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Jim Rossi

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ENERGY FEDERALISM'S AIM[†]

*Jim Rossi**

The Federal Power Act¹ (FPA) has endured for eighty-five years, in part because it does not embrace a single regulatory approach for the energy industry. Nor does the FPA favor a single approach to federalism: it delegates broad authority to the Federal Energy Regulatory Commission (FERC) to regulate the wholesale sale and transmission of energy in interstate commerce, while leaving states considerable leeway to regulate not only retail rates but also power generation and distribution.² The statute expanded federal authority over wholesale electric power sales, with the primary purpose of closing regulatory gaps in interstate energy markets.³

For the FPA's first fifty or so years, the division of authority between the federal government and the states was clearly understood. During this time, courts routinely invoked a "bright line" rule to keep federal and state regulators in their own lanes as they pursued the common goal of setting rates to protect consumers based on the cost of service.⁴ Then, in the 1990s, FERC shifted its policies away from setting rates based on cost to promoting competition in interstate energy markets. FERC's most recent market policies aim to level the playing field in energy resource bidding, an approach that has little appetite for state programs that favor specific energy resources regardless of price. The bright line seems to have faded.

Or maybe it is dead altogether. A bright line does not appear anywhere in the FPA. Recently, the U.S. Supreme Court has weighed in on

[†] Responding to Matthew R. Christiansen & Joshua C. Macey, *Long Live the Federal Power Act's Bright Line*, 134 HARV. L. REV. 1360 (2021).

* Judge D.L. Lansden Professor of Law, Vanderbilt University Law School. Email: jrossi@vanderbilt.edu. Thanks to Rob Mikos for his insightful comments on a draft.

¹ 16 U.S.C. §§ 791a–828c.

² *Id.* § 824(b)(1) (giving federal regulators authority over transmission and "the sale of electric energy at wholesale in interstate commerce," but not "any other sale" of energy or "facilities used" for power generation or in local distribution). Sections 205 and 206 of the FPA authorize federal regulation of wholesale rates. *Id.* §§ 824d–824e.

³ The FPA originally delegated power to FERC in order to close the gaps in the scope of state authority that had rendered regulation of interstate energy transactions ineffective. This is known as the "Attleboro gap." See *Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 90 (1927) (holding that electricity sales that involved companies located in two different states were "not subject to regulation by either of the two states"); see also Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 404 (2016) (explaining that when Congress passed the FPA, it "was legislating to close the 'Attleboro gap' attributed to dormant commerce clause limits on state regulation" (footnote omitted)).

⁴ See, e.g., *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215–16 (1964) ("Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction . . ." *Id.* at 215.).

federal-state jurisdictional tensions in an important trio of cases, but failed to give the bright line a single mention in its majority opinions.⁵ These recent decisions do not clarify the law or reduce uncertainty: FERC's authority remains a subject of great contention, and legal challenges to state clean energy policies based on their fit with FERC's vision for competitive markets continue to mount.⁶ Energy federalism's horizon is as foggy as ever.

Matthew Christiansen and Professor Joshua Macey's article *Long Live the Federal Power Act's Bright Line* projects a much-needed clarity onto the FPA's jurisdictional horizon.⁷ Christiansen and Macey argue that the Court's recent cases do not reject but reinforce the FPA's bright line, especially to the extent that they define limits on jurisdiction based on whether the endeavor of a regulator whose jurisdiction is challenged aims at or targets regulatory powers that the FPA assigns to another sovereign (what Christiansen and Macey call the "aiming at" test⁸). They also advance the novel argument that the FPA's bright line is especially relevant to modern energy markets, where the endeavors of state and federal regulators intersect in ways that are often complicated.

In this Response, I argue that Christiansen and Macey's framework presents some implicit tradeoffs for energy federalism. Energy lawyers will find their clear doctrinal framework for approaching jurisdiction useful, as do I. I agree with them that the Court's recent attention to an "aiming at" test is an improvement on the kind of strictly divided or exclusive jurisdiction approach associated with the FPA's traditional bright line rule. But Christiansen and Macey interpret the Court's recent cases as ascribing a clear zone of authority to both federal and state regulators under the FPA. In contrast, I argue that most modern disputes concerning jurisdiction under the FPA cannot be resolved by beginning with a clear zone of authority. To the extent that the FPA assigns authority to FERC only in general terms, without specifying any clear limit, a zone of authority approach to jurisdiction leaves judges wide leeway to fill in the gaps by projecting their own ideas about jurisdictional limits on FERC and states. This approach also tends to generate broadly binding judicial precedents about jurisdiction, which can hamstring FERC from exercising its discretion to advance the purposes of the FPA and increase uncertainty for new kinds of state policies regarding power supply. Christiansen and Macey's understanding of

⁵ See *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016); *FERC v. Elec. Power Supply Ass'n (EPSA)*, 136 S. Ct. 760 (2016); *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015).

⁶ In addition to the decisions that have already been rendered on these conflicts, which are cited below, at least two new cases surrounding federal preemption are slated for litigation in federal courts in the next year. See Matthew R. Christiansen & Joshua C. Macey, *Long Live the Federal Power Act's Bright Line*, 134 HARV. L. REV. 1360, 1365 n.22 (2021).

⁷ Christiansen & Macey, *supra* note 6.

⁸ *Id.* at 1410.

the bright line principle thus may be consistent with some regulator interdependence, but certainly does not require it. Nor does it require courts to respect the purposes of the FPA, which delegates the authority to fill in the gaps to FERC, not judges.

As an alternative to Christiansen and Macey's approach, I argue that an "aiming at" test grounded in conflict preemption — which would resolve jurisdictional questions based on obstacle or impossibility preemption and require courts to rule narrowly on jurisdiction based on case-specific facts — provides a more flexible approach that also ensures FERC's exercises of jurisdiction are consistent with the FPA and its purposes. Whatever doctrinal approach is taken to applying the FPA's "aiming at" test, I also argue that an agency-led preemption approach is the best context for its application. Requiring a decision by a federal agency based on its own factual findings about the benefits and harms of state regulation prior to judicial resolution of preemption disputes would better advance the coordination and information production functions of energy federalism. An agency-led preemption approach under the FPA not only has important implications for how preemption is understood and litigated; it also would better promote uniformity, allow for adaptation, and more likely promote the FPA's goals of closing regulatory gaps and allowing state and federal energy regulation to work as complements. Additionally, it would mitigate many of my concerns with Christiansen and Macey's extension of the bright line principle, as FERC is better equipped than courts to draw on its regulatory expertise and policy judgments in defining the limiting principle for a zone of authority approach.

I. A WELCOME SHIFT AWAY FROM A RIGID BRIGHT LINE RULE

In its original articulation by courts, the FPA's jurisdictional bright line rule defined an *exclusive* sphere for federal regulation of the rates for wholesale sales of energy. Under the Natural Gas Act (a companion statute to the FPA), the Court described the jurisdictional bright line as "clear and complete," recognizing "[n]o exceptions," and codifying decisions about "distributing regulatory power before the Act was passed."⁹ Under the FPA (adopted by Congress in 1935), the Court also endorsed a form of "plenary" jurisdiction, celebrated as "a bright line easily ascertained, . . . making unnecessary . . . case-by-case analysis."¹⁰

Historically, the bright line thus worked as a rule hand-in-hand with judicial recognition of "exclusive" federal jurisdiction to set wholesale rates. Yet case-by-case litigation of energy market jurisdictional conflicts continues to this day, even where modern trial and appellate courts continue to embrace a bright line rule. This is hardly what the Court

⁹ *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n*, 332 U.S. 507, 517 (1947).

