

PROTECTING STATES IN THE NEW WORLD OF ENERGY FEDERALISM

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ABSTRACT

In a trilogy of recent cases, the Supreme Court has launched a quiet revolution in energy federalism. With little fanfare, it has abandoned its decades-long effort to divide electricity regulation into mutually exclusive spheres of federal and state authority. Instead it has embraced a more sophisticated concurrent jurisdiction model—against the wishes of Justice Scalia, who opposed this transformation in his final published dissent.

This Article explores the ramifications of this revolution, particularly for state energy regulators. The shift to concurrent jurisdiction is long overdue. The historic model of the local vertically integrated utility has long been replaced by regional, complex, innovative electricity markets. Concurrent jurisdiction allows regulators to adapt more nimbly to changing market dynamics, unrestrained by the outdated formalism of the old dual federalism model.

But this shift raises important questions regarding how states can remain relevant in an increasingly complex regulatory environment without the judicial safeguards that the dual federalism model once provided. States remain vital sources of local knowledge, experimentation, and expertise. But in this brave new world of concurrent jurisdiction, federalism-related disputes are more likely to be settled in the political arena than in the courtroom—an arena where federal authorities have the advantage. Drawing upon recent scholarship in negotiation theory and dynamic federalism, this Article discusses ways that state officials can, and do, negotiate with their federal counterparts to maintain influence over energy policy decisions. It also highlights procedural reforms that would improve the robustness and effectiveness of negotiations between state and federal officials in the

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INTRODUCTION

In the last two terms, the Supreme Court has quietly signaled a significant shift in the law of energy federalism. The Court has traditionally employed a dual federalism paradigm to settle jurisdictional disputes. Under this model, New Deal-era statutes such as the Federal Power Act¹ and the Natural Gas Act² divided the energy industry neatly into two mutually exclusive spheres: federal agencies regulated interstate or wholesale operations, while intrastate or retail operations, which historically comprised the bulk of industry activity, remained the exclusive prerogative of state regulators.³ In the event of a jurisdictional dispute, the Court would typically engage in a formalistic inquiry to determine whether a particular initiative is better placed on the federal or state side of that jurisdictional “bright line.”⁴

But the Court has struggled at times to police this line,⁵ and as Professor Jim Rossi has argued,⁶ a recent trilogy of cases has signaled a shift toward concurrent jurisdiction over some facets of energy markets. In early 2016, the Court allowed the Federal Energy Regulatory Commission (FERC) to regulate transactions in which energy providers pay consumers to reduce electricity consumption during peak demand—over the dissent of Justice Scalia, who argued (in what turned out to be his final opinion) that the agency had crossed into the state’s regulatory sphere.⁷ Shortly thereafter, the Court invalidated

¹ Federal Power Act, Pub. L. No. 74-333, ch. 687, tit. II, 49 Stat. 803 (1935) (codified as amended in scattered sections of 16 U.S.C.). The 1935 Federal Power Act amended an earlier 1920 Act that granted the Federal Power Commission licensing authority over hydroelectric dams, which fell outside state purview by virtue of affecting the navigable waters of the United States. *See id.* at 838; Federal Water Power Act, Pub. L. No. 66-280, ch. 285, 41 Stat. 1063 (1920).

² *See* Natural Gas Act, Pub. L. No. 75-688, ch. 556, 52 Stat. 821 (1938) (codified as amended at 15 U.S.C. § 717 (2012)).

³ *See* 15 U.S.C. § 717(b) (2012); 16 U.S.C. § 824(b)(1) (2012).

⁴ *See, e.g.,* *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm’n*, 332 U.S. 507, 517 (1947) (discussing the “clear and complete” line between federal and state jurisdiction); *Pub. Utils. Comm’n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 469 (1943) (conducting this inquiry).

⁵ *See, e.g.,* *New York v. FERC*, 535 U.S. 1, 7–8 (2002) (explaining that regionalization of electricity markets challenges the market assumptions informing the Federal Power Act’s division of regulatory authority).

⁶ Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 430–37 (2016).

⁷ *FERC v. Elec. Power Supply Ass’n (EPSA)*, 136 S. Ct. 760, 767 (2016); *see also id.* at 784, 786 (Scalia, J., dissenting) (arguing the rule at issue regulated “retail electricity sales,” therefore being a matter of state, rather than FERC, authority). A few weeks later, the Court issued an extraordinary stay of the Environmental Protection Agency’s Clean Power Plan, pending a lower-court challenge by over two dozen affected states. *Chamber of Commerce v. Envtl. Prot. Agency*, 136 S. Ct. 999 (2016). Commentators have suggested this was the first instance in recent memory of the Court staying a federal regulation pending the outcome of a lower-court decision, which is a testament to the Court’s unusual interest in these cases. *See, e.g.,* William W. Buzbee, *Federalism-Facilitated Regulatory Innovation and Regression in a Time of*

Maryland's attempt to guarantee new power plants a fixed price in federally administered wholesale markets, but carefully explained that states may regulate within their sphere even when their efforts incidentally affect areas within FERC's domain.⁸ These electricity cases followed a similar decision during the preceding term that permitted the overlap of state and FERC authority in the related field of natural gas regulation, which prompted the late Justice Scalia to accuse the Court of "smudg[ing]" the line between federal and state authority over energy markets.⁹

The Court's seeming willingness to embrace a more sophisticated model of energy federalism follows a decades-long effort by Congress and FERC to restructure electricity markets. Traditionally, consumers purchased electricity from vertically integrated electric utilities that were regulated primarily at the state level, subject to rate regulation and nondiscrimination duties in exchange for protection from "destructive" competition.¹⁰ But beginning in the 1970s, Congress began to stimulate competition among electricity providers, prompting a lengthy realignment period wherein local vertically integrated utilities were dissected, restructured, and subjected to new forms of competition. This competitive dynamism, in turn, promoted greater economies of scale, leading traditionally fragmented markets to become regional in scope and more complex than they were in the monopoly era.¹¹ This realignment was part of a broader movement that Joseph Kearney and Thomas Merrill dubbed the "Great Transformation of Regulated Industries Law,"¹² through which several traditionally rate-regulated infrastructure industries were subjected to experiments in managed competition and increased consumer choice.¹³

Environmental Legislative Gridlock, 28 GEO. ENVTL. L. REV. 451, 455 n.10 (2016) ("On February 9, 2016, the Supreme Court issued an unprecedented stay of the CPP, prior to creation of a regulatory record for review or a lower court ruling and with no opinion explaining its issuance of a stay.").

⁸ See *Hughes v. Talen Energy Mktg.*, 136 S. Ct. 1288, 1292, 1297–98 (2016).

⁹ *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015); *id.* at 1603 (Scalia, J., dissenting) (arguing the majority opinion "smudge[d]" the line between state and federal authority).

¹⁰ See Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1353–54 (1998) (quoting RICHARD J. PIERCE, JR. & ERNEST GELLHORN, *REGULATED INDUSTRIES IN A NUTSHELL* 347 (3d ed. 1994)); see also Daniel A. Lyons, *Federalism and the Rise of Renewable Energy: Preserving State and Local Voices in the Green Energy Revolution*, 64 CASE W. RES. L. REV. 1619, 1626 (2014) (discussing regulatory tradeoffs in the electricity industry).

¹¹ See, e.g., *New York v. FERC*, 535 U.S. 1, 7–8 (2002) ("[U]nlike the local power networks of the past, electricity is now delivered over three major networks, or 'grids,' in the continental United States. . . . [T]he nature and magnitude of coordination transactions have enabled utilities to operate more efficiently by transferring substantial amounts of electricity not only from plant to plant in one area, but also from region to region, as market conditions fluctuate." (internal quotation marks and citation omitted)).

¹² Kearney & Merrill, *supra* note 10, at 1323.

¹³ *Id.* at 1325–26.

