires* under the FPA.[225] "We will not read the FPA, against its clear terms," the majority reasoned, "to halt a practice that so evidently enables the Commission to fulfill its statutory duties of holding down prices and enhancing reliability in the wholesale energy market."[226]

Without doubt, *EPSA* will prove important for modern energy markets.[227] It definitively emboldens federal authorities to regulate a broad range of issues confronting energy markets. These include initiatives to promote clean energy, as the environmental community celebrated

223. *See supra* subpart II(B).

224. FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 784 (2016). This 6–2 lineup was also somewhat unusual. *Id.* at 765. Justice Kagan wrote the majority opinion, which was joined by Chief Justice Roberts, along with Justices Kennedy, Breyer, Ginsburg, and Sotomayor. *Id.* As discussed below, Justice Scalia wrote a dissent, which was joined by Justice Thomas. *Id.* at 784. Justice Alito did not participate in review of the case or the decision. *Id.*

225. *See supra* subpart II(C).

226. *EPSA*, 136 S. Ct. at 782. The Court upheld FERC's demand regulations against an arbitrary and capricious attack, reversing the second ground for the D.C. Circuit's opinion on this ground as well. *Id.* at 784.

227. A number of published articles already contain careful analysis of the decision's implications. *See, e.g.*, Matthew R. Christiansen, FERC v. EPSA*: Functionalism and the Electricity Industry of the Future*, 68 STAN. L. REV. ONLINE 100, 100, 102 (2016) (speculating that *EPSA* "may ultimately rank among the most significant energy law cases of all time" and that it may "provide a solid foundation for similarly functionalist and pragmatic approaches to adapting electricity regulation to the changing electricity sector"); Eisen, *supra* note 60, at 1787–88 (emphasizing how *EPSA* clarifies the expansive nature of FERC's authority over practices affecting wholesale rates); González, *supra* note 21, at 1429 (observing that the Court endorsed a functionalist approach in *EPSA*). For a discussion of the Court's decision and its implications for state clean-energy policies, grid-edge innovation, and agency deference, see Symposium, FERC v. EPSA *Symposium*, 40 HARV. ENVTL. L. REV. F. 1 (2016).

immediately after this decision was issued.[228] However, *EPSA* is also significant because it resoundingly rejects dual sovereignty as the primary framework for addressing important jurisdictional issues in modern energy markets. Rather than beginning its jurisdictional analysis with the traditional bright-line approach, the majority focused on the pragmatic challenges FERC faces given its policies to restructure the electric-power industry by enhancing competition and its ongoing statutory obligation to ensure "just and reasonable" rates.[229] The decision emphasized, in particular, the serious problem presented by electricity's inability to be stored and the need to coordinate the supply and demand of energy on the grid in real time.[230] It also noted "the wholesale electric market lacks the self-correcting mechanism of other markets."[231] The majority recognized that the "statutory division" between wholesale and retail sales "generates a steady flow of jurisdictional disputes because—in point of fact if not of law—the wholesale and retail markets in electricity are inextricably linked."[232]

Apart from its heavy reliance on changing foundational facts that support the agency's claim to jurisdiction, three analytical aspects of *EPSA*'s reasoning stand out as especially important for future energy federalism disputes. First, the Supreme Court placed its initial (and primary) analytical focus on establishing whether FERC has jurisdiction, using the established test that a practice must "directly affect" wholesale markets.[233] Second, *EPSA* clarified that the FPA does not authorize direct federal regulation of retail rates, but this is not a realm of authority that is exclusively reserved for states.[234] Third, the majority recognized the importance of state

228. *See, e.g.*, Darius Dixon, *Supreme Court Backs Federal Authority in Power Saving Rule*, POLITICO (Jan. 25, 2016), http://www.politico.com/story/2016/01/supreme-court-backs-electricity-saving-rule-218182 [https://perma.cc/643Y-HTUD] (quoting Environmental Defense Fund President Fred Krup, who said, "[t]oday's Supreme Court decision is a victory for all Americans who want greater choice and value broader customer access to clean, low-cost energy" and Allison Clements of the Natural Resources Defense Council, who said the decision is key "because demand response is flexible and fast-acting, it enables the affordable integration of more wind and solar power into the electricity transmission grid").

229. *EPSA*, 136 S. Ct. at 767–68. FERC initiated these policies in Order 888, as the Court addressed in *New York v. FERC*. *See supra* subpart III(A). *EPSA* notes that FERC's primary strategy for ensuring just and reasonable rates has been "to break down regulatory and economic barriers that hinder a free market in wholesale electricity." *EPSA*, 136 S. Ct. at 768 (quoting Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 536 (2008)).

230. *Id.* at 768.

231. *Id.* at 769.

232. *Id.* at 766.

233. *Id.* at 773.

234. *See id.* at 777–79 (conceding that FERC may not "set" retail rates but that it may impose regulations that change consumer incentives).

experimentation in approaching retail customer demand response.[235] I address each of these in turn.

After describing the practical problem FERC confronts in regulating interstate energy markets, the Supreme Court began its jurisdictional analysis in a fundamentally different manner than the D.C. Circuit. It did not fixate on a static sphere of sovereignty reserved to the states; instead it first assessed whether the FPA authorizes FERC to regulate demand response in interstate markets even though it is not a wholesale energy sale.[236] Although the majority recognized that FERC's reliance on remedial "practices . . . affecting" jurisdiction potentially might "extend FERC's power to some surprising places," it also endorsed a common sense judicial test that limits FERC's jurisdiction to rules or practices that "*directly* affect the [wholesale] rate."[237] Highlighting FERC's findings and policy rationales regarding how demand response can bring down wholesale energy prices, *EPSA* reasoned that FERC's rules regulating wholesale demand response meet this standard "with room to spare."[238]

EPSA also sheds light on the limited extent to which provisions of the FPA reserve exclusive state powers. Section 201(a), which states that federal regulation of electricity "extend[s] only to those matters which are not subject to regulation by the States," does not, in the view of the majority, provide state regulation any legal protection from federal intrusion.[239] Rather, consistent with past cases, *EPSA* treats section 201(a) as "merely a 'policy declaration . . . of great generality'" that only points towards the state authority reserved by section 201(b) over retail sales and specific facilities.[240]

The Supreme Court also reasoned that "a FERC regulation does not run afoul" of section 201(b)'s prohibition "just because it affects—even substantially—the quantity or terms of retail sales."[241] Again appealing to pragmatism, the majority emphasized how "transactions that occur on the wholesale market have natural consequences at the retail level."[242] Methodologically, *EPSA*'s approach suggests that the assessment of federalism disputes must begin with an analysis of FERC's authority: "When

235. *See id.* at 779–80 (concluding that FERC's provision of a state veto over "effective" increases in retail rates produced by federal demand response programs constitutes a "program of cooperative federalism").

236. *See id.* at 772–73 (describing the D.C. Circuit's bright-line approach in the case below and outlining the steps in the Supreme Court's analysis).

237. *Id.* at 774 (quoting Cal. Indep. Sys. Operator Corp. v. FERC, 372 F.3d 395, 403 (D.C. Cir. 2004)).

238. *Id.*

239. *Id.* at 775 n.6; Federal Power Act, ch. 687, sec. 213, § 201(a), 49 Stat. 838, 847 (1935) (codified as amended at 16 U.S.C. § 824(a) (2012)).

240. *EPSA*, 136 S. Ct. at 775 n.6 (quoting FPC v. S. Cal. Edison Co., 376 U.S. 205, 215 (1964) (quoting Conn. Light & Power Co. v. FPC, 324 U.S. 515, 527 (1945))).

241. *Id.* at 776.

242. *Id.*

FERC regulates what takes place on the wholesale market, as part of carrying out its charge to improve how that market runs, then no matter the effect on retail rates [section 201(b) of the FPA] imposes no bar."[243] After deciding that FERC has remedial authority under the statute to issue the demand response rules, the majority seems to presumptively favor FERC exercising its jurisdiction, including concurrently.

This does not, however, mean that FERC can regulate without any limits. Section 201(b)'s language states that the provisions of the FPA do not apply to "any other sale of electric energy" (other than wholesale sales).[244] Contrary to the view of the D.C. Circuit below, this does not create exclusive state jurisdiction. Instead, this provision only recognizes that the FPA (in its plain terms) does not *authorize* FERC to regulate "any other sale." For example, this would seem to suggest that FERC cannot directly regulate retail sales or set retail rates.[245] But, in regulating wholesale markets there is nothing in the FPA that precludes FERC's regulation of wholesale markets from having an effect on retail rates or on the quantity or terms of retail sales.[246] It follows that the only reservation of exclusive authority for state regulators appears in the last sentence of section 201(b), which does not speak in terms of what FERC is authorized to do but instead states FERC "shall not have jurisdiction."[247] States, of course, still set retail rates (since FERC is simply not authorized to do this) and nothing about FERC's demand response regulations directly regulates generation or distribution facilities, which are simply outside FERC's jurisdiction under the FPA.[248]

Finally, *EPSA* clearly indicates that the FPA's allocation of federal–state authority allows for concurrent federal and state authority over the practices affecting rates and encourages state experimentation. FERC's regulation of demand response occurs against the backdrop of considerable variation in state-policy approaches regarding retail demand response and retail customer participation in the wholesale market.[249] FERC's demand response rule, the Court noted, "allows any State regulator to prohibit its consumers from making demand response bids in the wholesale market."[250] While FERC would appear to have the statutory power to negate these kinds of state policy

243. *Id.*

244. Federal Power Act, ch. 687, sec. 213, § 201(b), 49 Stat. 838, 847 (1935) (codified as amended at 16 U.S.C. § 824(b)(1) (2012)).

245. *EPSA*, 136 S. Ct. at 777–78.

246. *Id.* at 776.

247. Federal Power Act § 201(b) (codified as amended at 16 U.S.C. § 824(b)(1)).

248. *Id.*

249. For a discussion of the various state schemes to facilitate demand response, see Stuart Schare & Brett Feldman, *A New Era of Demand Response*, POWER ENGINEERING (Aug. 21, 2015), http://www.power-eng.com/articles/print/volume-119/issue-8/features/a-new-era-of-demand-response.html [https://perma.cc/8EUY-7FD4].

250. *EPSA*, 136 S. Ct. at 779.

decisions if they produced discrimination in interstate power markets,[251] it chose not to exercise this authority.[252] In effect, FERC allowed states an "opt out," since any FERC regulation of demand response depends on the voluntary acquiescence of states. According to the Supreme Court, "that veto gives States the means to block whatever 'effective' increases in retail rates demand response programs might be thought to produce."[253] This allows states to experiment with a wide range of approaches to promote energy conservation, including allowing the states the option of prohibiting retail customers from making demand response bids into wholesale markets.