¹⁰ *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215–16 (1964).

envisioned when it first endorsed a jurisdictional bright line as a form of divided sovereignty, aimed to keep each regulator in its own lane and avoid case-by-case preemption challenges.

The Court's recent decisions on jurisdiction apply several different jurisdictional tests, creating even more questions about how to resolve jurisdictional disputes. Christiansen and Macey's article simplifies the analysis, synthesizing the Court's recent cases into a three-question doctrinal framework.

First, does the jurisdictional challenge involve direct regulation of a wholesale sale of energy by a state? The FPA assigns FERC exclusive jurisdiction over wholesale sales of energy, so any state effort to directly regulate a wholesale rate that FERC already regulates is preempted.¹¹ The Court has consistently recognized *exclusive* FERC jurisdiction to regulate the rates for the wholesale sale of energy as a form of field preemption in which FERC occupies a clear zone of authority that Congress has delegated to it.¹² The Court's most recent case on this matter suggested that this does not only include the setting of wholesale rates, but also extends to FERC regulation of practices affecting wholesale rates.¹³ Anything by a state that directly regulates such practice is prohibited.¹⁴

Second, the Court's recent cases give particular attention to whether a jurisdictional challenge to a state involves it aiming at or targeting the exercise of a regulatory power that the FPA has assigned to FERC. Christiansen and Macey have many insightful and important things to say about this "aiming at" test. To the extent that a state does not directly regulate but aims at an exercise of authority that Congress has assigned to FERC under the FPA, it is preempted under the Supremacy Clause of the U.S. Constitution.¹⁵ At the same time, Christiansen and Macey see the "aiming at" test as applying from the "bottom up"; so if federal regulators target an exercise of authority that the FPA assigns to states (primarily through limits on FERC's delegated powers), such as the setting of retail rates or regulating generation or distribution facilities, for them this can be invalid under the "aiming at" test.¹⁶ Importantly, as Christiansen and Macey suggest, this second prong does not foreclose FERC and states from possessing some degree of concurrent authority over energy transactions;¹⁷ the "aiming at" test is thus a

¹¹ Christiansen & Macey, *supra* note 6, at 1408–09.

¹² See *S. Cal. Edison Co.*, 376 U.S. at 215–16.

¹³ *FERC v. Elec. Power Supply Ass'n (EPSA)*, 136 S. Ct. 760, 773–80 (2016).

¹⁴ Christiansen & Macey, *supra* note 6, at 1409.

¹⁵ *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016); see *id.* at 1300 (Sotomayor, J., concurring).

¹⁶ Christiansen & Macey, *supra* note 6, at 1410–12.

¹⁷ *Id.* at 1417.

particularly appealing approach to addressing jurisdictional issues where the endeavors of federal and state regulators are “marked by interdependence.”¹⁸ For Christiansen and Macey, a court applying an “aiming at” test still needs to assess whether a regulator is targeting another’s clear zone of authority, which they view as a form of field preemption analysis that helps to reinforce the FPA’s bright line.¹⁹

And third, if what is at issue is a state program that operates against the backdrop of overlapping federal regulation, the next question is whether the state law conflicts with the federal program under traditional conflict preemption principles. For Christiansen and Macey, this applies only to challenges to state programs.²⁰ Courts here would invalidate a state program only if they determine, based on the particular facts and circumstances, that a state program presents a conflict with a FERC initiative. Christiansen and Macey would limit this to situations where a state program creates a situation where it is actually impossible for FERC to exercise a delegated power (what is known as “impossibility preemption”).²¹

Christiansen and Macey’s framework is grounded in a careful analysis of judicial precedents. Yet their approach differs from the Supreme Court’s previous articulations of a jurisdictional bright line, which embraced strictly divided jurisdiction. The Supreme Court has recently warned that it is elusive to rest jurisdiction under the FPA on the “Platonic ideal” of a neat jurisdictional division of authority,²² especially where the endeavors of regulators are “marked by interdependence.” Many (including myself) have observed that the FPA envisions federal and state regulators working in parallel and includes the possibility of concurrent jurisdiction, and that this approach provides a promising solution for many modern challenges being faced in the electric power

¹⁸ As Justice Sotomayor has stated:

The process through which consumers obtain energy stretches across state and federal regulatory domains. The Federal Power Act authorizes the States to regulate energy production. It then instructs the Federal Government to step in and regulate wholesale purchases and energy transportation. Finally, it allows the States to assume control over the ultimate sale of energy to consumers. In short, the Federal Power Act, like all collaborative federalism statutes, envisions a federal-state relationship marked by interdependence.

Hughes, 136 S. Ct. at 1299–300 (Sotomayor, J., concurring) (citations omitted); see also *EP SA*, 136 S. Ct. at 780 (Kagan, J.) (“Wholesale demand response as implemented in the Rule is a program of cooperative federalism, in which the States retain the last word.”).

¹⁹ Christiansen & Macey, *supra* note 6, at 1410.

²⁰ *Id.* at 1412.

²¹ *Id.*; see also *id.* at 1402 (rejecting the “more nebulous” form of conflict preemption known as “obstacle” preemption under the FPA).

²² *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1611 (2015) (explaining the elusiveness of the “Platonic ideal” of the “clear division between areas of state and federal authority” that purports to be behind both the FPA and the Natural Gas Act).

industry.²³ Christiansen and Macey too see the complexity of modern electricity markets as sometimes requiring that two (or more) regulators play a role in overseeing transactions.²⁴

Christiansen and Macey's bright line principle does not fix the FPA's allocation of authority in time, independent of facts about the operation of the industry. They acknowledge, for example, that the scope of FERC's regulatory powers can ebb and flow as jurisdictional facts change. New technologies and market services, such as demand response, energy storage, and distributed (customer) power generation, can shift stakeholder understandings about what is a wholesale sale of energy as well as what practices directly affect wholesale rates.²⁵ By contrast, many courts invoke FPA's jurisdictional bright line with little or no assessment of predicate facts surrounding the operation of energy markets and their regulation. Fragmented, and sometimes conflicting, preemption decisions by courts increase uncertainty and threaten many important energy programs, with some commentators even suggesting the need to amend the FPA to clarify the jurisdictional morass produced by courts.²⁶ Unlike the Court's precedents from fifty or more years ago, which apply the bright line as a rigid rule, Christiansen and Macey envision the bright line as a jurisdictional principle that can accommodate dynamically changing economic, technological, and environmental variables in the energy industry. This unified theory of the jurisdictional divide under the FPA serves to inform the doctrine based on factual context; for example, jurisdiction may vary across different regions of the country, depending on the role of organized interstate markets, and as new technologies change our understanding of energy services what was once a service embedded in a retail electricity sale may become a wholesale sale.