In electricity, as elsewhere, this “great transformation”¹⁴ in regulatory philosophy prompted an equally seismic shift in regulatory-utility federalism.¹⁵ To accomplish their goals of jumpstarting competition and eliminating pockets of market power that could impede consumer choice, federal authorities needed to reach into intrastate markets that had traditionally been within the states’ portfolio.¹⁶ This practice spawned conflicts with state regulators eager to protect their jurisdiction and thwart federal initiatives that they viewed as inconsistent with state regulatory objectives.¹⁷ These disputes increased as the growing regionalization and complexity of electricity markets multiplied the planes of potential conflict between federal and state officials.

By embracing concurrent jurisdiction, the Supreme Court appears to have found a new equilibrium between federal and state regulatory claims, one that relies on functionalist analysis of particular regulatory programs instead of formalistic emphasis on historic statutory silos. Rather than strictly enforcing mutually exclusive zones of authority as in years past, the Court seems comfortable allowing federal and state regulators to act even if initiatives at one level of government intrude somewhat into the other’s sphere. This is a positive development overall, as it aligns federalism doctrine more closely to the realities of the modern electricity market.¹⁸ The effect—indeed, the goal—of the great transformation was to make static, unchanging electricity markets more nimble, disruptive, and competitive. Today’s increasingly fluid and innovative energy providers require a more fluid and innovative regulatory regime that can adapt more quickly to changing market conditions. The common-law-like functionalist approach of concurrent jurisdiction is more likely than dual federalism’s formalism to deliver the regulatory flexibility necessary to govern this dynamic new reality.¹⁹

But the erosion of judicial safeguards to protect state jurisdiction raises important questions about the future enforcement of federalism norms in the energy law field. Although energy markets are no longer primarily intrastate, neither are they fully national in scope; rather, most energy markets are regional and benefit from the input of state regulators who have a better

¹⁴ See *id.* at 1324.

¹⁵ See, e.g., *New York*, 535 U.S. at 8–9.

¹⁶ See Ari Peskoe, *A Challenge for Federalism: Achieving National Goals in the Electricity Industry*, 18 MO. ENVT'L. L. & POL'Y REV. 209, 225–26 (2011).

¹⁷ See, e.g., *FERC v. Mississippi*, 456 U.S. 742 (1982).

¹⁸ See, e.g., Rossi, *supra* note 6, at 405 (arguing that allowing concurrent jurisdiction in the context of modern energy markets “better advances the primary objective of [the energy] statutes”).

¹⁹ Cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1181 (1989) (highlighting that standards give a decision maker more flexibility than rules do).

understanding of how broad federal policies should be tailored to fit local needs.²⁰ Moreover, several federal initiatives—including the demand-response program at issue in the *FERC v. Electric Power Supply Ass’n*²¹ decision—began in state laboratories of experimentation.²² For these and other reasons, states should maintain an active presence in this policy space, although that challenge has been made marginally more difficult by the demise of dual federalism.

This Article examines the levers that states can, and do, deploy to maintain relevance in an increasingly complex regulatory environment. Part I traces the origins of the dual federalism regime that historically governed electricity regulation, and the pressures that have begun putting cracks in this model in the modern era. Part II focuses on a trilogy of recent Supreme Court cases that acknowledge the shift toward a more cooperative federalism regime. It argues that in this “brave new world” of concurrent jurisdiction,²³ federalism-related disputes are more likely to be settled in the political arena than in the courtroom.²⁴ Finally, Part III examines how states can protect their interests given the decline of judicially enforceable jurisdictional boundaries. Drawing upon recent scholarship in negotiation theory²⁵ and dynamic federalism,²⁶ this Article discusses the tools available for state officials to negotiate with their federal counterparts to make their voices heard. It closes by suggesting procedural reforms that would improve the robustness and effectiveness of negotiations between state and federal officials in the policymaking sphere and therefore improve the likelihood that policy decisions will be sensitive to federalism concerns.

I. THE RISE AND FALL OF DUAL FEDERALISM IN ENERGY LAW

This Part discusses the origin of the dual federalism model and the modern factors that have placed it under increasing stress. As discussed below, the

²⁰ See *supra* note 11 and accompanying text (describing the transformation in energy markets).

²¹ 136 S. Ct. 760 (2016).

²² See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²³ Rossi, *supra* note 6, at 403.

²⁴ See, e.g., *id.* at 407 (“[C]oncurrent jurisdiction emboldens political institutions, rather than courts, to consider and make decisions about the federalism balance in regulation of interstate energy transactions.”).

²⁵ See, e.g., Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011) (framing federalism as a process of negotiation between the federal government and the states and proposing a theoretical framework for organizing this bargaining).

²⁶ See, e.g., Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773 (2013) (proposing dynamic federalism principles to navigate the complex interactions between federal and state authority over energy regulation).

Federal Power Act, which gives FERC jurisdiction over energy markets, was enacted during the New Deal against a backdrop of extensive state regulation of the electricity sector and was created primarily to regulate conduct that states could not reach because of the Commerce Clause.²⁷ For the first forty years, the law recognized a strict dual federalism regime, wherein energy law was sharply divided into two mutually exclusive hemispheres, with both state and federal regulators exercising plenary authority within their respective zones of control.²⁸ But following the 1970s energy crisis, Congress and then FERC upset this balance by reaching into the state sphere to encourage greater competition within electricity markets.²⁹ Ultimately, these reforms drove a comprehensive restructuring of electricity markets, in the process prompting a series of federalism-related conflicts with affected states.

A. Dual Federalism by Design: The Structure of New Deal Statutes

From its inception, energy law has been shaped by the concept of dual federalism. Courts interpreted the relevant statutes to create sharp and mutually exclusive divisions of authority between the federal government and the states. As explained by the Court when discussing the Natural Gas Act, it was “clear” that the statute contemplates “a harmonious, dual system of regulation . . . [with] federal and state regulatory bodies operating side by side, each active in its own sphere . . . without any confusion of functions.”³⁰

This division of authority was not accidental, but rather was an intentional feature designed during the New Deal, in part to protect preexisting state regulators from federal intrusion.³¹ In 1907, Wisconsin and New York enacted the first state public utility laws, which subjected electricity utilities and other businesses affected by the public interest to comprehensive regulation by state authorities.³² At the time, economists and policymakers considered electricity and other infrastructure markets to be “natural monopolies,” which were most efficiently served by a single firm and within which competition was likely to be destructive rather than beneficial.³³ Consistent with this theory, Wisconsin’s public utility law “represented a grand bargain between” state regulators and

²⁷ See *infra* notes 31–43 and accompanying text.

²⁸ See *infra* notes 48–55 and accompanying text.

²⁹ See *infra* notes 56–102 and accompanying text.

³⁰ *Pub. Utils. Comm’n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 467 (1943).

³¹ Ernest Young discusses the intellectual roots of the dual federalism model, in which “the sovereignty principle coexisted with a strong principle of autonomy reserving significant regulatory authority to the states.” Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 24 (2004).

³² See Lyons, *supra* note 10, at 1626; Peskoe, *supra* note 16, at 212–13.

³³ Lyons, *supra* note 10, at 1626.

the utilities they regulated: the state would grant each utility a monopoly over service within a given geographic area, which would protect the firm from competition and entice the utility to invest the huge fixed costs required to start a utility.³⁴ In exchange, the utility agreed to rate regulation, minimum service requirements, and nondiscrimination obligations enforced by state regulators to make sure the firm did not abuse its monopoly position.³⁵ By 1920, nearly every state had a similar law governing the electricity industry.³⁶

As the Supreme Court has explained many times,³⁷ the need for federal electricity legislation developed almost by accident, the byproduct of a regulatory gap in the state system first identified by the Court in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*³⁸ In that case, a Rhode Island utility agreed to sell a small amount of surplus electricity production to a neighboring Massachusetts utility for delivery to Massachusetts consumers.³⁹ The selling utility later successfully sought a rate increase for sale of this surplus electricity from the Rhode Island Public Utility Commission, but when the Massachusetts utility challenged the state commission's order, the Supreme Court found that the rate increase constituted an unconstitutional burden on interstate commerce.⁴⁰ In doing so, the Court exposed a regulatory void wherein monopoly utilities could sell electricity across state lines without governmental review to assure the transaction satisfied the public interest.