This state experimentation may reinforce federal goals regarding wholesale power markets, but ultimately the participation in wholesale markets depends on the choices of customers and private firms. In rejecting the D.C. Circuit's novel claim that FERC's demand response rule is *ultra vires* because it serves to "lure" retail customers into the wholesale market, at the very minimum *EPSA* endorses the basic principle (which FERC has applied elsewhere) that it is the customer's choice to participate in wholesale energy markets that triggers FERC's jurisdiction.[254] Since demand response is a market-driven innovation, not something FERC created, its effects on the wholesale market and FERC's reasons for regulating it will ultimately hinge on customer practices and choices.[255]

C. Unsnarling Concurrent Jurisdiction's Roots

Justice Scalia's *ONEOK* dissent critiques the majority for making a "snarl" out of the statute and judicial precedents.[256] According to him, the Supreme Court's longstanding precedents "draw a firm line between national and local authority," while the majority "smudges this line."[257] In contrast to concurrent jurisdiction, Justice Scalia believed that the FPA contains a "bright line easily ascertained" that makes unnecessary a case-by-case assessment of facts related to jurisdiction.[258] He saw the *ONEOK* majority's "make-it-up-as-you-go-along" approach to preemption[259] as unduly fixating on the purposes or aims (or *why*) rather than *what* the state regulates.[260] Justice Scalia also found the prospect of multiple antitrust standards in

251. *See infra* subpart IV(B).
252. *EPSA*, 136 S. Ct. at 779.
253. *Id.* at 779–80.
254. *Id.* at 778–79.
255. *Id.*
256. ONEOK, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1606 (2015) (Scalia, J., dissenting).
257. *Id.* at 1603.
258. *Id.* at 1607 (quoting Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986)).
259. *Id.* at 1603.
260. *Id.* at 1606.

natural-gas markets "unworkable."[261] "From now on," he stated, "pipelines will have to ensure that their behavior conforms to the discordant regulations of fifty States—or more accurately, to the discordant verdicts of untold state antitrust juries."[262]

His dissent in *EPSA*—the last dissent he authored—shows perhaps less vigor but no less conviction. Justice Scalia would have upheld the D.C. Circuit decision finding FERC's demand response rules *ultra vires* under the FPA.[263] The *EPSA* majority and dissent diverge not only in their conclusions but also in their basic approaches to interpreting the statute: Justice Scalia would begin by examining whether the statute forecloses federal regulation by reserving state authority, while (at least in his view) the majority flips the presumption under the statute to favor FERC, rather than states.[264] According to Justice Scalia, whether the statute leaves a regulatory gap "depends on what it says and not on what its proponents hoped to achieve."[265] He also raises a concern that the majority's emphasis on the statutory objective of closing regulatory gaps results in an "extravagant and otherwise-unheard-of method for establishing regulatory jurisdiction."[266]

It is no surprise to see Justice Scalia dissent from these recent decisions, given his partiality for bright-line rules.[267] But despite Justice Scalia's hyperbole, the dual sovereignty approach to jurisdiction is not required by the language or the structure of energy statutes, and an alternative approach need not produce a statutory "snarl."

261. *Id.* at 1603.

262. *Id.* at 1608. It may be somewhat surprising to see Justice Scalia supporting more federal regulatory power here—especially given his strident dissent in *Arizona v. United States*, 132 S. Ct. 2492 (2012) (striking down portions of Arizona's immigration law on preemption grounds); *see id.* at 2511 (Scalia, J., concurring in part and dissenting in part) (objecting to the majority's opinion on the grounds that it "deprives States of what most would consider the defining characteristic of sovereignty"). He, however, also seems squarely committed to uniform national regulation of competitive markets under federal statutes. Justice Scalia's concerns about nonuniform regulation of gas markets echo Justice Alito's dissent, with which Justice Scalia joined, in *Wyeth v. Levine*, 555 U.S. 555, 604 (2009) (Alito, J., dissenting).

263. FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 789 (2016) (Scalia, J., dissenting).

264. *See id.* at 785 ("While the majority would find every sale of electric energy to be *within* FERC's authority to regulate *unless* the transaction is demonstrably a retail sale, the statute actually *excludes* from FERC's jurisdiction all sales of electric energy *except* those that are demonstrably sales at wholesale.").

265. *Id.* at 788.

266. *Id.*

267. *See* Gluck, *supra* note 20, at 2042–43 ("Justices Stevens, Ginsburg, Breyer, and even Chief Justice Roberts have been more willing to see the federalism inside federal statutes than have more textualist Justices like Justice Scalia, even though textualist judges have often been more federalist. Justice Scalia wants clear direction and bright lines—a desire incompatible with a Congress that legislates with gaps for administrative flexibility and that utilizes states in varied ways across different statutes." (footnote omitted)).

It is helpful to begin—as would Justice Scalia—with the text of the NGA and the FPA. While these statutes speak to comprehensive federal authority and provide powerful tools to federal regulators, these provisions state only that federal law "shall apply to" certain transactions.[268] They do not use terms like "exclusive" or "preemptive" to describe federal regulatory jurisdiction. Thus, if federal law preempts state regulations it is because of some form of implied preemption—such as the approach of *Napier*[269]—not because of the explicit text of the NGA and the FPA. The structure of the statute, moreover, hardly incorporates a robust conception of state sovereignty. The otherwise-expansive authority granted by the NGA and the FPA is subject to an external constraint: state regulators have very-limited-but-exclusive authority over specific energy facilities.[270] *EPSA*'s discussion of section 201 of the FPA illustrates this point: "The above conclusion [that FERC's rules governing wholesale demand response directly affect wholesale rates] does not end our inquiry into the Commission's statutory authority; to uphold the Rule, we also must determine that it does not regulate *retail* electricity sales."[271] There is thus nothing in either the text or structure of the FPA that requires dual sovereignty's bright-line approach to jurisdiction.

Perhaps the strongest rationale supported by history for recognizing a sharp jurisdictional division of power in these energy statutes is that this formalistic view of the Commerce Clause produced *Attleboro* and its gap,[272] and that this constitutional doctrine was thus an assumption against which Congress was legislating in the 1930s. This argument that New Deal-era energy statutes locked in an antiquated constitutional-federalism principle by simple virtue of adoption (with no other mention in the statute), however, was rejected in *New York v. FERC*.[273] It is also inconsistent with the Court's

268. Natural Gas Act, ch. 556, § 1(b), 52 Stat. 821, 821 (1938) (codified as amended at 15 U.S.C. § 717(b) (2012)) ("The provisions of this Act shall apply to the transportation of natural gas in interstate commerce . . . ."); Federal Power Act, ch. 687, sec. 213, § 201(b), 49 Stat. 838, 847 (1935) (codified as amended at 16 U.S.C. § 824(b)(1) (2012)) ("The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and the sale of energy at wholesale in interstate commerce . . . .").

269. *See supra* subpart II(A).

270. Natural Gas Act § 1(b), 52 Stat. at 821 (codified as amended at 15 U.S.C. § 717(b)) ("The provisions of this Act . . . shall not apply to . . . the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."); Federal Power Act, ch. 687, sec. 213, § 201(b), 49 Stat. at 848 (codified as amended at 16 U.S.C. § 824(b)(1)) ("[FERC] shall not have jurisdiction, except as specifically provided . . . over facilities used for the generation of electric energy or over facilities used in local distribution or only the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.").

271. *EPSA*, 136 S. Ct. at 775.

272. *See supra* subpart I(A) (discussing *Attleboro*); *see generally* Post, *supra* note 4 (noting how 1920s Commerce Clause jurisprudence was premised on dual sovereignty).

273. *See supra* subpart III(A).

recent turn towards giving little weight to the "contemporary legal context" against which Congress legislated when interpreting statutes.[274] It also would produce absurd results if used as a general interpretative principle in approaching energy statutes. For example, such an approach would also require modern courts to use the *Lochner*[275]-era cases such as *Smyth v. Ames*[276] in addressing the rate-setting authority of agencies under communications and energy statutes adopted during the New Deal era, rather than the later, more deferential approach that courts have consistently favored for more than half a century.[277] Absent some language to the contrary, statutes simply do not freeze in place existing constitutional doctrines as interpretive tools.

Nor is it "unheard" of to suggest that New Deal-era statutes authorize some concurrent jurisdiction in the regulation of energy markets. These statutes clearly envision state regulation continuing against the backdrop of comprehensive (but not exclusive) federal authority. In the legislative history surrounding adoption of these statutes, Congress envisioned overlapping jurisdiction. A number of the Court's precedents also give the lie to dual sovereignty's nirvana-like fallacy that energy markets ever adhered to a static jurisdictional bright line based on legal formalisms. In terms of the statutes and case law, the majorities in *ONEOK* and *EPSA* are thus correct in beginning with an assessment of FERC's jurisdiction. The conclusions that these statutes also authorize concurrent jurisdiction over a considerable range of activities, rather than require dual sovereignty, is not without historical basis.[278]

The history surrounding the FPA's enactment contains numerous statements showing that its supporting legislators understood the expansion

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274. This interpretative principle is most clearly illustrated by the Court's implied-right-of-action cases. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court held that private individuals may not sue to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964. *Id.* at 278. When asked to interpret Title VI according to the interpretive principle prevalent at the time of the statute's enactment, the Court declined. *Id.* at 287–88. Justice Scalia, writing for the Court, distinguished several prior implied-right-of-action cases, concluding that the Court had "never accorded dispositive weight to context shorn of text. In determining whether statutes create private rights of action, *as in interpreting statutes generally*, legal context matters only to the extent it clarifies text." *Id.* at 288 (emphasis added) (citation omitted).

275. Lochner v. New York, 198 U.S. 45 (1905).

276. 169 U.S. 466, 545–49 (1898) (adopting reproduction cost as a constitutionally required approach to setting rates in order to protect railroad and utility investors). The Supreme Court overruled this approach in the 1940s. *See* FPC v. Hope Nat. Gas Co., 320 U.S. 591, 627 (1944); FPC v. Nat. Gas Pipeline Co., 315 U.S. 575, 602 (1942) (Black, Douglas, Murphy, JJ., concurring).

277. For discussion of this since-repudiated approach to constitutional protection of property in utility regulation, see generally Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187 (1984).