²³ See, e.g., Shelley Welton, *Electricity Markets and the Social Project of Decarbonization*, 118 COLUM. L. REV. 1067, 1087 (2018); Daniel A. Lyons, *Protecting States in the New World of Energy Federalism*, 67 EMORY L.J. 921, 937–54 (2018); Joel B. Eisen, *Dual Electricity Federalism Is Dead, but How Dead, and What Replaces It?*, 8 GEO. WASH. J. ENERGY & ENV'T L. 3, 5 (2017); Ari Peskoe, *Easing Jurisdictional Tensions by Integrating Public Policy in Wholesale Electricity Markets*, 38 ENERGY L.J. 1, 19 (2017); Hannah J. Wiseman, *Disaggregating Preemption in Energy Law*, 40 HARV. ENV'T L. REV. 293, 294 (2016); Rossi, *supra* note 3, at 464–65.

²⁴ See Christiansen & Macey, *supra* note 6, at 1366 (noting that they agree that the FPA is consistent with a concurrent jurisdiction approach, in which federal and state regulators complement each other in regulatory endeavors marked by interdependence).

²⁵ *Id.* at 1374–81 (highlighting dynamic recent shifts in market conditions and technologies in the electric power industry); *id.* at 1398 (predicting that with changing conditions in the energy industry we will see more preemption challenges where “federal or state regulators have sought to harness those effects in an effort to aim at or target matters within the other’s sphere of jurisdiction,” and that this “is the result of an evolving industry, not a new standard for applying the FPA’s jurisdictional bounds”).

²⁶ *Id.* at 1365 n.23 (citing various recent sources that note that the FPA may need to be amended to accommodate initiatives related to climate change).

For Christiansen and Macey, the bright line principle can help resolve disputes in a modern energy industry that looks nothing like it did when Congress passed energy legislation in the 1930s. Courts and energy lawyers should take notice of Christiansen and Macey's framing of the bright line as a flexible principle for approaching jurisdiction under the FPA — at least to the extent that the bright line is used to assess jurisdiction.

II. THE DANGER OF PRIVILEGING A BRIGHT LINE PRINCIPLE

Still, I am not convinced that it is a good idea to privilege a bright line principle over other established doctrinal tools that courts routinely use to decide jurisdictional disputes under the FPA. Christiansen and Macey present the Court's "aiming at" test as a form of field preemption that defines jurisdiction based on a clear zone of authority.²⁷ This is not "the best reading of the cases," nor is it "the only rational way to apply the FPA's jurisdictional divide to the modern electricity sector."²⁸ Courts have a long legacy of looking to conflict preemption as a tool for approaching jurisdiction under the FPA, an approach that provides for greater flexibility in resolving jurisdictional conflicts in a manner that is consistent with the purposes of the FPA.

A. *The Best Reading of the Cases*

As a practical matter, Christiansen and Macey say the most about the Court's most recent (and arguably most controversial) energy federalism case, *Hughes v. Talen Energy Marketing, LLC*.²⁹ In *Hughes*, the Supreme Court held that a Maryland program that guaranteed certain in-state natural gas-fired generators a minimum price if they bid into, and cleared, the PJM Interconnection capacity auction was preempted.³⁰ There is perhaps no more central role for FERC under the FPA than its directive to set "just and reasonable" wholesale rates for power sales.³¹ Pursuant to its statutory mandate, FERC had approved a capacity auction as the proper mechanism to determine the "just and reasonable" rate for the sale of energy at wholesale in the PJM Interconnection. Maryland, however, guaranteed an in-state power generator a rate different from FERC's "just and reasonable" rate, contravening the goals of the FPA and encroaching upon FERC's exclusive jurisdiction. A straightforward application of step one of Christiansen

²⁷ *Id.* at 1396.

²⁸ *Id.* at 1405.

²⁹ 136 S. Ct. 1288 (2016).

³⁰ *Id.* at 1292.

³¹ 16 U.S.C. § 824d(a).

and Macey's preemption framework would support the Court's conclusion to "reject Maryland's program *only* because it disregards an interstate wholesale rate required by FERC."³²

Christiansen and Macey, however, interpret *Hughes* as hinging on whether the challenged state law "aims at or targets" FERC's regulatory sphere under the FPA.³³ For them, Maryland's program was problematic because it had placed in clear sight the target of a FERC-approved rate for wholesale bidding in the organized market. As the Court concluded in *Hughes*, "[n]othing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures 'untethered to a generator's wholesale market participation.'"³⁴ For Christiansen and Macey, *Hughes*'s tethering standard, interpreted through the doctrinal lens of the "aiming at" test, protects FERC's exclusive sphere of jurisdiction over wholesale market participation — a zone of authority that the bright line principle helps to reinforce.³⁵

But *Hughes* is an odd decision on which to build the foundation for a clear doctrinal approach to preemption (let alone a revival of the FPA's bright line). *Hughes*, which Justice Ginsburg characterized in her opinion for the majority as a "limited" holding,³⁶ does not make one single mention of the jurisdictional bright line. Nor do the Court's other recent energy federalism opinions in *Oneok, Inc. v. Learjet, Inc.*³⁷ or *FERC v. Electric Power Supply Ass'n*³⁸ (*EPSA*). As Christiansen and Macey acknowledge, *Hughes* is a "terse" opinion that invites multiple interpretations,³⁹ so it is thus not surprising that their interpretation of *Hughes* needs to look elsewhere for support.

Other cases decided under the FPA reinforce that courts see conflict or obstacle preemption as a more pragmatic tool for resolving federal-state jurisdictional conflicts than a focus on a sphere of jurisdiction grounded in field preemption. *Hughes* itself observed that the problem with Maryland's statute "mirrors" two previous Supreme Court decisions that also rejected state policies.⁴⁰ These cases are paradigmatic instances of obstacle, not field, preemption.

In its 1986 decision *Nantahala Power & Light Co. v. Thornburg*,⁴¹ the Supreme Court concluded that state retail rate regulation is

³² 136 S. Ct. at 1299 (emphasis added).

³³ Christiansen & Macey, *supra* note 6, at 1398.

³⁴ 136 S. Ct. at 1299 (quoting statements of respondents).

³⁵ Christiansen & Macey, *supra* note 6, at 1392–93.

³⁶ 136 S. Ct. at 1299.

³⁷ 135 S. Ct. 1591 (2015).

³⁸ 136 S. Ct. 760 (2016).

³⁹ Christiansen & Macey, *supra* note 6, at 1392–93.

⁴⁰ 136 S. Ct. at 1298.