Shortly thereafter, Congress enacted the Federal Power Act⁴¹ to close this “*Attleboro* gap.” The Act was careful to assure that the new federal regulator would not intrude upon the regulatory efforts already underway at the state level. The Report of the House Committee on Interstate and Foreign Commerce that accompanied the bill clarified that the Federal Power Commission (FERC's predecessor) would be “a complement to and in no sense a usurpation of [s]tate regulatory authority.”⁴² Similarly, FPC

³⁴ See Lyons, *supra* note 10, at 1626–27.

³⁵ *Id.* at 1626.

³⁶ See *id.* at 1626–27; Peskoe, *supra* note 16, at 213.

³⁷ See, e.g., *New York v. FERC*, 535 U.S. 1, 20–21 (2002) (discussing the *Attleboro* gap); *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 378–80 (1983) (same).

³⁸ 273 U.S. 83, 90 (1927).

³⁹ *Id.* at 84.

⁴⁰ *Id.* at 90.

⁴¹ Federal Power Act, Pub. L. No. 74-333, ch. 687, tit. II, 49 Stat. 803, 838, 847 (1935) (codified as amended in scattered sections of 16 U.S.C.).

⁴² H.R. REP. NO. 74-1318, at 7, 8, 27 (1935); see also *Conn. Light & Power Co. v. Fed. Power Comm'n*, 324 U.S. 515, 526 (1945) (discussing the Federal Power Act's legislative history).

Commissioner Clyde Seavey testified before Congress in support of the bill, noting that it was “conceived entirely as a supplement to, and not a substitute for State regulation.”⁴³

To that end, the Federal Power Act defines the Commission’s jurisdiction in both positive and negative terms. Section 201 grants FERC two related regulatory powers: the agency has power to regulate (1) “the transmission of electric energy in interstate commerce” and (2) “the sale of electric energy at wholesale in interstate commerce.”⁴⁴ But the same passage then clarifies that the Commission “shall not have 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 or over facilities for the transmission of electric energy consumed wholly by the transmitter.”⁴⁵ To resolve any confusion, the preface to this section explains that Congress intended “such Federal regulation, however, to extend only to those matters which are not subject to regulation by the [s]tates.”⁴⁶ While the Supreme Court has interpreted this last phrase as a statement of policy rather than an independent restriction on the Commission’s authority, it nonetheless explained that the policy statement “is relevant and entitled to respect as a guide in resolving any ambiguity or indefiniteness” in the statute.⁴⁷

For the next several decades, the notion that federal and state regulators each presided over distinct and mutually exclusive spheres of authority shaped energy law. One could argue that this statutory dual federalism was a logical

⁴³ *Public Utility Holding Companies: Hearing on H.R. 5423 Before the H. Comm. on Interstate & Foreign Commerce*, 74th Cong. 384 (1935) (statement of Clyde Seavey, Comm’r, Federal Power Commission); see *Conn. Light & Power*, 324 U.S. at 525.

⁴⁴ 16 U.S.C. § 824(b)(1) (2012).

⁴⁵ *Id.* This state savings clause, defining federal jurisdiction in negative terms, is not unique to the Federal Power Act. Like many other New Deal-era statutes, the Federal Power Act was modeled upon the first federal public utility law, the Progressive-era Interstate Commerce Act of 1887 (ICA), which governed interstate railroads. See Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887). In the *Shreveport Rate Case*, the Supreme Court interpreted the ICA to grant federal regulators authority to regulate certain intrastate railroad practices on the theory that such intrastate practices had an effect on federally regulated interstate rates. *Hous., E. & W. Tex. Ry. Co. v. United States (Shreveport Rate Case)*, 234 U.S. 342, 351–52 (1914). When Congress enacted the Communications Act of 1934 to provide for federal regulation of the burgeoning Bell Telephone empire, it explicitly added a savings clause prohibiting the new Federal Communications Commission from assuming jurisdiction over intrastate communications. See 47 U.S.C. § 152(b) (2012). This provision was included to clarify that the logic of the *Shreveport Rate Case* would not extend to telephone regulation. See Daniel A. Lyons, *Technology Convergence and Federalism: Who Should Decide the Future of Telecommunications Regulation?*, 43 U. MICH. J. L. REFORM 383, 389 (2010). One may fairly assume that a similar savings clause in the Federal Power Act was included to give state regulators similar security that their spheres of authority were not at risk by the new federal regulator.

⁴⁶ 16 U.S.C. § 824(a).

⁴⁷ *Conn. Light & Power*, 324 U.S. at 527.

outgrowth of pre-New Deal conceptions of the limits of the federal government's Commerce Clause power to regulate intrastate activity.⁴⁸ But long after cases like *Wickard v. Filburn*⁴⁹ smudged the *constitutional* boundaries and admitted the possibility of overlapping power to regulate, courts continued to patrol these *statutory* bright lines in energy law cases to assure that one branch of government did not intrude into the realm of another.⁵⁰ The language of these decisions was characteristically broad and straightforward, leaving no room for ambiguity or common-law-like functionalist analysis of the impact of a particular program. For example, the Court explained that the Natural Gas Act's jurisdictional line, which parallels that of the Federal Power Act, was "clear and complete" and "cut sharply and cleanly" between federal and state authority in a way that preserved state regulatory authority that existed "before the Act was passed."⁵¹ Similarly, the Court "squarely rejected" any suggestion that jurisdictional disputes under the Federal Power Act could be "determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis."⁵²

B. The Statutory Shift Toward Cooperative Federalism

1. Public Utility Regulatory Policies Act of 1978

For the next forty years, dual federalism coexisted relatively peacefully with the traditional rate-regulated structure of the electricity industry. Until 1978, the vast majority of electricity utilities were vertically integrated intrastate firms, each of which generated its own electricity, transmitted it along high-voltage transmission lines, and distributed it to retail customers within the utility's service territory.⁵³ The Public Utility Holding Company Act

⁴⁸ See, e.g., Robert Post, *Federalism in the Taft Court Era: Can It Be Revived?*, 51 DUKE L.J. 1513, 1518 (2002) (noting that the Taft Court subscribed to a theory of "[d]ual sovereignty [which] held that the nation and the states were each authorized to control autonomous and distinct domains of social life").

⁴⁹ 317 U.S. 111 (1942).

⁵⁰ Which is not to say that the Court continued to apply pre-New Deal constitutional limits to the Federal Power Commission. My point is more modest, being that just as pre-*Wickard* case law divided the country into federal and state jurisdiction as a constitutional matter, so too did post-New Deal case law create a two-sphere regulatory world as a statutory matter.

⁵¹ *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n*, 332 U.S. 507, 517 (1947); see Rossi, *supra* note 6, at 417.

⁵² *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215–16 (1964).

⁵³ See RICHARD J. PIERCE JR. & ERNEST GELLHORN, *REGULATED INDUSTRIES IN A NUTSHELL* 364 (4th ed. 1999).

of 1935 provided strong incentives for utilities to limit their operations to a single state.⁵⁴ As Professor Rossi has chronicled, the Federal Power Commission—and later FERC—aggressively protected its jurisdiction, leading to numerous court decisions highlighting the federal government’s “plenary” authority over interstate and wholesale markets and noting that the Federal Power Act has “occupied the field” in these areas.⁵⁵ But these decisions only reinforced the notion of a sharp, bright, and relatively static line between regulation of interstate and intrastate operations.