278. Of course, a statute may affirmatively identify specific activities as outside of FERC's reach, but, as the Court makes clear in *EPSA*, the only activities reserved *exclusively* for states under the FPA are the facilities listed in the last sentence of § 201(b). *See supra* note 244 and accompanying text.

of federal authority as an overlay onto existing state regulatory power, not as replacing it. The Report of the Senate Committee on Interstate Commerce that accompanied the bill that would become the FPA states that "[s]ubsection (a) . . . declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers."[279] The House Committee Report accompanying that same piece of legislation states: "The bill . . . contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges."[280] That Report also notes that: "The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority . . . ."[281]

In addition, earlier in consideration of the proposed legislation, then-FPC Commissioner Clyde Seavey testified in support of creating federal jurisdiction over interstate power markets before the House Committee on Interstate and Foreign Commerce.[282] He stated that the proposed legislation "is designed to secure coordination on a regional scale of the Nation's power resources and to fill the gap in the present State regulation of electric utilities."[283] And he further elaborated, "[i]t is conceived entirely as a supplement to, and not a substitute for State regulation."[284]

This legislative history clearly envisions a continuing role for state regulation, and some of the Court's earliest decisions also call into question whether dual sovereignty is required by the statute. One of the earliest preemption cases under the NGA noted that the jurisdictional inquiry

> has been less concerned to find a point in time and space where the interstate commerce in gas ends and intrastate commerce begins, and has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce.[285]

In the first decade following the enactment of the FPA, the Court also observed that under the statute "[f]ederal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test."[286]

Despite the shadow that dual sovereignty cast over such interpretations, courts also have a long tradition of construing the scope of FERC's authority

279. S. REP. NO. 74-621, at 48 (1935).
280. H.R. REP. NO. 74-1318, at 8 (1935).
281. *Id.*
282. *House Hearings*, *supra* note 47, at 384, 392 (statement of FPC Commissioner Clyde Seavey in support of original bill).
283. *Id.* at 384.
284. *Id.*
285. Ill. Nat. Gas Co. v. Cent. Ill. Pub. Serv. Co., 314 U.S. 498, 505 (1942).
286. Conn. Light & Power Co. v. FPC, 324 U.S. 515, 529 (1945).

under these statutes to prioritize the purpose of allowing federal law to fill regulatory gaps presented by energy markets.[287] As the Court stated in 1961:

> [W]hen a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a "no man's land" will be created. That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs.[288]

Justice Stevens's 2002 opinion for the Court in *New York v. FERC* suggests that, methodologically, this analysis must begin with an assessment of "the nature and scope of the authority granted by Congress to the agency," rather than with a fixed sphere of state sovereignty.[289]

Finally, though there is little doubt that federal authority over interstate energy markets is comprehensive, the idea that it is exclusive is a judicial construction, not anything that is required by the statute itself. A long line of cases rejects the idea of exclusive federal jurisdiction over wholesale markets or exclusive state jurisdiction even where federal regulation has a substantial effect on retail rates or retail energy sales. For example, the Court has stated that "once a company is properly found to be a 'public utility' under the Act the fact that a local commission may also have regulatory power does not preclude exercise of the Commission's functions."[290] Later decisions observe that the established authority of a state to regulate retail rates does not foreclose federal regulators from taking into account the same rates, even when federal regulation will ultimately affect retail rates. As the Supreme Court states in *FPC v. Conway Corp.*,[291] even though a federal regulator "lacks authority to fix rates for direct industrial sales, [it] may take those rates into consideration when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction."[292]

Even *Schneidewind*, which embraces a bright line and dual sovereignty approach, acknowledged that any analytical approach to preemption that only examines the scope of federal jurisdiction will not, on its own terms, support

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287. As discussed above, this also has a strong grounding in the history surrounding the enactment of these statutes. *See supra* note 47 and accompanying text.

288. FPC v. Transcon. Gas Pipe Line Corp., 365 U.S. 1, 19–20 (1961) (citation omitted).

289. New York v. FERC, 535 U.S. 1, 18 (2002) (quoting La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986)).

290. *Conn. Power & Light Co.*, 324 U.S. at 533.

291. 426 U.S. 271 (1976).

292. *Id.* at 281–82 (quoting Panhandle E. Pipe Line Co. v. FPC, 324 U.S. 635, 646 (1945)).

a conclusion that a state law is preempted.[293] In applying field preemption, a court still needs to decide the *scope* of the field and apply this to state law. Courts thus cannot resolve a preemption question under the vacuum of federal law and its static definition of a sphere of federal authority without examining facts related to purposes. For example, *Schneidewind*'s field preemption analysis was not based on Congress's delegation to FERC but looked to the purposes of the state law as well as the nature of federal law in deciding whether a state regulatory action is within the scope of the field.[294] By its very nature, this kind of preemption analysis does not reason to its conclusion based on a predefined sphere of federal regulation, as the delegation analysis of *Napier* would suggest.[295] Instead, this kind of preemption analysis requires analysis of how federal and state regulation of energy markets interact when they overlap. Thus, even before *ONEOK* and *EPSA*, the Supreme Court appears to have recognized that state regulatory programs have the potential to serve as complements, rather than inherent impediments, to federal regulation of energy markets.

IV. New Challenges for Energy Federalism(s)

It is easy to get lost in the weeds of energy federalism, especially to the extent courts have traditionally fixated on a formalistic bright-line approach or tried to define exclusive jurisdiction for various activities. In the end, however, as the Supreme Court recognized in its 2016 *EPSA* opinion, these jurisdictional disputes always circle back to one overarching principle: no one, not even those who advocate for field preemption, disputes that the primary purposes behind New Deal-era energy statutes is to close general regulatory gaps.[296]

The traditional bright-line approach is based on the premise that these statutes prohibit federal–state jurisdictional overlaps. However, as I have argued, outside of a few very specific statutory provisions that speak clearly to foreclose federal regulation of particular facilities or transactions, there is nothing in the legislative history, text, structure, or purpose of these statutes that requires a dual sovereignty approach. Applying a presumption in favor of these statutes authorizing concurrent federal–state jurisdiction over energy markets not only recognizes extensive federal authority over interstate energy markets. It also leaves states considerable authority to craft their own energy-resource policies by fundamentally redefining energy-federalism disputes as political and policy questions, not as formalistic legal ones.

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293. *See* Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300–01 (1988) (confirming Congress's power to implicitly indicate an "intent to occupy a given field to the exclusion of state law" in the absence of explicit statutory language).

294. *See supra* notes 114–18 and accompanying text.

295. *See supra* notes 77–81 and accompanying text.

296. FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760 (2016).

But concurrent jurisdiction is hardly neat and tidy. The Supreme Court's recognition of concurrent jurisdiction leaves many questions unanswered and is certain to motivate new jurisdictional challenges regarding the scope of both federal and state regulatory authority.[297] In contrast to dual sovereignty, concurrent jurisdiction requires regulators and courts to be more attentive to the core purposes behind energy statutes as they address modern market disputes—a fundamental insight that could help to bring a principled resolution to some current issues pending before courts involving state incentives for power-generation capacity. *EPSA* highlights the value of state experimentation, yet it also recognizes that it is ultimately FERC that possesses a powerful range of federalism possibilities to aid its regulatory approach for modern power markets. But how far can these state initiatives go, and when will they be preempted?

The Supreme Court has recently provided part of the answer in *Hughes*, which concluded that Maryland's incentives to encourage new natural-gas plants interfered with FERC's regulation of the wholesale market under the FPA.[298] *Hughes* favors a preemption conclusion for certain state initiatives that conflict with federally approved wholesale-market energy prices, but its holding is narrow. As I argue below, the decision does not reject concurrent jurisdiction in the regulation of wholesale energy markets and envisions continued leeway for state energy resource subsidies and incentives—especially for energy-supply attributes that FERC-approved rates do not price in the wholesale market. However, if courts do not approach these issues carefully, they risk converting *Hughes*'s into a sweeping application of field preemption, which would be inconsistent with a concurrent jurisdiction in energy federalism. This would be a mistake. In order for regulatory federalism to evolve and to adapt to modern energy markets, it will be necessary for courts to carefully approach some of the precedents and remaining doctrinal relics of dual sovereignty, especially after *Hughes*.

They can start by eliminating use of judicial field preemption with regards to "practices. . .affecting" rates language in energy statutes. Courts should instead review FERC's actual regulatory decisions, including agency determinations of jurisdictional facts and policy rationales, and employ conflict-preemption principles while doing so. In addition, while concurrent jurisdiction still contains some meaningful limits on federal authority under energy statutes, these are primarily grounded in pragmatic agency law and policy findings, not some predefined notion of state sovereignty or judicial precedents that fix the scope of FERC's jurisdiction.

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297. *See* Joel B. Eisen, FERC v. EPSA *and the Path to a Cleaner Electricity Sector*, 40 HARV. ENVTL. L. REV. F. 1, 9 (2016) (arguing the decision in *EPSA* left many questions unanswered including the extent to which states can regulate electricity if their laws impact wholesale markets).

298. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1291–92 (2016).

As I also discuss below, clarification of FERC's role in making preemption determinations can help to enhance the transparency and accountability, while also allowing regulators to better adapt their approaches to evolving new issues in energy markets. Judicial clarification of these issues can help to encourage more creative federal–state collaborations, leave considerable space for state experimentation, and simplify and make more predictable preemption analyses.

A. *Avoiding a Regulatory "No Man's Land"*

The Supreme Court's 2016 *EPSA* decision illustrates how a federalism approach premised on concurrent jurisdiction—rather than bright-line jurisdiction—can often better advance the primary purpose of energy statutes in modern energy markets. Apart from the very clauses in these statutes, there is no evidence that it also was aiming to give similar weight to avoiding all federal–state jurisdictional overlaps. And there is no evidence whatsoever that Congress intended to endorse a single federalism principle—dual sovereignty or otherwise—to govern regulation of energy markets.

Rather, the core objectives of the FPA and NGA are to close regulatory gaps. There is little doubt that in adopting these statutes Congress was aiming to address the *Attleboro* gap.[299] This gap is not permanently fixed by law. Instead, it is the byproduct of energy-market conditions coupled with federal and state regulatory efforts. If states are unable to "practicably" regulate a certain area, it is appropriate to ask whether the statute gives FERC some substantive or remedial authority to address the conduct.[300] Where state regulation results in a regulatory "no man's land," the Supreme Court has recognized how federal regulation under the statute is appropriate.[301]

Consistent with this historical expansion of federal authority, the Court's 2016 *EPSA* decision upheld FERC's authorization to adopt demand response rules for wholesale energy markets. It is thus well established that the FPA allows broad federal jurisdiction over not only wholesale sales, but also "practices . . . affecting" sales—as a way of ensuring that there is no regulatory gap in power markets.[302] In recognizing how demand response can "directly affect" wholesale markets, *EPSA* concluded that demand response is within the agency's clear statutory authorization "with room to

299. *See supra* subpart I(A).

300. *See* FPC v. Transcon. Pipe Line Corp., 365 U.S. 1, 19–20 (1961) ("[W]here congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs.").