⁴¹ 476 U.S. 953 (1986).

preempted to the extent that it conflicts with FERC-approved wholesale power rates.⁴² FERC had determined Nantahala's quantity allocation of low-cost hydroelectric power for purposes of setting wholesale rates.⁴³ In deciding what could be recovered from retail ratepayers in North Carolina, state regulators employed a different methodology.⁴⁴ North Carolina regulators' approach to setting retail rates was upheld by the North Carolina Supreme Court,⁴⁵ but the U.S. Supreme Court reversed, applying the "filed rate doctrine," an obscure regulatory principle aimed at "enforcing the Supremacy Clause."⁴⁶ Because the effect of the North Carolina ruling would be to "trap" FERC-approved wholesale costs, allowing it to stand would deny Nantahala the ability to fully recover its costs of purchasing at a FERC-approved rate.⁴⁷ Thus, in *Nantahala* the Supreme Court rejected it.⁴⁸ *Nantahala* recognized FERC's exclusive jurisdiction over rates, but it was not decided on the basis of field preemption or a bright line. Rather, the Court focused on how the North Carolina ruling "runs directly counter to FERC's order, and therefore cannot withstand the pre-emptive force of FERC's decision,"⁴⁹ grounding the analysis in conflict preemption.

A year later, in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*,⁵⁰ the Court again relied on the filed rate doctrine to preempt a state proceeding.⁵¹ FERC proceedings had culminated in an agency order requiring an electric utility to purchase a portion of a nuclear plant's output at rates the agency determined to be just and reasonable.⁵² At issue in the appeal before the Court was whether a state inquiry into the prudence of management decisions leading to the construction and completion of the nuclear power plant was preempted.⁵³ The Court reasoned that "[s]tates may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable."⁵⁴ Since "FERC's jurisdiction to adjust the allocations of Grand Gulf power in the [agreement] has been established,"

⁴² *Id.* at 966 (noting "plenary" FERC jurisdiction over interstate wholesale rates, but preserving some state role in evaluating the prudence of purchased power decisions).

⁴³ *Id.* at 958.

⁴⁴ *Id.* at 960.

⁴⁵ *State ex rel. Utils. Comm'n v. Nantahala Power & Light Co.*, 332 S.E.2d 397, 404 (N.C. 1985), *rev'd*, 476 U.S. 953.

⁴⁶ 476 U.S. at 953.

⁴⁷ *Id.* at 970.

⁴⁸ *Id.* at 972.

⁴⁹ *Id.* at 968.

⁵⁰ 487 U.S. 354 (1988).

⁵¹ *Id.* at 357.

⁵² *Id.* at 360-64.

⁵³ *Id.* at 356.

⁵⁴ *Id.* at 374.

the Court reasoned that this encroached upon FERC's exclusive authority to set wholesale rates.⁵⁵ This case more neatly parallels *Hughes* (which involved a state encroaching into FERC's exclusive authority to set rates⁵⁶), but the Court's rejection of Mississippi's program was not because of FERC's exclusive authority but because the state program rendered impossible FERC's previous exercise of authority under the FPA.

Christiansen and Macey themselves recognize the legacy of conflict preemption under the FPA, including in *Mississippi Power & Light Co.* and *Nantahala*.⁵⁷ Yet in the end they interpret *Hughes* as endorsing a clear zone of authority approach to the "aiming at" test, grounded in field preemption.⁵⁸ Some support for this might be found in *Oneok*, to the extent the Court there applied an "aiming at" test to uphold a state antitrust law against a preemption challenge under the Natural Gas Act;⁵⁹ though in that case Justice Breyer also paid attention to the kinds of state legislative motivations that Christiansen and Macey find problematic.⁶⁰ They also interpret *Hughes* against the backdrop of Justice Gorsuch's recent plurality opinion in *Virginia Uranium, Inc. v. Warren*⁶¹ (joined by only two other Justices), which frames the key jurisdictional issue in terms of field preemption and objective evidence of "what the State did, not why it did it."⁶² Such an approach to jurisdiction would not dwell on an examination of jurisdictional effects,⁶³ but instead begin by asking whether a clear zone of authority assigned in the statute is targeted by another regulator (focusing on what objective indicators of

⁵⁵ *Id.*

⁵⁶ *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016).

⁵⁷ Christiansen & Macey, *supra* note 6, at 1368 n.36 (citing both cases as instances where "state law is conflict preempted when it is actually impossible to comply with both state and federal law simultaneously"); *id.* at 1400-02 (discussing these cases as an "impossibility" form of conflict preemption).

⁵⁸ *Id.* at 1398.

⁵⁹ *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599-600 (2015).

⁶⁰ *Id.* at 1599.

⁶¹ 139 S. Ct. 1894 (2019).

⁶² *Id.* at 1905 (plurality opinion) ("[T]his Court has generally treated field preemption inquiries like this one as depending on *what* the State did, not *why* it did it." (citing *Hughes*, among other cases)). Justice Gorsuch's opinion stands out for its rejection of obstacle preemption as inconsistent with textualism, *id.* at 1907, but importantly only Justice Thomas (who has elsewhere criticized obstacle preemption for giving too much discretion to judges) and Justice Kavanaugh joined this opinion, *id.* at 1900. For discussion of the tension between textualism and obstacle preemption, see Note, *Preemption as Purposivism's Last Refuge*, 126 HARV. L. REV. 1056, 1065-67 (2013) [hereinafter *Last Refuge*].

⁶³ See Christiansen & Macey, *supra* note 6, at 1368 ("[These] transgressions are inconsistent with the bright line approach not because they *affect* matters over which the other sovereign has jurisdiction, but because they *regulate* matters over which the other sovereign has jurisdiction."); *id.* at 1396 (noting that the bright line principle "does not force courts to engage in the Sisyphean task of stamping out the cross-jurisdictional effects" of different regulators' actions).

meaning tell us about that regulator's aim).⁶⁴ A conflict preemption approach, by contrast, places more emphasis on the jurisdictional effects of a regulator's actions. Christiansen and Macey find this to be too "Sisyphean" a task for judges,⁶⁵ but it is hardly one that they are unfamiliar with in the litigating of jurisdiction under the FPA.

B. The Best Way to Resolve the FPA's Jurisdictional Disputes

As an analytical matter, beginning an analysis of jurisdiction with zone of authority in the FPA — based on the bright line principle and the methods of field preemption — is not the best way for courts to resolve jurisdictional disputes. Such an approach encourages courts to make abstract and overbroad decisions about jurisdiction and ultimately invites judges to craft limits even where the statute does not clearly contain them. By contrast, a conflict preemption approach focuses on reasons and facts for exercising authority, as well as its effects on other assignments of authority, providing courts a more flexible doctrinal tool for advancing the purposes of the FPA.

i. Avoiding Abstract and Overbroad Preemption Rulings. — To begin, an "aiming at" test should not be understood as an invitation for a court to decide a jurisdictional dispute any time an abstract "zone of authority" under the FPA is arguably being targeted by another regulator. Christiansen and Macey present *National Ass'n of Regulatory Utility Commissioners v. FERC*,⁶⁶ a recent D.C. Circuit opinion that held that FERC's energy storage rule was within the agency's delegated jurisdiction under the FPA,⁶⁷ as "the best example yet" of how their proposed framework works.⁶⁸ There the D.C. Circuit relied on "two separate zones of jurisdiction"⁶⁹ under the FPA in upholding FERC's rule against state challengers.⁷⁰ To the extent such an approach is used to assess jurisdiction, courts must take care to apply it to only those situations where both regulators actually *exercise* authority. If a state attempts to regulate in a zone that the FPA assigns to FERC but in which FERC has not exercised its regulatory powers, a preemption

⁶⁴ *Id.* at 1411.