This static, rigid conception of the energy industry began to change with the Public Utility Regulatory Policies Act of 1978 (PURPA).⁵⁶ Passed as a reaction to the 1970s energy crisis, PURPA was meant to promote energy conservation and to diversify America’s electric power industry so that the country would not be so reliant upon fossil fuels.⁵⁷ In pursuit of these federal objectives, PURPA included two significant provisions that reached into the sphere of authority traditionally reserved to the states. First, it required state public utility commissions to “consider” whether to adopt several measures meant to promote energy conservation as part of their ratemaking efforts.⁵⁸ The statute spelled out the procedures by which state ratemakers must “consider” these federal suggestions,⁵⁹ and it required that states report their progress periodically to FERC.⁶⁰ Second, and perhaps more notably, PURPA instructed FERC to make rules encouraging non-utility companies to generate their own electricity using alternative energy sources such as cogeneration.⁶¹ The Act required utilities to buy electric power from these small power production facilities rather than generating power themselves if it was cost-efficient to do so, and gave FERC the power to exempt these non-utility electricity generators from otherwise applicable state laws.⁶²

⁵⁴ Public Utility Holding Company Act of 1935, ch. 687, 49 Stat. 803 (repealed 2005); *see* Lyons, *supra* note 10, at 1627; Peskoe, *supra* note 16, at 218–19.

⁵⁵ *See* Rossi, *supra* note 6, at 415–27.

⁵⁶ Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 16 U.S.C.).

⁵⁷ FERC v. Mississippi, 456 U.S. 742, 745–46 (1982).

⁵⁸ 16 U.S.C. § 2621(a) (2012); *see also id.* §§ 2621(d), 2623(b), 2624(a) (listing the various federal standards to be considered by state energy regulators).

⁵⁹ 15 U.S.C. § 3203 (2012); 16 U.S.C. §§ 2621(b)–(c)(2), 2623.

⁶⁰ 15 U.S.C. § 3209(a); 16 U.S.C. § 2626(a).

⁶¹ 16 U.S.C. § 824a–3(a). “Cogeneration” refers to the process of making electricity and other energy simultaneously, such as by using the steam left over from electricity generation to produce heat. This process can be useful for small-scale buildings or complexes with significant heating or cooling needs, such as office buildings or hospitals. *See id.*; *id.* § 796(18)(A) (defining “cogeneration facility”).

⁶² 16 U.S.C. § 824a–3.

As Professors Joseph Kearney and Thomas Merrill have noted in their seminal article *The Great Transformation of Regulated Industries Law*, PURPA was part of a larger shift in America's infrastructure industries away from traditional rate-regulated monopolies and toward the promotion of consumer choice.⁶³ In the railroad, airline, trucking, telecommunications, electricity, and natural gas industries, policymakers began to emphasize competition rather than regulation as the primary guarantor of consumer protection.⁶⁴ Commentators often described this change as "deregulation," although, as Professors Kearney and Merrill explain, "if 'deregulation' means that a system of public regulation is abolished and replaced by exclusive reliance on market transactions, this is an inaccurate characterization of what [was] happening."⁶⁵ It is perhaps more accurate to describe the new paradigm as one of "managed competition," wherein regulators radically rearranged existing markets to stimulate new competitors. The focus of regulators shifted from consumer protection of nondiscrimination norms to competitor protection, identifying and eliminating pockets of market power by incumbents and others that might inhibit market entry on a level playing field.⁶⁶

But like many other Great Transformation initiatives, this seismic shift in perspective in regulatory philosophy triggered an equally seismic shift in regulatory federalism. To achieve PURPA's goals of reducing energy consumption and promoting competition among new sources of electricity, Congress had to reach into a sphere—vertically integrated electricity utilities—that traditionally lay within the states' authority. Perhaps unsurprisingly, the act prompted a backlash from state regulators unhappy with the federal government's intrusion across the traditional regulatory divide.

The Supreme Court addressed this backlash in *FERC v. Mississippi*,⁶⁷ one of the first cases to raise doubts about the inviolability of the dual federalism model. In that case, state regulators challenged PURPA on constitutional grounds, alleging that the statute violated both the Commerce Clause and the Tenth Amendment as an intrusion into state sovereignty.⁶⁸ In a 5–4 decision,

⁶³ See Kearney & Merrill, *supra* note 10, at 1329–30.

⁶⁴ See Orloff v. FCC, 352 F.3d 415, 419 (D.C. Cir. 2003) (noting that "[a] carrier's success 'should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs—and not by strategies in the regulatory arena'" (quoting *In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd. 1411, 1420 (1994)).

⁶⁵ Kearney & Merrill, *supra* note 10, at 1324–25.

⁶⁶ *Id.* at 1361–64.

⁶⁷ 456 U.S. 742, 753 (1982).

⁶⁸ *Id.* at 752.

the Court upheld the statute, explaining that under the Commerce Clause, Congress could have preempted the field of electricity regulation completely if it had chosen to do so.⁶⁹ Given this fact, the Court explained, “PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the [s]tates to continue regulating in the area on the condition that they consider the suggested federal standards.”⁷⁰ While “the choice put to the [s]tates—that of either abandoning regulation of the field altogether or considering the federal standards—may be a difficult one,”⁷¹ it does not “involve the compelled exercise of Mississippi’s sovereign powers” and therefore does not unconstitutionally infringe upon the state’s sovereignty.⁷²

The Court recognized that there might be an alternative to the dual federalism model that heretofore dominated energy policy. Although the case did not involve interpretation of the Federal Power Act’s jurisdictional provisions, it nonetheless acknowledged the possibility that not every question of energy law fell neatly into the exclusive province of either FERC or its state analogues.⁷³ At least with regard to energy conservation measures and the promotion of alternative generation sources, the Court recognized that Congress had opened the door to “cooperative federalism”: a shared power arrangement wherein the federal government sets the basic policy goals of a regulatory scheme and enlists states to carry out the scheme, but states have some latitude to tailor policies in response to local conditions.⁷⁴

States responded to this invitation by pressing the jurisdictional envelope themselves, perhaps most notably with the *Pike County* doctrine. In *Pike County Power & Light Co. v. Pennsylvania Public Utility Commission*,⁷⁵ the Pennsylvania Public Utility Commission (PUC) excluded from the utility’s rate base a portion of the wholesale power cost that the utility paid to its parent company because the utility could have bought power more cheaply from an

⁶⁹ *Id.* at 765.

⁷⁰ *Id.* (emphasis omitted).

⁷¹ *Id.* at 766.

⁷² *Id.* at 769, 771.

⁷³ *Id.* at 761–62, 764–65, 769–71 (noting that although Mississippi possessed the ability to regulate energy via state regulatory bodies, it is not the case that such state-level regulation is totally separate from federal regulation under FERC because federal law frames elements that state regulators must consider with respect to rules and regulations impacting the use, creation, and sale of energy).

⁷⁴ See Jonathan H. Adler, *Judicial Federalism and the Future of Environmental Regulation*, 90 IOWA L. REV. 377, 384 & n.35 (2005); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1698 & n.23 (2001).