301. *Id.*

302. *See* Eisen, *supra* note 60, at 1845 ("If FERC could not oversee mechanisms that form the core of the wholesale markets, it would create the kind of regulatory gap that Congress sought to correct when it adopted the FPA in 1935.").

spare."[303] It reasons that following the D.C. Circuit's approach of excluding demand response from FERC's jurisdiction would "prevent[] all use of a tool that no one . . . disputes will curb prices and enhance reliability in the wholesale electricity market."[304]

After finding FERC's demand response rules to be clearly authorized and not prohibited under the statute, the Court addressed how the effect of the D.C. Circuit's narrow interpretation of the scope of FERC's jurisdiction would be to create a situation where no regulator—federal or state—would be able to address activities regarding demand response in wholesale power markets. Under the D.C. Circuit approach "state commissions could not regulate demand response bids either."[305] But as the Court observed, this produces a problem: "If neither FERC nor the States can regulate wholesale demand response, then by definition no one can. But under the Act, no electricity transaction can proceed unless it is regulable by someone. . . . Congress passed the FPA precisely to eliminate vacuums of authority over the electricity markets."[306]

In preventing the creation of "any" regulatory "no man's land," the Court further emphasized, "[t]he Act makes federal and state powers 'complementary' and 'comprehensive,' so that 'there [will] be no "gaps" for private interests to subvert the public welfare."[307] This same concern led Justice Kagan to press the lawyers for the appellee during oral argument. As she stated then, if the D.C. Circuit opinion were upheld, "there would be a regulatory gap."[308] She elaborated, "[i]n other words, FERC can't do anything nor can the States do anything."[309]

EPSA, however, should not be understood as only endorsing expansive federal authority to address regulatory gaps. It is a mistake to think that any time FERC is authorized by statute to regulate an activity that this preempts any state regulation. Even the Court's decision in *Hughes*, which upheld federal preemption of Maryland's incentives for new power-generation facilities given FERC's approval of the PJM-capacity market,[310] shows how an overly broad preemption analysis can produce the reverse effect. Categorically claiming broad comprehensive federal regulation, as with field preemption, may also in some instances produce a situation where *both*

303. FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760 (2016). As the Court notes, its determination is based on the clear language of the statute, not on any sort of deference to the agency. *Id.* at 773 n.5.

304. *Id.* at 773.

305. *Id.* at 780.

306. *Id.*

307. *Id.* at 780 (quoting FPC v. La. Power & Light Co., 406 U.S. 621, 631 (1972)).

308. Transcript of Oral Argument at 44, FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760 (2016) (No. 14-840).

309. *Id.*

310. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1291–92 (2016).

federal and state regulators are incapable of addressing conduct in modern energy markets.

In writing for the majority in *Hughes*, Justice Ginsburg concluded: "We . . . need not and do not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector."[311] In other words, the Court left open the question of whether in a future case many other state incentives for clean-energy generation will be preempted by federal regulation under the FPA. A broad finding of federal preemption as preempting all state-generation incentives and subsidies would produce a "no man's land" for many incentives affecting new, clean sources of energy. To prevent creating this kind of regulatory void, courts should avoid excessively broad claims of exclusive jurisdiction based merely on whether a statute *authorizes* federal regulation without also addressing whether regulators have made a practicable commitment to exercising this authority to address energy-market activities.[312]

Of course, field preemption under energy statutes has a long history in the context of utility-rate approvals. Recall *Nantahala*, where the Court found that the *tool* of a utility-specific, cost-of-service rate approval preempted states from "trapping" wholesale costs.[313] These ratemaking tools were largely self-implementing in individual rate cases, and to the extent that there was a risk of under- or overcompensation, both federal and state regulators were likely to have an opportunity to address this and apply the applicable rules.[314]

Yet what may have seemed pragmatic for managing conflicts when both federal and state regulators were focused on setting rates simply does not serve a similar purpose in modern energy markets. Dynamic modern energy markets challenge federal regulators to monitor and regulate transactions in a competitive industry rather than focusing on a monopolistic energy supplier's costs.[315] The ability of any regulator to effectively monitor and

311. *Id.* at 1299.

312. Although the Supreme Court in *Hughes* upheld the Fourth Circuit's conclusion that Maryland's incentives were preempted, the Court's analysis in reaching this conclusion does not echo the lower court's reasoning, which relied on a sweeping categorical application of field preemption. *Id.* at 1299; PPL Energy Plus, LLC v. Nazarian, 753 F.3d 467, 474–77 (4th Cir. 2014), *aff'd sub nom.* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016). For background discussion, see *supra* notes 142–76 and accompanying text.

313. Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 970 (1986).

314. *See id.* at 966 (discussing the filed rate doctrine and the principle that once FERC sets a rate, a state cannot interfere with FERC's authority by declaring that rate to be unreasonable); Rossi, *supra* note 6, at 1607–08 (discussing the preemption effects of the filed rate doctrine and the imprudent exception to the doctrine).

315. *See* Spence, *supra* note 9, at 767–74 (chronicling the decline of vertically integrated energy markets along with the traditional cost-of-service regulation model).

enforce market rules depends not only on whether it has authority to regulate an activity but also on the agency's monitoring resources and enforcement priorities. It seems particularly misguided to assume that federal agency regulators will be positioned to regulate every market transaction.[316] Courts should be especially wary of extending field preemption principles to pro forma or industry-wide tariffs or rules. *New York v. FERC* recognizes these kinds of general restructuring rules and tariffs as foundational to the operation of both electricity and natural-gas markets.[317] But unless FERC were to actually monitor and enforce these marketwide rules, extending a preemptive effect would leave large categories of market behavior unregulated.[318]

To the extent that such broad federal preemption continues to apply at all, its application should be limited to those situations where FERC clearly exercises regulatory authority over substantive aspects of wholesale transactions, like setting wholesale energy rates. In this kind of context, federal regulators have established clear market rules and effective ways to monitor market conduct, providing the most compelling case for federal preemption. Still too, such a preemption analysis is not automatic but requires a careful assessment of foundational facts related to federal jurisdiction. For example, it was an essential predicate to the Court's preemption analysis in *Hughes* that "FERC extensively regulates the structure of the PJM capacity auction to ensure that it efficiently balances supply and demand, producing a just and reasonable clearing price."[319] As the Court also acknowledged, "FERC has approved the PJM capacity auction as the sole ratesetting mechanism for sales of capacity to PJM, and has deemed the clearing price *per se* just and reasonable."[320] The Court concluded that FERC's regulation of PJM's wholesale-capacity-market pricing mechanism preempted Maryland's incentives,[321] but it would be a stretch to extend similar preemptive effect to FERC's mere jurisdiction over any practice that looks like a wholesale sale (such as net metering) or affects a wholesale transaction, regardless of how FERC has regulated it. *Hughes* simply does not speak to how wholesale markets fail to price important

316. *See, e.g.*, Rossi, *supra* note 6, at 1626 (arguing that FERC does not have the opportunity to assess "every potential violation of the public interest" and that FERC and other agencies "frequently lack the authority to pursue or impose" remedies for misconduct).

317. *See* New York v. FERC, 535 U.S. 1, 14 (2002) (noting that FERC's open-access regime was not targeted at individual behaviors, but was aimed at addressing a systemic, marketwide problem).

318. *See* Rossi, *supra* note 6, at 1645–46 (discussing how blind adherence to the filed rate doctrine produces sweeping preemption and a similar type of regulatory gap).

319. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1294 (2016).

320. *Id.* at 1297.

321. *Id.*

values, such as environmental concerns and reliability.[322] If FERC has not adopted a regime that provides the exclusive pricing of these values in the wholesale market, states still have plenty of space to adopt their own initiatives to promote them with incentives and subsidies that are not directed at wholesale rates. For example, New York has recently adopted an ambitious clean-energy standard that includes zero-emission credits for nuclear plants,[323] a plan that is already facing a legal challenge on federal-preemption grounds.[324] If these credits are calculated based on carbon attributes of the energy produced, which is not priced in the interstate market, they do not contradict *Hughes*. But, if the credits are directly tagged to wholesale-market prices of energy, they could be preempted like the Maryland scheme.[325] This kind of analysis would require a case-specific assessment of whether the state incentives contravene federally approved market prices.

At its extreme, extending exclusive preemptive authority to FERC in areas where states are providing complementary regulation risks the creation of a new form of regulatory gap, where neither state nor federal regulators can address the pricing of certain attributes of power supply. In adopting New Deal-era energy statutes, Congress was likely unaware of the full range of challenges that would be presented to modern energy markets, but avoiding a regulatory "no man's land" is just as fundamental and important to the efficient operation of energy markets today as closing the *Attleboro* gap was to Congress in 1935. *New York v. FERC* reasons that the types of regulatory gaps the FPA was designed to address are not fixed in time based on constitutional limits on state-regulatory authority circa 1935 but include practical challenges for interstate energy markets.[326] *ONEOK* echoes this

322. While *Hughes* does not directly speak to these values, it does recognize that PJM's capacity markets were focused on reliability; however, many other wholesale markets regulated by FERC do not make an effort to price capacity, leaving this reliability function to state regulators. *Id.* at 1298. Also, *Hughes* envisions states continuing to play some role in promoting clean-energy resources. *See id.* at 1299 (naming clean-energy generation as a priority states might seek to encourage through various incentives or state regulation policies).

323. Steven Mufson, *New York State Just Rescued a Nuclear Plant from Oblivion. Why That's a Very Big Deal*, WASH. POST (Aug. 9, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/08/09/new-york-state-just-rescued-a-nuclear-plant-from-oblivion/?utm_term=.a1255c9b372c [https://perma.cc/DKT4-DVQT].

324. Saqib Rahim, *Challenge Looms for N.Y.'s Clean Energy Standard*, E&E PUB. (Aug. 24, 2016), http://www.eenews.net/stories/1060041976 [https://perma.cc/4WUX-CWGQ].

325. Emily Hammond & Jim Rossi, *Stranded Cost and Decarbonization*, 82 BROOK. L. REV. (forthcoming 2017) (manuscript at 34–36), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2833870 [https://perma.cc/9EP6-CRFH]. *See generally* Joel B. Eisen, *Dual Electricity Federalism Is Dead, But How Dead and What Replaces It?*, 8 GEO. WASH. J. ENERGY & ENVTL. L. (forthcoming 2016) (on file with author).