⁶⁵ *Id.* at 1396.

⁶⁶ 964 F.3d 1177 (D.C. Cir. 2020).

⁶⁷ *Id.* at 1181.

⁶⁸ Christiansen & Macey, *supra* note 6, at 1415.

⁶⁹ 964 F.3d at 1187.

⁷⁰ The court observed that, under the Supremacy Clause, FERC's claims to authority will prevail more often than a state's (as it did in the D.C. Circuit's rejection of state challenges to FERC's rule that claimed the agency went too far by not allowing states to allow storage resources to opt out of the wholesale market). *Id.* Following the D.C. Circuit's opinion, states remain free "to challenge the Orders as applied to their own state regulations or imposed conditions," *id.* at 1189 — suggesting that outside of pre-enforcement review conflict preemption questions can still come up relating to FERC's exercise of authority and its impacts on actual state laws.

claim is simply not ripe for judicial resolution and it is premature for a court to hear it. If a court were to adjudicate such a preemption claim, its decision would constrain FERC in the future even if FERC had not weighed in on the issue. Similarly, if a state were to claim a FERC endeavor is targeting the zone of authority assigned to it under the FPA but no state law is actually being applied or enforced, it is not clear that a state would even have standing to challenge FERC in the first instance; the FPA does not create general standing for states to sue FERC for exceeding its delegated powers, absent a harm to a state's enforcement of its own laws.⁷¹ As a friendly amendment to Christiansen and Macey's bright line principle, I would thus propose that courts limit application of the "aiming at" test to those situations where both sovereigns actually exercise some regulatory authority — not as an invitation for courts to adjudicate new forms of jurisdictional disputes based on abstract questions of authority or sovereignty.

Still, the analytical endeavor of analyzing jurisdiction based on a zone of authority presents a risk that courts will generate overbroad judicial precedents on jurisdiction. Jurisdictional rulings under Christiansen and Macey's "aiming at" test would use field preemption tools to specify a zone of authority. At the very least, this requires a court to designate the outer limits of the assignment of authority in the FPA — even in instances where the statute is not clear. Future litigants and courts likely would understand these decisions as general judicial pronouncements about the FPA's legal limits, instead of as fact-specific, narrower holdings. In this sense, such decisions are likely to be treated

⁷¹ Section 201(a) of the FPA provides that federal regulation is "to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). However, the Court's precedents consistently treat section 201(a)'s "prefatory" language as a mere "policy declaration" that "cannot nullify a clear and specific grant of jurisdiction [to FERC], even if the particular grant seems inconsistent with the broadly expressed purpose." *New York v. FERC*, 535 U.S. 1, 22 (2002) (quoting *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964)). To the extent that courts have limited FERC from interfering with state regulation they have applied only section 201(b) of the FPA narrowly, to recognize that FERC cannot exercise its delegated powers to regulate "any other sale" (other than wholesale sales, thus preserving state authority over retail sales) or to regulate generation or local distribution facilities. *See, e.g., id.* at 19 n.11. Section 201(b) of the FPA states only that FERC has no jurisdiction over "any other sale" (other than wholesale sales) or "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." 16 U.S.C. § 824(b)(1) (emphasis added). Given that the only express reference to *state authority* in section 201(b) of the FPA is with respect to hydroelectric power, it seems a bit of a stretch to suggest that Congress intended to carve out a sphere of state sovereignty that is off limits in the statute in its reference to generation and distribution facilities. Its reference to "any other sale" as beyond FERC's authority gives states a stronger ground for claiming there is some sphere of authority that is off limits to FERC, to the extent that states, not FERC, regulate retail sales.

in broad precedential terms.⁷² Moreover, any factual predicates behind applications of the field preemption that is used to invalidate state laws will be enshrined into new legal precedents about jurisdiction, limiting the ability of courts and FERC to modify these until previous judicial decisions are rejected or overturned.

Hughes and its aftermath demonstrate the undesirable consequences of a sweeping field preemption approach basing jurisdiction on a zone of authority. Since the Court's decision in *Hughes*, litigants have consistently invoked broad interpretations of its holding, including crude references to exclusive jurisdiction and the FPA's bright line, to challenge state clean energy initiatives, including zero emission credits and other clean energy programs.⁷³ More challenges relying on *Hughes* are on their way. Christiansen and Macey convincingly show why judicial opinions to date applying *Hughes* and its "aiming at" test do not follow a principled approach to jurisdiction. But relying on a zone of authority and field preemption risks generating more of the same kinds of challenges, and producing legal opinions that speak to jurisdiction in broad terms but do little to resolve future conflicts. If the small sampling of cases following *Hughes* is any indication, it seems even more likely federal courts will continue to generate broad legal precedents that do not give helpful jurisdictional guidance. As in the years since *Hughes*, these broad judicial decisions will only invite new forms of private challenges under the FPA, drawing on precedents that risk constraining FERC just as much as state actors.⁷⁴

In contrast to starting with a clear zone of authority, a conflict preemption approach would begin by asking whether one regulator's endeavor makes it impossible for another regulator to exercise authority assigned to it under the FPA. Conflict preemption would require case-by-case adjudication of jurisdictional disputes. It would leave courts

⁷² For a similar criticism of the impacts of sweeping field preemption on state products liability claims, see generally Thomas H. Sosnowski, Note, *Narrowing the Field: The Case Against Implied Field Preemption of State Product Liability Law*, 88 N.Y.U. L. REV. 2286 (2013).

⁷³ To date, lower courts have consistently rejected these challenges — suggesting that the jurisdictional limits the Court identified in *Hughes* are not as muscular as some had thought. See, e.g., *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 52 (2d Cir. 2018) (upholding against a preemption challenge New York zero emission credits that account for the "environmental attributes of energy generation"); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) (upholding Illinois emission credits against a similar challenge).

⁷⁴ For example, one recent FERC Commissioner expressed a concern that sweeping judicial precedents on preemption under the FPA can constrain FERC's discretion to make its own policy judgments about net metering for rooftop solar. *New Eng. Ratepayers Ass'n*, 172 FERC ¶ 61,042 (July 16, 2020) (Danly, Comm'r, concurring) (noting that "dismissing the petition on procedural grounds may well result in a patchwork quilt of conflicting decisions if the questions raised in the petition are instead presented to federal district courts across the country," that federal courts "are not steeped in the history of the Federal Power Act nor in matters of national energy policy," and that "[c]onfusion, delay and inconsistent rules — some of which will apply to individual states or parts of states — will be the inevitable result").

considerable discretion to decide cases based on factual findings about when a regulator's actions preclude the possibility for another regulator to exercise its assigned authority. A broader form of conflict preemption would assess obstacles that would require courts to use the guidepost of the FPA's purposes as a criterion for evaluating whether one regulator aims at another's assigned authority in a way that conflicts with the purposes of the FPA.⁷⁵ Such an approach generates narrower precedents and is less likely than field preemption to lead to premature or overbroad preemption rulings that can threaten the interdependent workings of federal and state regulators in approaching energy markets.