⁷⁵ 465 A.2d 735 (Pa. 1983).

alternative supplier.⁷⁶ The utility argued that the PUC infringed on FERC's jurisdiction by attempting to regulate the utility's wholesale rates.⁷⁷ The court disagreed, concluding that the state was not determining the wholesale rate that the parent company charged, but rather whether it was prudent for the utility to include that charge in its retail rate base.⁷⁸ The court in *Pike County* allowed the PUC to pass judgment on its utilities' wholesale-power purchasing decisions, thus giving both state and federal authorities influence over wholesale markets—a practice that was upheld in some states⁷⁹ but rejected in others as inconsistent with the Federal Power Act.⁸⁰ Both the Supreme Court and FERC acknowledged the existence of the *Pike County* doctrine without addressing whether it constituted a permissible interpretation of the Federal Power Act.⁸¹

2. *Energy Policy Act of 1992*

PURPA's effort to jumpstart competition in the electricity generation market was the opening salvo in a lengthy battle to restructure the nation's electricity markets. Professors Kearney and Merrill note that PURPA “inadvertently created a lobby for open access” to utility-owned transmission networks.⁸² PURPA-favored independent power producers sought to compete in FERC-regulated wholesale electricity markets, but were thwarted by the utilities' continued monopoly over the transmission lines that carry electricity from generators to consumers.⁸³ Vertically integrated utilities had little incentive to provide transmission facilities to independent generators who competed against the utility's own electricity generation facilities.⁸⁴ But FERC

⁷⁶ *Id.* at 736.

⁷⁷ *Id.* at 737.

⁷⁸ *Id.* at 738. To this point, the court held that FERC and the PUC serve complementary but separate roles in determining rates for electric service describers and that such an arrangement properly reserves to the PUC the sole ability to determine the reasonableness of such rates. *Id.*

⁷⁹ See, e.g., *Commonwealth Elec. Co. v. Dep't of Pub. Utils.*, 491 N.E.2d 1035, 1043–45 (Mass. 1986); *Spence v. Smyth*, 686 P.2d 597 (Wyo. 1984) (holding that the Wyoming Public Service Commission properly followed its own policies while complying with the relevant requirements of FERC).

⁸⁰ See, e.g., *Narragansett Elec. Co. v. Burke*, 381 A.2d 1358 (1977).

⁸¹ See *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 972 (1986) (explaining that regardless of *Pike County*'s validity, the doctrine did not apply to the present case); *In re AEP Generating Co.*, 39 FERC ¶ 61,158, at 61,630 (1987) (recognizing the *Pike County* doctrine but noting that it “is inapplicable to the facts of this case”).

⁸² Kearney & Merrill, *supra* note 10, at 1395; see also David B. Spence, *Regulation, Climate Change, and the Electric Grid*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 267, 276 (2012).

⁸³ Cf. Kearney & Merrill, *supra* note 10, at 1395 (noting that since PURPA's passage, “[i]ndependent power producers have . . . become an active force pushing for greater access to interstate power grids”).

⁸⁴ See *id.* at 1353–54 (quoting *PIERCE & GELLHORN*, *supra* note 10, at 347) (noting the vertically integrated environment that energy utilities operated in prior to 1978).

had very limited authority to order a recalcitrant utility to provide transmission services against its will to a competitor for delivery to wholesale markets (an arrangement known as “wheeling”).⁸⁵ Congress filled this gap with the Energy Policy Act of 1992,⁸⁶ which lifted most preexisting restrictions on FERC’s wheeling authority and instead allowed FERC—if it found that doing so would serve the public interest—to order specific utilities to wheel power upon request by an electricity generator.⁸⁷

Nevertheless, in the spirit of promoting cooperative federalism, the Act provided two avenues through which state regulators could influence the grant of wheeling authority. First, the Act retained a preexisting requirement that, before issuing an order, FERC must give “notice to each affected State regulatory authority” and “afford[] an opportunity for an evidentiary hearing” on the question.⁸⁸ This gave state regulators the opportunity up front to raise objections to particular wheeling requests. Second, it provided that FERC shall terminate a wheeling order if (1) the order required enlargement of existing transmission facilities and (2) the utility, after making a “good faith effort,” was unable to get siting approval from the relevant state or local authorities.⁸⁹ In other words, if the state saw no in-state benefit to a wheeling order that required facility expansion, the state could effectively block the order by failing to issue the necessary siting approvals, so long as its efforts were consistent with underlying state siting laws.⁹⁰

⁸⁵ See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374–76, 375 n.7 (1973). The Court noted in *Otter Tail*—an antitrust case brought by the government against a recalcitrant utility—that the Federal Power Commission had “limited authority” to order interconnection and “no authority” to order wheeling. *Id.* at 374–76. PURPA later gave FERC limited authority to order wheeling, but because of the conditions Congress placed on that authority, FERC never exercised it. 16 U.S.C. § 824j (2012).

⁸⁶ Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified as amended in scattered sections of 42 U.S.C.).

⁸⁷ See 16 U.S.C. § 824j; see also Kearney & Merrill, *supra* note 10, at 1354 (explaining that “wheeling” arrangements “ensure that customers have the benefits of competitively priced generation”).

⁸⁸ 16 U.S.C. § 824j(a). This provision was included in PURPA’s original, restricted grant of wheeling authority to FERC. See Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, §203, 92 Stat. 3117, 3137 (codified as amended at 16 U.S.C. §824j).

⁸⁹ 16 U.S.C. § 824j.

⁹⁰ Perceived problems with state siting authority as an inhibitor of federal market expansion has driven Congress to create yet another cooperative, federalism-themed encroachment on state regulatory authority. Numerous commentators have noted that transmission line construction has failed to keep pace with the expansion of the electricity industry, leading to greater strain on the country’s existing transmission networks. Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. REV. 1079, 1084–85 (2013). This problem is compounded by the rise of renewable electricity, which is typically generated far from load centers and requires construction of new transmission lines to bring these new resources to the market. See Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 VAND. L. REV. 1801, 1811 (2012); Lyons, *supra* note 10, at 1637–38. In response, the Energy Policy Act of 2005 grants FERC limited backstop authority to grant siting approval of new transmission

C. Order 888 and the Administrative Push Toward Concurrent Jurisdiction

In the years following PURPA's enactment, FERC creatively and aggressively exercised its authority under the Federal Power Act to promote greater competition and to mitigate market power in interstate electricity markets. Even before Congress expanded its wheeling authority in 1992, FERC used its merger authority to promote greater wheeling by interstate transmission networks. Section 203 of the Federal Power Act requires FERC approval of mergers involving any utility subject to FERC jurisdiction.⁹¹ In the late 1980s and early 1990s, FERC often conditioned its approvals on commitments by post-merger entities to offer transmission services to competitors on a nondiscriminatory basis.⁹² The agency justified these requirements as necessary to mitigate the potential market power that could result from the merger.⁹³ Over time, the agency hoped to cajole the industry into voluntarily providing the wheeling services that it lacked the ability to impose directly.⁹⁴

By its own admission, FERC “aggressively” exercised the additional wheeling authority granted to it by the Energy Policy Act of 1992.⁹⁵ Between 1992 and 1996, FERC issued orders requiring that a utility provide wheeling services for a complaining wholesale competitor in twelve separate cases.⁹⁶ Ultimately FERC concluded that piecemeal wheeling was “too costly and time-consuming” and was not achieving the level of market reform that it sought.⁹⁷ In response, it adopted its landmark Order 888 in 1996, which

facilities even without state approval, provided the proposed line is in an area designated by the Department of Energy as a “national interest electric transmission corridor.” Energy Policy Act of 2005, 16 U.S.C. § 824p(a)–(b). But use of this authority has thus far been stymied by litigation over procedures through which the Department of Energy has designated existing corridors, as well as the breadth of FERC’s rules to exercise the authority granted it by the statute. *See* Cal. Wilderness Coal. v. U.S. Dep’t of Energy, 631 F.3d 1072, 1079 (9th Cir. 2011); Piedmont Env’tl. Council v. FERC, 558 F.3d 304, 310 (4th Cir. 2009).

⁹¹ 16 U.S.C. § 824b.

⁹² *See, e.g.*, Utah Power & Light Co., 45 FERC ¶ 61,095, at 61,268, 61,291, 61,309 (approving merger but imposing open-access transmission service obligations as conditions of approval); *see also* Rossi, *supra* note 6, at 428 (noting that the FERC’s rules aimed to “provide ‘equal access’ to transmission lines through the filing of open-access tariffs with the agency”).