326. *See* New York v. FERC, 535 U.S. 1, 21 (2002) (reasoning that, while the FPA may have addressed the gap identified in *Attleboro*, the regulatory power the FPA grants is not limited by *Attleboro* but is more expansive).

principle in recognizing concurrent state jurisdiction to complement federal antitrust enforcement in modern natural-gas markets.[327]

Recognizing the statutory purpose of avoiding regulatory gaps calls for a more dynamic assessment of jurisdiction, but this does not put everything up for grabs anew each time there is a federalism dispute involving energy markets. Rather, in assessing preemption the Court's decisions in *ONEOK* and *Hughes* show that the key inquiry is whether a state law targets a federal regulation.[328] In *ONEOK*, the Court emphasized that, as a general matter, state antitrust law can complement federal antitrust regulation.[329] *Hughes* emphasized how the capacity market (as approved by FERC) was intended to serve as the sole way of pricing power-supply capacity for wholesale sales in PJM,[330] but other regional pricing approaches in the wholesale market will require a different assessment of the interaction of federal and state law. For example, in regions of the United States where there is no wholesale-interstate-capacity market (such as most of the Southeast),[331] a state presumably would retain its jurisdiction to address retail reliability by adopting incentives to expand generation. Even outside of these areas, states may adopt incentives and subsidies to address energy attributes, such as carbon emissions, that FERC-regulated wholesale energy markets fail to price.[332] The preemption analysis ultimately depends on the reviewing court's foundational factual findings regarding federal regulation of a market activity and its interaction with state regulation of the same market activity,

327. *See* ONEOK, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599 (2015) (holding that the NGA, drafted to preserve continued exercise of state power, does not preempt state-law antitrust actions).

328. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1298 (2016) ("States, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain. But States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates, as Maryland has done here." (footnote omitted) (citation omitted)); *see ONEOK*, 135 S. Ct. at 1599 (2015) (indicating that whether the NGA preempts a particular state law turns on "the *target* at which the state law *aims*").

329. *ONEOK*, 135 S. Ct. at 1599.

330. *Hughes*, 136 S. Ct. at 1297 ("FERC has approved the PJM capacity auction as the sole ratesetting mechanism for sales of capacity to PJM, and has deemed the clearing price *per se* just and reasonable.").

331. FERC, ENERGY PRIMER: A HANDBOOK OF ENERGY MARKET BASICS 40 (2015), https://www.ferc.gov/market-oversight/guide/energy-primer.pdf [https://perma.cc/4DBR-4E4Z] (noting that the Southeast operates "under [a] more traditional market structure[]" and that the Southeastern states do not participate in RTOs or independent system operators (ISOs), both of which "operate the transmission system independently of, and foster competition for electricity generation among, wholesale-market participants").

332. *See supra* notes 323–25 and accompanying text (addressing New York's recently adopted Zero Emission Credits).

focusing on whether the target at which the state law is aimed presents an unacceptable conflict with a federal regulatory initiative.[333]

Regulatory gaps can be symmetrical—they can apply to *both* federal *and* state regulation. Recognizing this provides a principled basis for acknowledging the importance of expansive federal authority in some contexts,[334] and broad state authority in others.[335] There thus is nothing inconsistent with *EPSA*'s endorsement of expansive FERC jurisdiction to address demand response in wholesale markets and continued state regulation of many of the same market activities—even if these might directly touch upon wholesale energy sales. Rather, the key inquiry needs to focus on whether a preemption determination advances or hinders the statutory purpose of avoiding a regulatory no man's land in energy markets—a question entirely ignored by previous precedents that embrace dual sovereignty.

B. *Federal Regulatory Floors for Energy Markets*

Recognition of statutory authorization for concurrent jurisdiction in the regulation of modern energy markets holds promise for energy law to move in bold new directions because it enables innovative approaches to collaboration between federal and state regulators. Statutes such as the FPA already explicitly allow for some collaboration between federal and state regulators. Robert Nordhaus has recently reminded us of one example explicitly mentioned in the statute.[336] Section 209 authorizes FERC to hold joint hearings with state regulators and to set up joint boards to address matters otherwise within FERC's jurisdiction.[337] Elsewhere, the FPA provides for interstate compacts to address transmission approval.[338] To date, however, these formalized, collaborative approaches have not been used successfully.[339]

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333. As the Court concludes in *Hughes*, "So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the same fatal defect that renders Maryland's program unacceptable." *Hughes*, 136 S. Ct. at 1299.

334. *See* FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 780–81 (2016) (recognizing FERC's authority to regulate wholesale demand response markets).

335. *See Hughes*, 136 S. Ct. at 1299 (leaving avenues open for states to promote clean energy); ONEOK, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599–1601 (2015) (recognizing that state antitrust law can complement federal regulation).

336. *See* Nordhaus, *supra* note 3, at 214–15 (describing FPA's authorization of joint federal–state hearings and boards composed of state officials but recognizing that the "mechanism" is rarely used).

337. Federal Power Act, ch. 687, sec. 213, § 209, 49 Stat. 838, 853 (1935) (codified as amended at 16 U.S.C. § 824h (2012)).

338. Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 1221, § 216(i), 119 Stat. 946, 950–51 (codified at 16 U.S.C. § 824p(i) (2012)).

339. *See* Klass & Rossi, *supra* note 50, at 135 (observing that no interstate transmission-siting compact has been adopted); Nordhaus, *supra* note 3, at 214–15 (observing that the FPA's joint-board mechanism "is rarely used").

Beyond the explicit statutory authorization to create new collaborative institutions, federal and state regulators have taken their own initiative to pursue many new avenues for regulatory coordination. One such approach is what Hari Osofsky and Hannah Wiseman call "dynamic federalism,"[340] exemplified most clearly by FERC's initiative to encourage voluntary RTOs as private institutions to help manage and coordinate interstate energy markets.[341] Such multistate-institutional arrangements have played an undeniable role in forging dynamic new types of energy markets, though they have required state regulators to acquiesce by approving new transmission and generation investments by regulated utilities that participate in RTOs.[342]

Similarly, FERC's regulation of regional-grid planning and cost allocation has encouraged state experimentation in clean-energy policies to reinforce federal goals related to the operation of regional markets.[343] Increasingly, as new renewable-energy supply comes online, FERC is being asked to work with states in integrating these resources into interstate energy markets.[344] As Emily Hammond and David Spence observe, however, overly broad federal preemption of state incentives for new electric-power capacity makes consistent integration of renewable-resource capacity into energy markets nearly impossible, since many renewable resources are dependent on state incentives.[345]

By contrast, recognition of concurrent jurisdiction opens up new institutional arrangements where state and federal regulators can coordinate regulatory approaches or operate adjacent programs that touch on the same regulatory topics, such as solar net metering programs. Just like demand response, authorization of customer energy resource participation in wholesale markets presently requires states to opt in.[346] Elsewhere, Thomas Hutton and I have argued that these kinds of arrangements point to the possibility of cooperative federalism under energy statutes, allowing FERC to establish federal objectives, such as the promotion of clean energy, and

340. Osofsky & Wiseman, *supra* note 21, at 814–24.

341. Regional Transmission Organizations, 65 Fed. Reg. 809, 811, 831 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35).

342. *Id.* at 811.

343. Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49842, 49848–51 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35).

344. *Id.* at 49848.

345. *See* Hammond & Spence, *supra* note 10, at 199–201 (noting FERC's recent efforts to "incentivize a greener grid" and that "some of [these] efforts have also bumped up against the potential limits of its jurisdiction").

346. *See* Jim Rossi, *Federalism and the Net Metering Alternative*, ELECTRICITY J., Jan.–Feb. 2016, at 13, 13 (observing that over forty states have authorized net metering programs); Jim Rossi & Jon Wellinghoff, FERC v. EPSA *and Adjacent State Regulation of Customer Energy Resources*, 40 HARV. ENVTL. L. REV. F. 23, 28–29 (2016) (observing that states generally have flexibility in crafting their net metering policies).

enlist state cooperation in their implementation.[347] To take one example, while Congress has specifically authorized a federal floor when it comes to power-grid reliability, the FPA also recognizes that states can go further in enacting more rigorous reliability standards.[348] Recognition of concurrent jurisdiction would allow for federal regulation of energy markets without automatically preempting state experimentation and, especially, state approaches that advance the same goals federal regulators have endorsed.[349]

In a bold recognition of this possibility, the Supreme Court's 2016 *EPSA* opinion observes, "[w]holesale demand response as implemented in the Rule is a program of cooperative federalism, in which the States retain the last word."[350] Other energy statutes have been recognized as endorsing cooperative federalism,[351] and scholars have advanced the argument that the FPA and NGA are compatible with this approach.[352] *EPSA*'s novelty is that it is the first Supreme Court decision to explicitly recognize cooperative federalism as compatible with the allocation of federal–state power under a New Deal-era energy statute.

The Court's decision also sheds light on the significance of FERC's role in establishing these kinds of arrangements. The Court reasoned that FERC's demand response rule's "opt-out" opportunity for states (who may choose to eliminate customer bidding into wholesale demand response markets) "removes any conceivable doubt" as to its compliance with the allocation of federal–state authority under the FPA.[353] While the opt-out feature of Order 745 may have deflated any claim by the challengers that FERC's rule was coercive, nothing in *EPSA* concluded that allowing states the opportunity to veto customer participation in FERC's wholesale-market programs is always necessary to sustain a cooperative federalism program under the FPA.[354] A

347. *See* Rossi & Hutton, *supra* note 21, at 1288–89 (arguing that federal energy statutes are consistent with floor preemption, which allows subnational energy-regulation innovations).

348. The Electricity Modernization Act of 2005 expands federal regulation over reliability but also specifically states that this is not intended "to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, . . . as long as such action does not result in lesser reliability outside the State . . . ." Energy Policy Act of 2005, Pub. L. 109-58, sec. 1211, § 215(h)(3), 119 Stat. 941, 945 (2005) (codified as amended at 16 U.S.C. § 824o(i)(3) (2012)).

349. *See* Rossi & Hutton, *supra* note 21, at 1288 (describing the concept of floor preemption, in which federal law provides "only a minimum that precludes more lax state standards" and leaves "states the authority to adopt more restrictive requirements").

350. FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 780 (2016).

351. *See, e.g.*, FERC v. Mississippi, 456 U.S. 742, 767 (1982) (noting that the Public Utility Regulatory Policies Act establishes a program of cooperative federalism).

352. *See, e.g.*, Rossi & Hutton, *supra* note 21, at 1316 (arguing that "the history and structure of the FPA favor an alternative approach—energy federalism—that allows the use of floor preemption tools").

353. *EPSA*, 136 S. Ct. at 779–80.

354. To the extent this is an open question, it will likely be resolved under constitutional (rather than statutory) federalism doctrines. *Cf.* New York v. United States, 505 U.S. 144, 167–68 (1992)

state opt out does not appear *necessary* under *EPSA* to support FERC's jurisdiction to address demand response insofar as FERC's regulation ultimately hinges on the participation of demand response providers in wholesale markets, not on any sort of claim that FERC lacks the power to preempt states.