2. *Grounding an "Aiming at" Test in Facts and Reasons — Not Claims to Authority.* — Basing jurisdiction on a zone of authority resonates well with those who want to see courts use a textual approach to interpreting the FPA. But such an approach to the "aiming at" test is either too simplistic to be useful on its own terms, or lacking a limiting principle. To the extent that an "aiming at" test invites judges to project their own jurisdictional lines onto the statute in order to find a zone of authority, it is likely to make textualists uncomfortable. Outside of those cases where a state directly regulates an endeavor that Congress has assigned to FERC, jurisdictional disputes under the FPA cannot simply be adjudicated as purely legal questions. Where the FPA does not clearly define the exact bounds of a delegation, on what basis would a court identify a regulator's zone of authority? A court could look to the language Congress used in the statute, but the language of section 201(b) of the FPA limits FERC's delegation only in residual language ("any other sale") or by referencing specific "facilities" that are beyond the scope of FERC's jurisdiction.⁷⁶ Christiansen and Macey's approach to the bright line would treat this limit on FERC's delegation as an assignment of a zone of authority to states, but a statutory limit on one regulator's delegation does not constitute an assignment of authority to someone else. Even if it did, a court treating this as a zone of authority would need to define its bounds, and the FPA does not define "any other sale" or generation or distribution "facilities." Perhaps courts could draw on their wisdom to attribute meaning to these terms — and the "aiming at" test might help to frame such a task — but as others have noted, using field preemption to project meaning onto statutes can readily turn the "entire game" of statutory interpretation into a strategy of

⁷⁵ Christiansen and Macey reject this "more nebulous" form of conflict preemption under the FPA as "inherently . . . subjective." Christiansen & Macey, *supra* note 6, at 1402. I disagree that it is subjective, as indicators of regulator purposes can be established by objective criteria, and I see obstacle preemption as a doctrinal tool that enables an "aiming at" test to operate outside of a field preemption approach.

⁷⁶ 16 U.S.C. § 824(b)(1).

defining the level of generality — which ultimately depends on nontextual interpretive criteria.⁷⁷

Rather than making jurisdiction hinge on a zone of authority — a question of law — an “aiming at” test would best focus its attention on the facts and reasons related to a regulator’s exercise of authority. As a practical matter, jurisdictional challenges relating to preemption almost always require a court to make at least some factual findings about how a state’s assertion of regulatory power interacts with FERC’s initiatives. Christiansen and Macey are mindful of how assessing the interactions of different regulations presents especially complex factual questions under the “aiming at” test for jurisdiction.⁷⁸ But facts are facts, and outside of the situation where a state directly encroached upon an exclusive grant of authority to FERC, the ultimate touchstone of when one regulator has hit the target of another’s endeavor will depend on how it affects that endeavor. If it is truly impossible for the other regulator to exercise the authority the FPA allows it to, an impossibility preemption approach would help to address the question, but that too is a factual determination. Beyond that, courts would need to look to the purposes of the FPA in deciding if there is a conflict, using traditional tools of obstacle preemption. Unless the language of the statute clearly prohibits FERC or a state from doing something, what other criterion could be used to identify whether a target has been hit under the “aiming at” test?

An attractive alternative — which I am sympathetic to — is to define a limiting principle for an “aiming at” test procedurally. Christiansen and Macey explain: “[I]f FERC or a state energy regulator explains how a regulation promotes a goal over which that regulator has jurisdiction, and if that reason withstands scrutiny [on review], then the regulation aims at a matter that is subject to that regulator’s authority under the FPA.”⁷⁹ It is not clear what would give federal courts jurisdiction to review the reasons of state regulators under the FPA,⁸⁰ but a reasoned decisionmaking standard would be a helpful addition to the analysis of jurisdiction under the FPA. Like arbitrary and capricious review elsewhere, reasoned decisionmaking under such a standard cannot ignore

⁷⁷ See Note, *Last Refuge*, *supra* note 62, at 1067–68. See generally Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1 (2013).

⁷⁸ Christiansen & Macey, *supra* note 6, at 1398 (discussing how even in *Hughes* it was necessary for a court to carefully analyze how a state regulation “functioned in practice”).

⁷⁹ *Id.* at 1411–12.

⁸⁰ As Justice Gorsuch noted in his opinion for the plurality in *Virginia Uranium*, the Atomic Energy Act specifically stated: “Nothing in this section [that is, § 2021] shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.” *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1902 (2019) (plurality opinion) (quoting 42 U.S.C. § 2021(k) (alteration in original)). That statute thus makes an assessment of state purposes relevant to preemption, but there is no such provision in the FPA — so it is not clear why a state’s reasons for regulation should be relevant at all under an “aiming at” test.

the effects of regulatory or statutory purpose.⁸¹ Without an impossibility or obstacle preemption analysis, or some other criterion that courts can use to evaluate the consistency of the agency's reasons for exercising jurisdiction, the "aiming at" test is left searching for a regulator's zone of authority. In this sense, courts assessing jurisdiction where claims of authority are in conflict cannot ignore these purposes and effects any more than regulators can. So in my view, a conflict preemption approach gives courts a principled normative tool (based on impossibility or obstacle preemption) to assess when the interactions of regulators truly present a problem for authority the FPA assigns to a regulator — something that a zone of authority approach lacks.

One commonly cited concern with conflict preemption is that it leaves too much to judges. Yet it is less harmful to leave narrow factual findings or reasons about obstacle or impossibility preemption to judges than it is to invite judges to create a zone of authority where nothing in a statute clearly defines it. In contrast to applying field preemption, applying the "aiming at" test as a form of conflict preemption would be more likely to formulate standards than legal rules for addressing jurisdiction; to the extent that they limit their holdings to specific facts about conflicts, these judicial decisions would generate narrow judicial precedents about federal-state jurisdiction. A conflict preemption approach to jurisdiction would likely require courts to adjudicate more jurisdiction cases, and that is a cost to this approach; but over time it can generate more focused applications of jurisdiction by courts, in a manner that allows FERC and states more flexibility in approaching jurisdiction in their future endeavors than a field preemption approach would.