⁹³ Jeffrey D. Watkiss & Douglas W. Smith, *The Energy Policy Act of 1992—A Watershed for Competition in the Wholesale Power Market*, 10 YALE J. ON REG. 447, 458–59 (1993).

⁹⁴ *See id.*

⁹⁵ *See* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540, 21,547 (May 10, 1996) (codified at 18 C.F.R. pts 35, 385).

⁹⁶ *Id.*

⁹⁷ *See* New York v. FERC, 535 U.S. 1, 9 (2002).

mandated industry-wide wheeling in all markets that FERC regulated.⁹⁸ The order functionally unbundled wholesale electricity markets by requiring all wholesale providers to provide wholesale transmission services under a single tariff applicable to itself and others.⁹⁹ It also imposed a similar requirement on retail transmission if the retailer sold transmission on an unbundled basis (meaning the utility voluntarily offered transmission to competitors as a standalone service) in interstate commerce.¹⁰⁰ As authority for Order 888, FERC cited section 206 of the Federal Power Act, which gives it authority to remedy discriminatory practices in FERC-jurisdictional markets.¹⁰¹ It explained that “market power through control of transmission is the single greatest impediment to competition”; and, therefore, remedying discriminatory practices would create a more competitive wholesale electricity market.¹⁰²

In Order 888, FERC recognized the “very legitimate concerns of state regulatory authorities” that “jurisdictional boundaries may shift as a result of restructuring programs in wholesale and retail markets.”¹⁰³ These concerns were largely due to the Order’s sweeping assertion of authority over both wholesale and interstate retail markets. As noted above, the Federal Power Act gave FERC jurisdiction over wholesale markets, but states traditionally regulated retail sales.¹⁰⁴ The extension of Order 888 to cover unbundled retail transactions in interstate commerce could thus prove disruptive to existing state retail regulatory schemes. Under an earlier Supreme Court decision, *Federal Power Commission v. Florida Power & Light Co.*,¹⁰⁵ a retail transmission could be jurisdictionally interstate even if the seller and buyer were in the same state, provided that the transmission line was connected to a larger interconnection grid; therefore, the electricity in question was “commingled” with electricity sold in interstate commerce.¹⁰⁶ This interpretation meant that Order 888 reached virtually all retail sales outside of those in Alaska, Hawaii, and parts of Texas (where transmission lines were not

⁹⁸ See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. at 21,541 (introducing the regulations).

⁹⁹ *Id.* at 21,552; see *New York*, 535 U.S. at 11.

¹⁰⁰ Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. at 21,571–72; see *New York*, 535 U.S. at 11.

¹⁰¹ 16 U.S.C. § 824e (2012).

¹⁰² See *New York*, 535 U.S. at 10 (quoting Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, 60 Fed. Reg. 17,662, 17,664 (proposed Apr. 7, 1995) (codified at 18 C.F.R. pt. 35)).

¹⁰³ Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. at 21,542.

¹⁰⁴ See *supra* notes 53–55 and accompanying text.

¹⁰⁵ 404 U.S. 453 (1972).

¹⁰⁶ See *id.* at 463.

connected to larger interstate grids), unless the utility chose not to offer retail transmission on an unbundled basis.¹⁰⁷

Concerned about losing control over retail transmission lines, New York challenged Order 888's assertion of jurisdiction over unbundled retail sales. The state argued that the Federal Power Act's legislative history showed that by granting FERC authority over wholesale markets, Congress meant to leave retail electricity markets to the states.¹⁰⁸ The Court disagreed, explaining that the Federal Power Act created two founts of regulatory authority: FERC could regulate both "the sale of electric energy at wholesale" and "the transmission of electricity in interstate" markets.¹⁰⁹ Under this plain language, FERC had authority to apply Order 888 to unbundled retail transmissions in interstate commerce.¹¹⁰ The Court went on to reaffirm the holding in *Florida Power & Light*, that "transmissions on the interconnected national grids constitute transmissions in interstate commerce."¹¹¹

New York v. FERC thus turned ultimately upon the same formalistic analysis reflected in earlier cases interpreting the Federal Power Act's jurisdictional divide. The Court's analysis focused primarily upon the language of the statute: "[W]e must interpret the statute to determine whether Congress has given FERC the power to act as it has, and we do so without any presumption one way or the other."¹¹² Because the statute placed interstate transmission on the federal side of the line, Order 888 was valid, despite New York's argument that this construction was contradicted by legislative history and would "impede sound energy policy."¹¹³ At first glance, therefore, the case fits comfortably within the long line of cases examining FERC's jurisdiction through a dual federalism lens.

But foreshadowing its later shift toward concurrent jurisdiction, the Court in *New York* noted repeatedly that "the landscape of the electric industry has changed since the enactment of the FPA, when the electricity universe was

¹⁰⁷ Justice Douglas predicted this federal jurisdictional grab two decades before Order 888. In his dissent in *Florida Power & Light*, he explained that "fleeting episodes" of interstate transmission "are not in my view sufficient to displace a state regime with the federal one, since the Congress promised that as much as possible be left to the States. . . . If we allow federal pre-emption in this case, then we have come full cycle, leaving local authorities control of electric energy only insofar as municipal plants are concerned. The federal camel has a tendency to occupy permanently any state tent." *Id.* at 476 (Douglas, J., dissenting).

¹⁰⁸ *New York v. FERC*, 535 U.S. 1, 20–24 (2002).

¹⁰⁹ *Id.* at 16–17.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 16.

¹¹² *Id.* at 18.

¹¹³ *Id.* at 24.

‘neatly divided into spheres of retail versus wholesale sales.’”¹¹⁴ Indeed, this shift soothed any apprehension the Court had regarding potential conflicts between its holding and the legislative history of the Federal Power Act:

Our evaluation of the extensive legislative history reviewed in New York’s brief is affected by the importance of the changes in the electricity industry that have occurred since the FPA was enacted in 1935. No party to these cases has presented evidence that Congress foresaw the industry’s transition from one of local, self-sufficient monopolies to one of nationwide competition and electricity transmission. Nor is there evidence that the 1935 Congress foresaw the possibility of unbundling electricity transmissions from sales. More importantly, there is no evidence that if Congress had foreseen the developments to which FERC has responded, Congress would have objected to FERC’s interpretation of the FPA. Whatever persuasive effect legislative history may have in other contexts, here it is not particularly helpful because of the interim developments in the electric industry.¹¹⁵

The Court is correct that modern electricity markets have moved far away from the local vertically integrated monopoly model that shaped the Federal Power Act. Even before FERC began experimenting with wheeling, local utilities had begun integrating their grids with one another to benefit from greater economies of scale, such as greater reliability and the ability to buy or sell excess electricity from neighboring utilities.¹¹⁶ Over time, these pooling arrangements have united the contiguous United States into three regional grids, known as “interconnections.”¹¹⁷ The Continental Divide roughly separates the Western Interconnection from the much larger Eastern Interconnection, while most of Texas is on a separate interconnection known as the Electric Reliability Council of Texas, or ERCOT.¹¹⁸

This integration of local transmission networks has created a greater regionalization of electricity markets. It may be a bit of an overstatement to suggest, as the Court did in *New York*, that “a customer in Vermont [may] purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma.”¹¹⁹ After all, there are only a

¹¹⁴ *Id.* at 16 (quoting *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 691 (D.C. Cir. 2000)).

¹¹⁵ *Id.* at 23.

¹¹⁶ See STAN MARK KAPLAN, CONG. RESEARCH SERV., R40511, ELECTRIC POWER TRANSMISSION: BACKGROUND AND POLICY ISSUES 2–3 (2009).

¹¹⁷ *Id.* at 3.