EPSA thus appears to leave FERC a considerable range of options in addressing state regulations that impede the effective operation of interstate-energy markets that FERC regulates. For example, if FERC were to make a finding that state prohibitions on customer participation in wholesale demand response markets impairs competition in wholesale power markets, FERC presumably could make a discrimination finding and preempt these prohibitions. In FERC's rules regarding transmission planning, for example, the agency decided to preempt many state rights of first refusal that favor incumbent utilities, though the agency limited its preemption to wholesale transmission.[355] As it has with demand response, FERC could have chosen to allow states an opt-out process for rights of first refusal. But in recognizing how this is harmful to interstate competition and discriminates against merchant transmission providers, FERC instead chose to preempt states, setting a floor in the basic ground rules surrounding transmission planning.[356] Ultimately, *EPSA* recognizes that these are not decisions that are dictated by an abstract principle of federalism or state sovereignty under the FPA. Rather, at the core these are pragmatic choices about the best institutional balance for regulating modern energy markets—decisions that Congress has delegated to FERC in recognition of its expertise.

C. Clearing the Jurisprudential Thicket

In order for these kinds of institutional federalism arrangements to succeed, however, courts must eliminate once and for all the doctrinal relics of dual sovereignty.[357] It is time for the Court to recognize that field preemption, long celebrated in energy regulation, is an anachronism that should no longer have a role in modern preemption analysis under these statutes. At the very least, field preemption needs to be limited to its supporting precedents involving cost-of-service regulation, where state and federal regulators were applying the same basic regulatory model and objectives. In areas where concurrent jurisdiction is authorized, it remains

(discussing how programs of cooperative federalism have been replicated in a number of federal statutes).

355. For discussion of this issue, see Klass & Rossi, *supra* note 50, at 193.

356. *See* Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49842, 49846 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35) (outlining minimum requirements for state public utility transmission providers).

357. In raising concerns with the rise of "national federalism without doctrine," Abbe Gluck also recognizes fifteen doctrinal questions presented by forms of statutory federalism more generally. Gluck, *supra* note 20, at 2022–42.

important for courts and federal regulators to be attentive to the factual and policy rationales that support jurisdiction, approaching these questions prospectively rather than in reaction to dual sovereignty arguments advanced by litigants. Finally, courts must recognize their own limits in resolving energy-federalism disputes and better clarify the significance of democratic agency procedures and expertise in advancing federalism.

1. Ending Wholesale-Market Field Preemption.—The rise of concurrent jurisdiction calls into question whether the traditional field preemption doctrine should continue to play any role under energy statutes. Precedents such as *Nantahala* and *Schneidewind* remain good law. However, at the very minimum they need to be limited in their application to scenarios involving similar cost-of-service regulatory tools, if not recast as applications of conflict rather than field preemption. Field preemption is simply incompatible with the recognition of concurrent jurisdiction over aspects of wholesale energy markets under these statutes. It leads to overly broad federal preemption decisions, routinely confuses courts, and thwarts the primary purposes of these energy statutes by creating the potential for new regulatory gaps.[358]

Even the core energy precedents decided by the Court using field-preemption language acknowledge that field-preemption analysis cannot, on its own terms, answer the core federalism questions that need to be addressed. Consider again *Nantahala*, one of the leading modern field-preemption cases under the FPA. The Court held that since "FERC clearly has exclusive jurisdiction over the rates to be charged . . . interstate wholesale customers," a state "may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable."[359] A state is prohibited, for example, from "trapping" costs by exercising its "undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate."[360] While the Court spoke here in terms of exclusive jurisdiction, it is a mistake to conclude that, as a categorical matter, the setting of wholesale rates "field preempts" states. The Court did not reason that the statute itself occupied the field, but instead spoke in terms of the potential "interference" that states could present to FERC-approved rates without a finding of federal preemption.[361] Courts have recognized that this is not a

358. As Justice Kagan astutely observed in her concurrence in *Kurns v. Railroad Friction Products Corp.*, 132 S. Ct. 1261 (2012), "[v]iewed through the lens of modern preemption law, [Justice Brandeis's field-preemption decision in] *Napier* is an anachronism." *Id.* at 1270 (Kagan, J., concurring).

359. Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986).

360. *Id.* at 970.

361. *See id.* at 966 (rejecting the argument that the scope of FPC jurisdiction over wholesale gas and electricity should be determined on a case-by-case basis and instead determining that deference should be given to Congress's intent to ensure states do not interfere with FERC's authority to set wholesale rates).

bright-line or categorical approach to preemption. Some have devised an exception to the filed-rate-preemption approach of *Nantahala*, recognizing that states may deny a utility the opportunity to recover costs incurred as a result of buying power at FERC-approved rates if the specific purchase (apart from the actual rate that was paid) is deemed imprudent.[362]

To the extent that *Nantahala*'s reasoning relies on an assessment of whether a specific state-regulatory action interferes with a particular federal rate, however, it is not an application of field preemption at all. Instead, in placing its primary attention on tensions between a federal and state approach, the key inquiry becomes whether the state-regulatory action presents *an obstacle* to the implementation of a federal-approved wholesale rate. Using field preemption to reach this conclusion would eliminate a broad range of state-regulatory decisions assessing prudence, which the Court in *Nantahala* explicitly preserved for state regulators.[363] Field preemption simply does none of a court's primary analytical work in reaching a preemption conclusion. Instead, at the very minimum, a court reaching a conclusion of federal preemption always implicitly depends on its assessment of whether a state-regulatory decision presents an obstacle. Moreover, resorting to field preemption can lead to overbroad preemption decisions, in effect foreclosing a broad range of otherwise permissible state regulatory actions.[364]

The recent rise of concurrent jurisdiction also throws into question whether *Schneidewind*, another darling of the dual sovereignty approach, should continue to be understood as a field preemption case. Field preemption would foreclose any state regulation in the relevant field as a matter of implied preemption. However, despite its strong field preemption rhetoric, *Schneidewind* itself suggests that the scope of the field can only be determined upon an examination of the objective of the particular state regulation at issue.[365] Drawing on a similar approach, *ONEOK* elaborates that this requires an inquiry into "the *target* at which the state law *aims*."[366] In other words, this is more of a conflict or obstacle than a field preemption test. A broad interpretation of *Schneidewind* is even more problematic in that it would authorize FERC to make broad regulatory decisions that undermine

362. *See, e.g.*, Pub. Serv. Co. v. Patch, 167 F.3d 29, 35 (1st Cir. 1998) (adopting the imprudent exception in the First Circuit); Pike Cty. Light & Power Co.–Elec. Div. v. Pa. Pub. Util. Comm'n, 465 A.2d 735, 737–38 (Pa. Commw. Ct. 1983) (holding that a state may deny a utility company from recovering costs for purchasing power at a FERC-approved rate when cheaper alternatives are available).

363. *See Nantahala*, 476 U.S. at 972 (assuming without deciding that states retain authority to address the prudency of purchased-power decisions).

364. For a discussion of the necessity of careful assessment of preemption in the context of particular federal approval of a monitoring action regarding wholesale rates, see Rossi, *supra* note 6, at 1642–44.

365. *See supra* notes 293–95 and accompanying text.

366. ONEOK, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599 (2015).

state environmental-protection goals under the Clean Water Act or other environmental statutes that delegate a role to state regulators.[367]

If the form of field preemption Justice Brandeis had in mind in *Napier* was ever appropriate for energy statutes, these cases illustrate that it no longer has a place in federalism disputes in modern energy markets. At the very minimum, if these decisions continue to be construed as field preemption cases, their scope should be limited to wholesale rates actually set or approved by FERC and should not include federal regulation of practices affecting rates. Instead of relying on the fiction of field preemption, courts need to focus on whether federal and state regulations of energy markets are compatible. For example, in finding federal preemption of the Maryland generation incentives, *Hughes* relies on foundational facts regarding FERC's approach to regulating PJM's capacity market[368] and the regulatory target at which the Maryland program aims (namely, the FERC-approved wholesale capacity market).[369] It did not frame the preemption analysis in terms of some abstract, fixed field defined by statute, but carefully assessed facts regarding the nature of FERC's regulation of the PJM capacity market and applied the aims test from *ONEOK*.[370] For all practical purposes, it thus appears that the Supreme Court has replaced energy field preemption with an assessment of obstacle preemption (in the setting of wholesale rates, under FERC's substantive jurisdiction) or conflict preemption (in assessing FERC's exercise of remedial jurisdiction over practices affecting rates).[371]

At bottom, in the regulation of modern energy markets, field preemption is little more than a fiction. It ultimately does none of the analytical work in assessing whether federal energy statutes preempt state regulations since a preemption finding under these statutes ultimately depends on first assessing the issue as an obstacle or conflict preemption case. Absent clear language to the contrary in a statute or in an agency's explicit decision to exercise broad preemption over a specific activity, preemption analysis in modern

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367. For a discussion of this issue, see generally Alexandra B. Klass & Jim Rossi, *Reconstituting the Federalism Battle in Energy Transportation*, 41 HARV. ENVTL. L. REV. (forthcoming 2017).

368. *See* Hughes v. Talen Energy Mktg., 136 S. Ct. 1288, 1294 (2016) (discussing the policy and factual concerns that influenced Maryland's regulators to develop the program at issue).

369. *Id.* at 1298–99.

370. This observation is made clear by Justice Sotomayor's concurrence in *Hughes*. *See id.* at 1300 (Sotomayor, J., concurring) ("Using the purpose of the Federal Power Act as the 'ultimate touchstone' of its pre-emption inquiry rather than resting on generic pre-emption frameworks unrelated to the Federal Power Act, the Court holds that Maryland has impermissibly impeded the performance of one of FERC's core regulatory duties." (citation omitted)); *id.* ("The Court, however, also rightly recognizes the importance of protecting the States' ability to contribute, within their regulatory domain, to the Federal Power Act's goal of ensuring a sustainable supply of efficient and price effective energy.").

371. The sole remaining exception may be Justice Thomas, whose concurrence in *Hughes* purports to support preemption based entirely on the FPA's delegation of authority to FERC to regulate wholesale energy sales. *Id.* at 1301 (Thomas, J., concurring).

energy markets should attempt a case-by-case analysis of foundational facts and of regulatory conflict, and should not be decided based on field preemption alone. Courts would be well-advised to abandon the use of field preemption in this context entirely.

Despite the Court's recent movement away from dual sovereignty, some courts may not have received a clean enough message. For example, to date, at least one Eighth Circuit Judge's opinion takes the wrong message altogether from *Hughes*, citing the case to endorse dual sovereignty and a sweeping application of field preemption.[372] This opinion is particularly startling because, unlike the PJM market tariff that was the source of federal preemption in *Hughes*, under the Midcontinent Independent Transmission System Operator (MISO) tariff at issue no regulator or court has found FERC has exclusive authority to regulate all aspects of energy capacity markets in Minnesota and North Dakota.[373] Fortunately, no other judge joined the opinion,[374] so it is unlikely to have a precedential impact, but it shows how lower courts are slow to move away from dual sovereignty's doctrinal relics such as field preemption—even following clear, recent signals from the Supreme Court of a more pragmatic jurisdictional approach.