As an example, consider if FERC were to allow an organized wholesale energy market to include a state-set carbon price in its market-based sales tariffs. FERC does not need to exercise any regulatory power over a state-set carbon price, but without rendering a decision the agency could authorize the integration of the carbon price as a cost of production for a generator. As was true with zero emission credits, absent a decision from FERC that can be appealed, private litigants seeking to challenge state carbon pricing policies would likely bring Supremacy Clause challenges, forum shopping for a precedent from a federal district court that FERC's exclusive authority over wholesale rates preempts a state-specified carbon price for any jurisdictional sale of energy under the FPA. Judicial resolution of such questions typically

⁸¹ See, e.g., *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912–14 (2020) (finding agency decision to rescind immigration status arbitrary and capricious because, among other defects, it did not consider the hardship effects, a form of reliance interest); *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (holding that the EPA must consider cost impacts in deciding whether it is "appropriate and necessary" to regulate under the Clean Air Act); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983) (holding agency decisionmaking arbitrary and capricious due in part to agency being too quick to dismiss safety benefits of automatic seatbelts).

occurs on a limited record and may not even involve the participation of FERC. A field preemption analysis focused on sovereignty presents a considerable risk that some district court(s?) would hold, in a broadly framed decision, that FERC's delegated authority under the FPA to regulate wholesale rates, or its broad delegation to regulate practices affecting rates, preempts a state from setting a carbon price that is integrated into a FERC jurisdictional rate (as a matter of the first or second step of Christiansen and Macey's jurisdiction test), even though no federal regulator has actually exercised regulatory authority over the carbon price component of the rate.⁸²

In the end, my disagreement with Christiansen and Macey is not about the outcomes of specific cases. Rather, it is about which judicial method to decide jurisdictional disputes under the FPA will do less harm to future regulation of energy markets. Privileging field preemption as a doctrinal method to define a zone of jurisdiction — consistent with a unifying bright line principle — risks the creation of broad judicial precedents that can result in unintended swaths of dormant federal regulatory authority. To the extent that this occurs, energy firms with monopoly power can present barriers to entry for new market entrants and harm customers without any supervision or remedy — precisely the kind of regulatory “no man's land” that Justice Kagan has warned about.⁸³ The FPA's open-ended approach to federalism aims to promote exercises of power by federal and state regulators that complement each other, rather than conflict. It would be unfortunate if the jurisdictional bright line led litigants and courts to use field preemption to revive a divided sovereignty approach to energy federalism, in a manner that hamstring the ability of federal and state regulators to work together to address the problems presented in modern energy markets.

III. TOWARD AGENCY-LED PREEMPTION UNDER THE FPA

Judges would best promote the aims of energy federalism if they did not fixate on making *de novo* decisions about preemption, prior to FERC making a decision reflecting its own judgment of preemption under the FPA. Such an approach would be particularly beneficial to a conflict preemption approach to the “aiming at” test for jurisdiction under the FPA, by helping to alleviate concerns such as courts being

⁸² I do not dismiss the possibility that a virtuous judge could interpret and apply Christiansen and Macey's test in a principled manner to support a finding of no preemption on these facts. Rather, I intend only to suggest that the first and second prongs of their preemption analysis are more likely to lead federal courts to make broad decisions finding state preemption even where FERC has not exercised its regulatory authority or without any guidance from FERC. In my view, a field preemption approach produces more of a risk that at least some district courts would get it wrong — generating more precedents that will produce uncertainty for state carbon pricing policies.

⁸³ *FERC v. Elec. Power Supply Ass'n (EPSA)*, 136 S. Ct. 760, 780 (2016) (quoting *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 19 (1961)).

flooded with complicated fact patterns that require case-by-case determinations. It would also provide a useful context for applying the zone of authority approach to the bright line endorsed by Christiansen and Macey, by requiring FERC to weigh in on jurisdictional questions before courts do.

Where a federal court decides that a federal law preempts a state law or regulation prior to FERC making a preemption decision, it is more likely that there will be conflicting judicial precedents on preemption, factfinding by non-experts, and binding preemption rulings that cannot easily be changed. In addition, allowing private litigants to bring preemption challenges in federal court does not present a level playing field for those seeking to preserve a role for state regulation: states seeking to challenge federal policies (such as, for example, by refusing authorization of a carbon price) can only do so by appealing a federal agency order, which is reviewed under administrative law's deference principles. The expansion of federal authority over energy markets can be good policy where it is justified by facts and reasons in the record, but allowing private litigants to ask federal courts to make *de novo* decisions to preempt state law is likely to lead to premature expansions of federal power at the expense of states — even where the record does not support FERC regulating those activities. Any approach to preemption that is compatible with concurrent jurisdiction — as the “aiming at” test would presumably be — should provide a level playing field for litigants to raise preemption challenges.

Courts could play a more constructive role by taking a back seat in federal-state jurisdictional disputes and promoting an agency-led approach to preemption. In contexts where FERC wishes to preempt states, it would benefit the FPA's approach to federalism if FERC did so in an explicit and transparent manner. Federal regulators too could be more constructive and proactive if they issued guidance and regulations that made factual findings to better harmonize the operation of state approaches against the backdrop of interstate markets.

To the extent that Christiansen and Macey's doctrinal framework is used to assess preemption, it would be more likely to result in a principled approach to jurisdiction under the FPA if it were used in the first instance by FERC — not invoked as an objective legalistic test applied *de novo* by courts. A decision about when an exercise of regulatory powers over an activity concerning the sale of energy in interstate commerce is prohibited, and why, should be made in the first instance by FERC, the agency to which Congress has delegated authority under the FPA. FERC has the expertise about the energy industry to make sound factual findings about complex technical and operational issues in energy markets, including the interaction of federal and state regulation; as an independent, multimember agency FERC is more capable than federal courts of making these kinds of findings in a consistent and principled way.

Consider, again, the example of a state-specified carbon price that is reflected in an organized market's tariff. If passed through as a cost of production for a generator submitting a bid in an organized market, FERC would not need to exercise any regulatory authority over the carbon price aspect of a rate. If FERC authorizes a carbon price as a cost pass-through under a previously approved market-based rate, it is not regulating it. In such an instance, FERC would have issued no decision on carbon pricing subject to judicial review under the FPA. If, however, FERC exercised its authority to directly regulate the carbon price, or approved specific adjustments to it, then this decision could be subject to judicial review under the FPA. In reviewing FERC's decision, doctrinal analysis of the legality of an agency decision to preempt (or not preempt) a state regulation would be relevant — including an assessment of whether FERC has exclusive jurisdiction and whether state regulation directly targets FERC's exercise of regulatory power. However, the preemption analysis would inform judicial review of the agency's preemption decision under principles related to statutory interpretation (that is, to the extent that the statute is clear and unambiguous as a limit on the agency) or under the arbitrary and capricious standard (that is, as a guidepost for assessing whether the agency exercised its jurisdiction in a reasonable manner), not as a legalistic test applied by federal courts as a form of *de novo* review of federal and state regulation.

An agency-led preemption approach would promote uniformity, enable federal regulators to more effectively coordinate state initiatives, and allow for more flexibility, while also allowing federal regulators to close gaps in energy markets where necessary. It also would level the playing field for states to build a record supporting their own claims to exercising regulatory authority in ways that are not inconsistent with FERC's exercises of regulatory power.

If taken seriously, an agency-led preemption approach would change how federalism disputes are litigated under the FPA. The FPA provides for judicial review of FERC's decisions, but it does not expressly create a private cause of action. If courts were to recognize that there is a bar on private causes of action under the FPA,⁸⁴ federal courts would be powerless to conclude that state initiatives, such as a state-specified carbon price, are invalid where a federal agency has failed to provide the

⁸⁴ Elsewhere, Christiansen has questioned whether the FPA even creates a private cause of action to raise preemption questions in federal court. See Matthew R. Christiansen, Essay, *The FPA and the Private Right to Preempt*, 84 GEO. WASH. U. L. REV. ARGUENDO 129, 130, 132 (2016) (questioning whether *Hughes*, a challenge brought by a private party under the Supremacy Clause of the U.S. Constitution, should have been in federal court at all, given the FPA's lack of a clear private enforcement provision).

initial factual and legal support for such a determination.⁸⁵ In *Hughes*⁸⁶ and in other recent cases challenging state zero emission credit programs,⁸⁷ no decision by FERC was under review, so these kinds of cases should have little precedential impact on future exercises of authority by either FERC or states. Absent an initial determination of preemption by a federal regulator that is reviewable by a court, it would be counterproductive, and even harmful, for courts to apply an objective preemption test in the first instance to set precedents that govern future jurisdictional conflicts.