¹¹⁸ *Id.*

¹¹⁹ *New York*, 535 U.S. at 8 (quoting *Transmission Access Policy Study Grp.*, 225 F.3d at 681).

handful of ties between the Western and Eastern Interconnections, and electricity dissipates as it travels long distances over transmission lines (a phenomenon known as “line loss”).¹²⁰ But the sentiment is directionally correct. The bulk of the nation’s transmission grid is interstate, and a significant amount of electricity crosses state lines en route from generation to consumption. Far from merely plugging the *Attleboro* gap in a regulatory environment dominated by state regulators, today’s FERC has authority to regulate the vast majority of the nation’s electricity grid.

In the two decades following Order 888, FERC has repeatedly exercised its authority under the Federal Power Act to continue restructuring the electricity industry, with significant spillover effects on state-regulated markets. Professor Sharon Jacobs has described this pattern as “bypassing federalism.”¹²¹ Her claim is that FERC uses the jurisdictional authority granted to it under the FPA to “achieve policy aims without challenging jurisdictional boundaries head on.”¹²² In other words, by maximizing its influence within its designated sphere, FERC can exert effects on markets beyond its control, effecting a “de facto, rather than de jure, reallocation of power” vis-à-vis the states.¹²³

As Professor Hannah Wiseman has noted, bypassing federalism may more accurately be described as the inevitable byproduct of regulating increasingly complex and interdependent electricity markets.¹²⁴ The Court correctly noted in *New York* that the world is no longer “neatly divided into spheres of retail versus wholesale sales.”¹²⁵ Initiatives undertaken in one corner of that world are likely to have ripple effects on adjacent markets. The friction that Jacobs describes is not so much a passive-aggressive attempt by FERC to bypass federalism, but instead an indictment of how poorly the Federal Power Act’s dual federalism model maps onto the realities of today’s complex electricity markets. FERC has discovered, intentionally or not, that modern electricity markets involve significant areas of concurrent jurisdiction.

¹²⁰ Lyons, *supra* note 10, at 1648–49.

¹²¹ Sharon B. Jacobs, *Bypassing Federalism and the Administrative Law of Negawatts*, 100 IOWA L. REV. 885 (2015).

¹²² *Id.* at 889.

¹²³ *Id.* at 889–90.

¹²⁴ Hannah J. Wiseman, *Moving Past Dual Federalism to Advance Electric Grid Neutrality*, 100 IOWA L. REV. BULL. 97, 97–100 (2015).

¹²⁵ *New York v. FERC*, 535 U.S. 1, 16 (2002) (quoting *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 691 (D.C. Cir. 2000)).

II. DEFINING AND DEFENDING CONCURRENT JURISDICTION

A. *Defining Concurrent Jurisdiction*

The demise of dual federalism and the erosion of a traditionally impregnable sphere of state authority over the electricity industry have left some uncertainty regarding how courts should resolve competing jurisdictional claims. At the same time, the increasingly porous nature of the federal–state divide and the growing complexity of regulated industries have arguably increased the number of federalism-related disputes that courts must address. As cases such as *New York v. FERC* show,¹²⁶ the Supreme Court recognizes the growing mismatch between the realities of modern electricity markets and the dual federalism model that has historically shaped its interpretation of federal energy laws. During the 2014–2016 Terms, a trilogy of cases seemed to signal a shift by the Court away from the increasingly anachronistic formalism of dual federalism and toward acceptance of the possibility that the statute can accept pockets of concurrent jurisdiction.¹²⁷

1. *The Precursor: ONEOK, Inc. v. Learjet, Inc.*

The 2015 decision in *ONEOK, Inc. v. Learjet, Inc.*¹²⁸ was the first to suggest the possibility that federal energy laws might be flexible enough to support concurrent jurisdiction. *ONEOK* arose out of trading practices during the 2000–2002 energy crisis.¹²⁹ Respondents, who are purchasers of retail natural gas, alleged that the petitioners—natural gas traders—manipulated the natural gas market by reporting false sales data to trade publications and by artificially inflating sales volumes through wash sales.¹³⁰ The purchasers argued that these practices violated various state antitrust laws and filed suit.¹³¹ After removing the case to federal court, the traders sought summary judgment on the ground that the Natural Gas Act preempted the state law claims.¹³²

¹²⁶ *Id.*

¹²⁷ See Rossi, *supra* note 6 (arguing that recent Supreme Court decisions have moved toward finding concurrent jurisdiction in energy statutes and that relics of dual federalism should be shed in the interest of better regulation of modern energy markets).

¹²⁸ 135 S. Ct. 1591 (2015).

¹²⁹ *Id.* at 1598.

¹³⁰ *Id.* at 1597–99. A “wash sale” is a sale wherein a trader agrees to execute a buy and simultaneously executes an equal and opposite sell on another trading platform. See *id.* at 1597.

¹³¹ *Id.* at 1598.

¹³² *Id.*

The preemption question upon which certiorari was granted presented the type of dilemma one can expect to arise with increasing frequency as the line between state and federal authority continues to erode. As noted above, the Natural Gas Act mimics the Federal Power Act's attempt to divide jurisdiction between federal and state regulatory authorities.¹³³ Section 1(b) of the Act gives FERC authority generally to regulate interstate and wholesale natural gas operations.¹³⁴ It also contains a savings clause that explicitly preserves state regulatory authority over retail natural gas sales.¹³⁵ But who has jurisdiction over the conduct in *ONEOK*, conduct that affects both wholesale and retail markets?

Consistent with prior case law interpreting the Natural Gas Act through a dual federalism lens, the traders pressed a field preemption argument. They argued that the Court should find that the Natural Gas Act “occupie[s] the field” with regard to any conduct affecting wholesale rates.¹³⁶ They found support for this argument in section 5(a) of the Act, which gives FERC authority over any “rule, regulation, practice or contract affecting” FERC jurisdictional rates.¹³⁷ Because the conduct at issue affected wholesale prices as well as the retail prices that the respondents paid, the traders argued that any manipulation resulting from those practices fell within FERC’s exclusive jurisdiction.¹³⁸ They noted that, following the energy crisis, FERC adopted a code of conduct that prohibited the very conduct at issue in this case.¹³⁹ Allowing state actions to proceed would risk state courts reaching conclusions about this conduct that are inconsistent with FERC’s rulings.¹⁴⁰ As a result, they argued, the Court should find that the state law antitrust claims were preempted.¹⁴¹

While the Court described these arguments as “forceful,” it ultimately decided that preemption was inappropriate in this case.¹⁴² Justice Breyer’s majority opinion acknowledged the Court’s prior holdings that, through the Natural Gas Act, “Congress occupied the field of matters relating to wholesale

¹³³ See *supra* note 51 and accompanying text.

¹³⁴ 15 U.S.C. § 717(a) (2012).

¹³⁵ *Id.*; see *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n.*, 489 U.S. 493, 507 (1989).

¹³⁶ *ONEOK*, 135 S. Ct. at 1595.

¹³⁷ *Id.* at 1596; see also 15 U.S.C. § 717d(a).

¹³⁸ *ONEOK*, 135 S. Ct. at 1599.

¹³⁹ *Id.* at 1598; see Amendments to Blanket Sales Certificates, 68 Fed. Reg. 66,323, 66,323–24 (Nov. 26, 2003) (codified at 18 C.F.R. pt. 284).

¹⁴⁰ *ONEOK*, 135 S. Ct. at 1599.