2. Factual and Policy Rationales for Federal Jurisdiction.—Of course attention to the nature of jurisdiction will often also require that courts define its scope. Outside of narrow activities that are explicitly designated as beyond the reach of federal regulators, *EPSA* emphasizes that the starting inquiry in addressing federalism disputes in energy statutes is whether federal regulators are authorized to address an activity.[375] In deciding whether federal regulation is authorized to regulate in the first place courts must pay attention to the statute itself, rather than some abstract set of federalism canons or principles that lack any foundation in statutory law.

One of the concerns raised by modern extensions of federal jurisdiction under energy statutes—and at the core of the D.C. Circuit opinion holding that FERC lacks jurisdiction over demand response[376]—is whether the statute contains any "limiting principle" to constrain FERC's assertion of authority over energy markets. These limiting principles are important to recognizing that federal regulation cannot go too far. Perhaps this concern is just as significant today, where there are fears of federal energy regulators indirectly imposing a carbon tax,[377] as it was during the New Deal era.

372. *See* North Dakota v. Heydinger, 825 F.3d 912, 927 (8th Cir. 2016) (Murphy, J., concurring in part) (referring to FERC's jurisdiction to regulate "certain parameters" of the capacity market as exclusive).

373. *Id.* at 913–17.

374. *Id.* at 923.

375. FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 767 (2016).

376. *See supra* notes 132–40 and accompanying text.

377. For the claim that FERC has sweeping statutory authority to address carbon emissions through its regulation of energy markets, see generally Christopher J. Bateman & James T.B. Tripp,

The Supreme Court's decision in *EPSA* acknowledges a limiting principle for FERC's exercise of expansive jurisdiction over market practices related to wholesale rates. As Joel Eisen has highlighted, courts have an established standard to discern practices that "directly affect" rates, in contrast to those practices that merely have an incidental effect on rates.[378] Under section 205 of the FPA, which required FERC to evaluate individual utility rates for the sale of power at wholesale, these principles are well established as a limit on FERC's jurisdiction in regulating the "rates or charges" demanded or received, as well as "all rules or regulations affecting or pertaining" to such rates or charges.[379] *EPSA* correctly applied this test in making a judicial finding that demand response is squarely within FERC's jurisdiction.[380]

But courts should not overread *EPSA* as requiring courts themselves to always connect harms to remedies under the FPA in assessing whether FERC is acting within its jurisdiction. This causation test, which links practices to the rates associated with any particular utility's sales, is best understood as a pragmatic requirement for FERC to make factual and policy findings, not as a fixed judicial or common law threshold a court can articulate in the abstract. It is significant to note that, under New Deal-era energy statutes, FERC's remedial authority to act proactively is not automatic, but requires the agency to make some finding of undue discrimination. Under section 206 of the FPA, FERC is authorized to initiate proactive proceedings to address industry-wide practices.[381] But as the Court observed in *New York v. FERC*, section 206 requires FERC to affirmatively make a discrimination finding before it can exercise its remedial authority over "practices . . . affecting" rates.[382] An expansive construction of FERC's power to address "practices . . . affecting" rates is hardly a roving invitation for the agency to impose any proactive policy preference it chooses on firms in energy markets. Rather, the statute constrains the agency by requiring it show a pragmatic linkage to interstate wholesale sales and also to make an affirmative finding of undue discrimination.

Toward Greener FERC Regulation of the Power Industry, 38 HARV. ENVTL. L. REV. 275 (2014) (arguing that the FPA implicitly allows FERC to consider environmental effects of power generation in setting just and reasonable rates), and STEVEN WEISSMAN & ROMANY WEBB, 2 ADDRESSING CLIMATE CHANGE WITHOUT LEGISLATION: HOW THE FEDERAL ENERGY REGULATORY COMMISSION CAN USE ITS EXISTING LEGAL AUTHORITY TO REDUCE GREENHOUSE GAS EMISSIONS AND INCREASE CLEAN ENERGY USE 3 (2014), https://www.law.berkeley.edu/files/CLEE/FERC_Report_FINAL.pdf [https://perma.cc/6U3V-PH58] (outlining ways FERC could act while "relying on its current legal authority").

378. *See* Eisen, *supra* note 60, at 1812–34 (describing the development and evolution of the standard).

379. Federal Power Act, ch. 687, sec. 213, § 205(a), 49 Stat. 838, 851 (1935) (codified as amended at 16 U.S.C. § 824d(a) (2012)).

380. *See supra* notes 233–43 and accompanying text.

381. Federal Power Act, sec. 213, § 206(a) (codified as amended at 16 U.S.C. § 824e(a)).

382. New York v. FERC, 535 U.S. 1, 27 (2002).

This kind of discrimination finding by FERC allows federal jurisdiction to evolve and adapt to new factual and policy circumstances. No doubt, after *EPSA*, FERC has expansive potential authority over practices affecting wholesale rates, as well as clear regulatory tools authorizing federal regulation. However, while *EPSA* appears to embrace strong deference to FERC regarding its factual findings and policy positions,[383] that does not leave the agency the ability to broaden or contract its jurisdiction over energy markets without principle. In adopting proactive marketwide rules, it is not enough that the tools regulators used to address discriminatory practices relate to wholesale markets in some general sense. Rather, at the time these rules are adopted, federal regulators are obligated to show how their rules are directly related to wholesale rates, or are tailored to address the kind of market discrimination that FERC has identified as a basis for exercising jurisdiction over a practice that affects wholesale rates.

For example, FERC would be acting on questionable authority if it simply declares illegal an industry-wide practice because the agency has concluded that this practice disadvantages a specific energy supplier or power generator without any additional facts or explanation. Rather, FERC must accompany such an assertion of jurisdiction with an explanation of how this kind of discrimination connects to the wholesale energy markets over which it has jurisdiction. The FPA, along with the basic expectations of arbitrary and capricious review, obligates FERC to explain how such a remedy is connected to the goal of protecting consumers or competitive power markets, so the agency would be obligated to provide factual findings or policy rationales to support its assertion of jurisdiction based on the harm to a supplier. The agency would be standing on its firmest ground in regulating "practice . . . affecting" rates if it not only makes a finding or provides a policy rationale regarding why such discrimination is harmful but also explains how its remedy is tailored to address that form of harm.[384]

After *EPSA*, regulators ignore these factual and policy rationales at their peril, as they derive from the clear language of the statute and also are an expectation of arbitrary and capricious review. There is a danger if courts make these findings themselves, rather than review the agency's findings with deference where appropriate. But it also would be harmful for courts to

383. *See* Sharon B. Jacobs, *Energy Deference*, 40 HARV. ENVTL. L. REV. F. 49, 51–54 (2016) (discussing how the Court's analysis in *EPSA* represents a variation of "thin rationality" review or "super deference").

384. See Matthew R. McGuire, Comment, *(Mis)Understanding "Undue Discrimination": FERC's Misguided Effort to Extend the Boundaries of the Federal Power Act*, 19 GEO. MASON L. REV. 549, 576–77 (2012), for an argument to similar effect. Although McGuire uses a similar argument to critique FERC's regulations that favor independent transmission lines, *id.* at 550–52, I am not convinced that this is outside of FERC's jurisdiction. FERC made multiple findings that support a need for new transmission investment and that utility-based financing has systematically led to underinvestment and reduced competition in the industry. I am thus much more sympathetic to FERC's effort to regulate transmission planning than McGuire.

ignore the need for some agency findings to support expansive jurisdiction into practices related to wholesale energy markets. While *EPSA* undeniably embraces deference to FERC, it does not eviscerate the FPA's core requirements. The agency must explain how a practice is connected to wholesale rates, why this produces discrimination that is harmful, and how the agency's remedies are connected (or directly related) to these harms.

3. Encouraging Agency (Rather Than Judicial) Preemption.— Ultimately, the Supreme Court's recent decisions regarding energy statutes open the possibility that energy federalism will finally follow the path of many other statutory-federalism programs. Jessica Bulman-Polzen has recently offered a qualified defense of executive-branch-led federalism as a way of improving the democratic political process.[385] A number of other scholars have also advanced an argument that agency preemption can be as transparent and democratic as relying on Congress to make preemption decisions.[386] In areas such as health care, environmental law, and marijuana prohibition enforcement, the preferred approach to federalism is primarily an executive-branch prerogative, rather than an invitation for the judiciary to impose its own federalism.[387]

Especially in contexts where Congress has delegated broad authority to a federal agency to regulate market structure and activities, such as under energy statutes, an executive-led approach to preemption analysis can help to ensure that regulation does not leave market activities unchecked. Even if dual sovereignty is no longer required by statute, federal-energy regulators possess the power to affirmatively preempt state regulation, in instances where they believe that this promotes regulatory goals. For example, as I have highlighted, in instances where FERC presents a factual and policy rationale that state regulation promotes discrimination against nonincumbent energy suppliers or hinders interstate energy markets, it may be appropriate for federal regulators to address the activity.[388]

Recognizing agency authority to preempt is necessary, but it is not sufficient to promote accountability and expertise in the regulation of energy markets. To ensure democratic accountability for preemption decisions, it is important to ensure that the agency, not courts, make the ultimate decision regarding the preemptive effect (if any) of federal regulation. As Galle and

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385. Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 954–55 (2016).

386. *See, e.g.*, William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity*, 77 GEO. WASH. L. REV. 1521, 1525 (2009) (advocating "hard look" review of agency preemption decisions as a mechanism to retain agency accountability); Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1936–39 (2008) (defending agency preemption based on institutional competence and transparency arguments).

387. *See* Bulman-Pozen, *supra* note 385, at 976 (discussing these examples as emblematic of executive federalism).

388. *See supra* note 241–52 and accompanying text.

Seidenfeld highlight, the "process behind the federal decision [to preempt state law] is nearly as important as its substance."[389] Given the impacts such a decision can have on state experimentation and on the underlying premise of state law as complementing federal regulation, such a decision is best made through an open and transparent agency decision-making process, such as notice-and-comment rulemaking, rather than as implicit regulatory choice or as a mere afterthought, as articulated in a brief.[390]

An agency-preemption approach to energy federalism underscores the significance to the democratic process of an agency such as FERC making an open and transparent decision regarding what kind of institutional federalism arrangement is desirable for activities in energy markets. Where FERC has failed to make such a preemption decision itself, it smacks of judicial imperialism for a court to impose its own view of preemption onto the agency for several reasons.