Once a federal agency has made initial factual findings and provided rationales to assert its regulatory authority over jurisdictional market activities (or to forgo exercising its authority), a federal court's role is limited: it must defer to a federal agency's findings of jurisdictional facts, to the extent that they are supported by record evidence. But it is also not toothless: doctrinal considerations related to preemption are relevant to a court's review of whether the federal agency's assertion of regulatory authority extends beyond what Congress delegated to it under the statute, and where a statute does not clearly cabin FERC's authority FERC's decisions must ultimately survive arbitrary and capricious review. The "aiming at" test in particular would help to frame the agency's assessment of reasons where it is not clear, based on the text of the FPA, that FERC has exceeded its delegated authority. The relevant remedy for federal courts would be to either uphold or invalidate federal agency decisions that preempt state programs, but not to reject state programs under the FPA unless FERC agrees and has weighed in with an agency decision record supporting their rejection.

An objection to such an approach is that, in comparison to having courts adjudicate preemption claims in the first instance, it may enable FERC to run roughshod over states. However, such an approach ultimately gives more to states than it takes from them: to the extent that the FPA delegates broad authority to FERC to regulate practices affecting wholesale rates, FERC certainly may be able to assert its regulatory reach into areas that states have historically regulated. Even an agency preemption approach would not allow FERC to do so without limit. If FERC were to assert that its jurisdiction exceeds the limits specified in

⁸⁵ Of course, the state law would still be subject to a constitutional challenge under the dormant commerce clause.

⁸⁶ For at least two Justices, this was a concern at the oral arguments in *Hughes*. See, e.g., Transcript of Oral Argument at 30, *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016) (Nos. 14-614, 14-623), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-614_g2hk.pdf [<https://perma.cc/DH3U-CCSP>] (Justice Breyer: "[T]ruer words were never spoke, than I am not quite on top of how this thing works."); *id.* at 24 (Justice Breyer: "I don't understand the procedural posture of this case. . . . [W]e don't have FERC's opinion. We only have it through the SG. I thought there was a doctrine called primary jurisdiction . . ."); *id.* at 38-39 (Justice Sotomayor: "I'm a little bit like Justice Breyer on this. I'm not quite sure how everything is working . . .").

⁸⁷ See cases cited *supra* note 73.

the FPA — extending, for example, to retail sales or generation or distribution facilities — this would be *ultra vires*. Beyond this, in contrast to a “bottom up” approach to the bright line, courts would not have any role in directly enforcing statutory limits on FERC’s exercise of authority under the “aiming at” test until FERC has done so itself. And once FERC does so, any FERC decision to extend its regulatory reach is subject to arbitrary and capricious review. States would be encouraged to participate actively in FERC proceedings and to develop a record to support their interests and concerns; and, as part of arbitrary and capricious review, a court can evaluate whether FERC has sufficiently considered whether its exercise of authority aims beyond a limit Congress has placed on the delegation of power to the agency because of state regulation of that activity. That consideration would include an assessment of facts related to the effects of FERC’s regulation on any limits Congress placed on its delegation of authority to FERC based on preserving state regulation of activities (such as retail prices) or facilities (such as generation and distribution). The primary focus of reviewing courts would be on the agency’s reasons and its factual findings — not on imposing a legal limit on FERC’s delegation independent of an agency decision and record. Such an approach may not give states as much of a claim to *ultra vires* legality against FERC, but it also would require FERC to do more in justifying its decisions as a part of arbitrary and capricious review. Moreover, to the extent it steers courts away from making preemption findings in broad precedents that rely on doctrines such as field preemption, it also is less likely to lead to legal uncertainty for states that wish to exercise jurisdiction where FERC has failed to do so. By contrast, a bright line approach would open states to a preemption challenge any time they take an action that affects wholesale markets. Ultimately, this gives states more space in which they can adopt policies than a bright line approach does.

In comparison to allowing judges to decide jurisdictional issues in the first instance under the FPA, an agency preemption approach better advances the coordination and information production functions of energy federalism. For example, in the context of a state-specified carbon price, this would allow FERC to rely on organized markets to integrate carbon prices based on state policies, allowing transactions in markets to produce information about how their use affects energy transactions. In addition, it is more likely to produce a single uniform national approach to resolving federalism disputes, reducing the need for case-by-case assessments of preemption by trial courts (ironically, better advancing the original purpose of the judicial bright line). An agency preemption approach would allow states the flexibility to step in to regulate harmful market conduct where federal regulators have failed to do so because of limited resources or due to a lack of knowledge (and a need for learning) about new forms of technology or harms. By contrast, if every energy federalism dispute is framed in the first instance by a

court prematurely applying a legalistic bright line, there is more of a risk that the coordination and information production functions of energy federalism will be thwarted in ways that benefit neither FERC nor the states.

CONCLUSION

I find a lot to agree with in Christiansen and Macey's article: they recognize the need for a dynamic approach to resolving jurisdictional disputes under the FPA, and their framework stands out for bringing clarity to the Court's jurisdiction doctrine. I find their three-prong framework helpful, especially in thinking about jurisdictional issues where federal and state regulators are engaged in interdependent endeavors. But I do not believe that the resolution of most jurisdictional conflicts under the FPA depends on a bright line principle, or requires an "aiming at" test based on a zone of authority. Conflict preemption doctrine is consistent with the case law and provides courts a basis for assessing facts and reasons — based on impossibility or obstacles to the FPA's purposes — for adjudicating jurisdictional disputes under the FPA. It allows courts flexibility to adjudicate jurisdictional disputes consistent with the purposes of the statute through narrow, fact-specific precedents, rather than inviting broad judicial rulings on jurisdiction that hamstring regulators.

Christiansen and Macey's framework is most likely to advance energy federalism's aim if it is taken seriously in the first instance by FERC, not applied *de novo* by federal courts in private preemption challenges. Where FERC has exercised its judgment to make a decision on the record about preemption under the FPA, courts reviewing the agency's decision will have clearer facts and a better understanding of how federal and state regulations interact than if judges attempt to do this on their own. Any approach to federalism under the FPA must take seriously that Congress delegated a vast range of powers to FERC to close regulatory gaps that can produce harms in energy markets, without providing many clear answers to their limits, at least in the text of the FPA. Especially in an era where states are increasingly taking clean energy and carbon reduction goals seriously and finding innovative ways to address them, it is important to empower FERC to exercise its judgment and expertise to enhance this goal, not generate new judicially imposed constraints that will prematurely hamstring FERC or states. This is the only rational way for courts to respect the functions of energy federalism.