First, notwithstanding *Hughes*, it is not at all clear that the FPA or (any other statute) creates an implied cause of action for a private party to ask a federal court to make a preemption determination that enjoins state regulation where the challenger is not seeking review of a FERC decision regarding preemption.[391] As a general matter, FERC, not federal courts, should have the first bite at the apple in defining agency jurisdiction, especially where jurisdiction over new kinds of transactions or practices in energy markets are at issue.

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389. Galle & Seidenfeld, *supra* note 386, at 1997.

390. Courts reviewing agency action have long disfavored post hoc agency articulation of rationales. *See* SEC v. Chenery Corp., 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 965 (2007) (explaining that under the *Chenery* principle, an agency must articulate supporting facts and the underlying rationale for a decision at the time the agency acts, not after).

391. The FPA, along with the Administrative Procedures Act, provides for judicial review of FERC decisions. Act of Sept. 6, 1966, Pub. L. 89-554, 80 Stat. 378, 392 (codified as amended at 5 U.S.C. § 702 (2012)) (creating Title V of the United States Code, which includes the original Administrative Procedures Act, Pub. L. 79-404, 60 Stat. 237 (1946)); Federal Power Act, ch. 687, sec. 213, § 313, 49 Stat. 838, 860 (1935) (codified as amended at 16 U.S.C. § 824l (2012)). Importantly, however, these statutes do not expressly create an avenue for private challengers to raise federal preemption claims, requiring private challengers to ground their legal challenges in the Supremacy Clause. Under 28 U.S.C. § 1342 (2012), federal district courts are prohibited from enjoining, suspending, or restraining operation or compliance with any order affecting rates chargeable by a public utility that is made by a state administrative agency or ratemaking body where jurisdiction is based solely on repugnance of the order to the federal Constitution and the order does not interfere with interstate commerce. 28 U.S.C. § 1342 (2012). In 2015, the Supreme Court held that the Constitution does not create a private cause of action to enjoin a state under the Supremacy Clause. Armstrong v. Exceptional Child Center, Inc., 135 S. Ct. 1378, 1383 (2015). It further held that equitable *Ex parte Young*-type preemption challenges to enjoin unlawful state action were foreclosed by a federal statute's provision of other remedies and judicial administrability concerns. *Id.* at 1385. For development of the argument that implied private preemption claims can be problematic under the FPA, see Matthew R. Christiansen, *The FPA and the Private Right to Preempt*, 86 GEO. WASH. L. REV. ARGUENDO 129, 138–48 (2016).

Second, allowing judicial resolution of jurisdictional disputes prior to an agency's decision about them is not desirable from the perspective of democratic accountability. An agency is required to explain its preemption choices in an open and participatory administrative process and is also subject to congressional oversight, whereas a court lacks this kind of political accountability for its decisions regarding preemption under energy statutes.[392]

Third, since any judicial preemption decisions binds an agency, premature judicial resolution of preemption disputes makes energy statutes less flexible and adaptive to new technological developments and market decisions. By contrast, an agency preemption decision can be changed through the administrative decision-making process. This sweeping precedential impact makes dual sovereignty a poor fit for the modern administrative process surrounding federal regulation.

Where there is no transparent process or decision before an agency leading to a preemption finding, this should weigh against a court reaching a preemption decision on its own. Such an approach has considerable support in the accepted administrative law principle that courts should not afford deference to post hoc agency rationales.[393] For example, in upholding state antitrust remedies in *ONEOK* and refusing to extend *Chevron*[394] deference to FERC, the Supreme Court considered it significant that FERC itself failed to take any position in its regulatory proceedings on whether it intended its regulatory approach to have a preemptive effect on states.[395]

However, in upholding the Fourth Circuit's rejection of Maryland's incentives in *Hughes*, the Court was not sensitive to this concern. Since the Supreme Court was reviewing a private challenge to the state program that was brought in federal court, it ultimately relied on judicial, rather than agency, factual determinations regarding the nature of federal regulation of capacity markets.[396] However, FERC had failed to make any affirmative finding on its own that Maryland's power-generation incentives presented a conflict with "just and reasonable" rates under PJM's capacity-pricing plan, the matter pending on review in *Hughes*.[397] Indeed, when asked to address these matters in its regulatory process, the agency even went so far as to claim

392. *See supra* Part II (describing the sweeping preemption approach of dual sovereignty).

393. *See supra* note 381–82 and accompanying text.

394. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

395. ONEOK, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1602–03 (2015).

396. *See* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1297 (2016) ("We agree with the *Fourth Circuit's judgment* that Maryland's program sets an interstate wholesale rate, contravening the FPA's division of authority between state and federal regulators." (emphasis added)).

397. *Id.* at 1297–98 (discussing FERC's reasons for rejecting Maryland's plan but failing to acknowledge any affirmative findings made by FERC to prove a conflict with "just and reasonable" rates under PJM's capacity-pricing plan).

that it was bound to the preemption approach of courts.[398] FERC's position that Maryland's incentives are preempted was not the product of a transparent decision-making process and was only articulated post hoc, in reaction to judicial decisions and in its appellate briefs on review before the Supreme Court. If FERC truly had wished to reject Maryland's incentives, it could have made a transparent regulatory decision of its own to do so, rather than waiting for a court to make this decision in reviewing the agency.[399]

To the extent that FERC chose not to make its own preemption decision regarding Maryland's power-supply incentives in PJM, or refused to use its own regulatory processes to develop an agency position on preemption in modern-energy-capacity markets, this created the opportunity for a federal court hearing a private-federal-preemption challenge to the state program to step in and make its own foundational factual findings regarding state power-supply incentives. Perhaps lower courts and the Supreme Court got these foundational facts and the ultimate conclusion right, and PJM's tariff (as initially approved by FERC) is, in fact, the sole way of pricing capacity in this particular regional organized market. Importantly, however, FERC took no position itself on the issue and courts brought no particular expertise to adjudicating these factual findings.[400]

More significantly still, such judicial findings could leave federal regulators little flexibility to work with states, exasperating the type of "reverse" *Attleboro* gap hypothesized above[401]—judicially assigning FERC de jure authority even where the agency has shown no interest at all in exercising it. It thus seems inconsistent with energy statutes such as the FPA for courts to make a preemption finding where FERC has not previously done so itself, especially when the effect of preemption is to preclude any complementary state regulation. This kind of judicially imposed preemption

398. *See supra* notes 215–16 and accompanying text.

399. Transcript of Oral Argument at 24, Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016) (No. 14-614) ("We don't have FERC's opinion. We only have it through the SG. I thought there was a doctrine called primary jurisdiction . . . ."). The Supreme Court's opinion in *Hughes* did not address this.

400. Even where, as in PJM, capacity markets provide some reliability pricing in the wholesale market, it is not clear that they provide a perfect market valuation of reliability values associated with different energy resources. The American Public Power Association, for example, has highlighted how long-term contracts provide a superior way of promoting reliability in comparison to capacity markets and that capacity markets can result in different reliability pricing based on how a state chooses to address its retail market. Randy Elliot, *Staying Power of a Bad Idea: Capacity Markets' Reliability Pricing Mechanism*, AM. PUB. POWER ASS'N (Sept. 8, 2015), http://blog.publicpower.org/sme/?p=761 [https://perma.cc/3N7B-PP9A]. For a similar argument being made in an amicus brief filed in the *Hughes* case, see Brief of Amici Curiae Am. Pub. Power Ass'n and Nat'l Rural Elec. Coop. Ass'n in Support of Petitioners at 29, Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2014) (No. 14-614) (arguing that "long-term contracting . . . [was] an intended and indispensable counterpart to the attainment" of FERC's goal of supporting investment in new infrastructure).

401. *See supra* subpart IV(A).

approach lacks any democratic process to ensure political accountability for the statutory interpretation behind it—a flaw that echoes the ghost of dual sovereignty to the extent that courts themselves routinely defined the jurisdictional bright line, not FERC. By binding the agency's ability to allow complementary state approaches in the future, such an approach dictates the federalism balance for the agency, regardless of how well that regulatory approach actually works in energy markets.

By contrast, if courts were to more consistently recognize concurrent jurisdiction as a starting premise for understanding the allocation of federal–state authority over new market transactions under energy statutes, any departure from this would sit squarely in the wheelhouse of FERC's jurisdiction and expertise, making it incumbent on the agency to only preempt states after an open and transparent agency decision-making process. An agency preemption approach thus promises to be more democratic and consistent with energy statutes than courts imposing relief post hoc through a binding judicial precedent, as typically has occurred with dual sovereignty.

V. Conclusion

Recent Supreme Court decisions consistently reject dual sovereignty as the organizing federalism principle under energy statutes. The Court's recent evaluation of jurisdictional disputes has been focused on the statutory objective of avoiding a regulatory no man's land, and its fixation on a jurisdictional bright line has faded. In recognizing authorization for concurrent jurisdiction under these statutes, the Court's recent decisions direct energy federalism towards a brave new path, inviting regulators to consider new institutional arrangements as they address problems in modern energy markets.

Yet this path is not unencumbered. Recent lower court cases show how precedents and doctrinal relics of dual sovereignty can present new regulatory gaps in modern energy markets. Courts and regulators should be wary of invoking precedents that fixate on dual sovereignty, especially where it is not required by statute. In modern energy markets, routine adherence to a dual sovereignty approach comes at the expense of state and federal regulators exploring more effective forms of regulation. Like other aspects of economic and social life, the complexity of modern energy markets requires regulators to recognize multiple energy "federalism(s)"—according to Heather Gerken's insightful characterization, a pluralistic rather than a singular approach to allocating power between the federal government and the states.[402]

402. Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1573 (2012) (noting that the "*ends* of federalism are plural" and questioning scholars who approach federalism as if "there is only one *means*" to achieving these ends).

Recent Supreme Court decisions that embrace concurrent jurisdiction should serve as a reminder that the federalism in regulatory statutes is not an abstract principle that is frozen in time, but instead must adapt to the factual and policy features of modern economic life. In this sense, the Court's recent rejection of dual sovereignty has returned basic decisions regarding the federalism balance in energy markets to the agency and political processes, rather than relegating it entirely to legalistic formalisms. By acknowledging space for regulators and stakeholders to develop more collaborative solutions, the Court has opened up a brave new path for energy federalism—an approach that could serve the goals of other types of regulation well too.[403] Advancing this trajectory will require courts to ensure that dual sovereignty's doctrinal relics do not impede more democratic, and more dynamic, approaches to federalism.

403. *Cf.* Gluck, *supra* note 20, at 2003–06 (offering Massachusetts's health-reform experiment as an example of the federal government working with a state to implement a federal goal or policy).