¹⁴¹ *Id.*

¹⁴² *Id.*

sales and transportation of natural gas in interstate commerce.”¹⁴³ But the opinion also acknowledged that the Act was drafted “with meticulous regard for the continued exercise of state power.”¹⁴⁴ Therefore, the Court explained, if, as here, a state law can apply both FERC-jurisdictional rates and rates outside FERC’s jurisdiction, courts should find preemption only when a detailed examination convincingly demonstrates that the matter falls within the preempted field.¹⁴⁵

In the process of rejecting this field preemption argument, the Court questioned whether it makes sense to continue interpreting the Act through a dual federalism lens. “Petitioners,” it noted, “argue that there is, or should be, a clear division between areas of state and federal authority in natural-gas regulation.”¹⁴⁶ This argument, the Court noted, described a “Platonic ideal” and did not capture the realities of regulatory overlap caused by the modern natural gas industry.¹⁴⁷ Instead, the Court framed the relevant inquiry as focusing upon the “target at which the state law aims.”¹⁴⁸ If the state law is aimed directly at interstate purchasers or wholesalers, which are subject to FERC jurisdiction, the Court would likely conclude that the Natural Gas Act preempts it.¹⁴⁹ However, when the state law is aimed primarily at protecting producers or retail sales, which are both firmly on the states’ side of the line, the regulation should not be preempted, even if it might have some effect on FERC-jurisdictional rates.¹⁵⁰ In *ONEOK*, the Court held that because the lawsuits were focused on retail sales, which are within the state’s purview, and because state antitrust laws at issue aimed at all businesses in the marketplace rather than just FERC-jurisdictional entities, the Natural Gas Act did not preempt those claims.¹⁵¹

Justice Scalia dissented, joined by Chief Justice Roberts.¹⁵² Echoing themes of traditional dual federalism, the dissent took issue with the majority’s focus on the purpose of state regulation.¹⁵³ The relevant inquiry, Justice Scalia

¹⁴³ *Id.* at 1594 (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 305 (1988)).

¹⁴⁴ *Id.* at 1599 (quoting *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm’n*, 332 U.S. 507, 517–18 (1947)).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1601.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1599 (emphasis omitted).

¹⁴⁹ *Id.* at 1600.

¹⁵⁰ *See id.*

¹⁵¹ *Id.* at 1600–01.

¹⁵² *Id.* at 1603 (Scalia, J., dissenting).

¹⁵³ *Id.*

wrote, should be on “whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act.”¹⁵⁴ Here, because the matter involves wholesale rates, which the NGA puts on the federal side of the line, the dissent would have found the state law preempted.¹⁵⁵ The majority’s purposive approach, Justice Scalia wrote, sacrifices the clarity of dual federalism in favor of a “make-it-up-as-you-go-along approach to preemption” that he predicted will “prove unworkable in practice.”¹⁵⁶

2. *Recognizing Concurrent Jurisdiction over Electricity Markets: FERC v. Electric Power Supply Ass’n*

The following Term, Justice Kagan’s opinion in *FERC v. Electric Power Supply Ass’n*¹⁵⁷ (*EPSA*) signaled that *ONEOK* was not an isolated decision, using language that even more forcefully rejected the dual federalism framework. At issue in *EPSA* was FERC’s demand-response initiative. To balance supply and demand in wholesale electricity markets during periods of peak energy use, FERC enacted a demand-response rule that pays large consumers of electricity to “dial down their consumption” if the price of reducing demand is less than the cost of paying electricity suppliers to add more energy to the grid.¹⁵⁸ The petitioner, a trade association representing electricity generators, challenged the rule as an impermissible intrusion on state authority.¹⁵⁹ By paying retail customers not to consume electricity, it argued, FERC has “usurped state power” over retail markets, “lured” retail consumers into wholesale markets, and effectively increased retail rates by creating an opportunity cost for retail consumers who choose to forego a demand-response payment.¹⁶⁰

The D.C. Circuit, applying a traditional dual federalism framework, had rejected the demand-response program as an unwarranted intrusion onto matters reserved exclusively for the states.¹⁶¹ The court noted the traditional recognition that the Federal Power Act “split[s] [jurisdiction over the sale and delivery of electricity] between the federal government and the states on the

¹⁵⁴ *Id.* at 1604 (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988)).

¹⁵⁵ *Id.* (“Straightforward application of these precedents would make short work of the case at hand.”).

¹⁵⁶ *Id.* at 1603.

¹⁵⁷ 136 S. Ct. 760 (2016).

¹⁵⁸ *Id.* at 767.

¹⁵⁹ *See id.* at 777–79.

¹⁶⁰ *Id.*

¹⁶¹ *Elec. Power Supply Ass’n v. FERC*, 753 F.3d 216, 218 (D.C. Cir. 2014), *rev’d* 136 S. Ct. 760 (2016).

basis of the type of service being provided and the nature of the energy sale”¹⁶² and that “FERC’s jurisdiction over the sale of electricity has been specifically confined to the wholesale market.”¹⁶³ But demand response, explained the circuit court, is not a “wholesale sale of electricity.”¹⁶⁴ Rather, it is a payment to reduce retail demand and therefore “directly regulat[es] a matter subject to state control,” namely “the retail market.”¹⁶⁵ The D.C. Circuit rejected FERC’s argument that it had jurisdiction by virtue of the fact that demand response indirectly affects wholesale rates, noting that such a theory “has no limiting principle” and was therefore inconsistent with the statutory design.¹⁶⁶

The Supreme Court disagreed, with Justice Kagan’s majority opinion directly and forcefully rejecting this dual federalism approach to FERC’s jurisdictional quandary. Unlike the D.C. Circuit, the Supreme Court did not focus on whether the federal agency had intruded upon an area of the market reserved to the states. Instead, the Court asked whether the Federal Power Act gives FERC a jurisdictional hook to support its rule.¹⁶⁷ Unlike the D.C. Circuit, it accepted the argument that demand response was permissible because it was a practice that “affected” FERC-jurisdictional wholesale rates.¹⁶⁸ The Court acknowledged the D.C. Circuit’s concern about the potentially unbounded nature of this jurisdictional grant but answered by holding that FERC could only undertake initiatives that “directly” affect FERC-jurisdictional rates—a standard that the Court found was met here “with room to spare.”¹⁶⁹

The Court acknowledged petitioner’s concern, echoed in the lower court opinion, that FERC’s demand-response program would affect retail sales, which lie within state regulators’ purview.¹⁷⁰ But in a passage that is jarring to students of energy federalism, the opinion boldly declares that this fact is “of no legal consequence.”¹⁷¹ The Court explained that an otherwise permissible federal initiative does not run afoul of the Federal Power Act’s jurisdictional limits “just because it affects—even substantially—the quantity or terms of

¹⁶² *Id.* at 219 (alterations in original) (quoting *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 824 (D.C. Cir. 2006)).

¹⁶³ *Id.* (quoting *New York v. FERC*, 535 U.S. 1, 19 (2002)).

¹⁶⁴ *Id.* at 221.

¹⁶⁵ *Id.* at 222.

¹⁶⁶ *Id.* at 221.

¹⁶⁷ *FERC v. Elec. Power Supply Ass’n (EPSA)*, 136 S. Ct. 760, 774 (2016).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *See id.* at 776.

¹⁷¹ *Id.*

retail sales.”¹⁷² Echoing *New York v. FERC*, the Court noted that “[i]t 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. To the contrary, transactions that occur on the wholesale market have natural consequences at the retail level.”¹⁷³ Section 201(b) prohibits FERC from directly regulating generation facilities, local distribution, and purely intrastate transmission lines.¹⁷⁴ Regardless, the majority held, “[w]hen 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)] imposes no bar.”¹⁷⁵

Unsurprisingly, Justice Scalia once again dissented, in what became his final published opinion. As in *ONEOK*, Justice Scalia focused categorically on whom the initiative seeks to regulate, rather than what the purpose of the initiative might be. Quoting earlier dual federalism cases, Justice Scalia wrote that the Act “cuts sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions are made in either category for particular uses, quantities, or otherwise.”¹⁷⁶ FERC’s demand-response initiative seeks to regulate retail consumers in an attempt to persuade them not to consume electricity in retail markets.¹⁷⁷ Because it regulates entities on the state side of the line, Justice Scalia found the program beyond FERC’s purview.¹⁷⁸

3. *Limits on Concurrent Jurisdiction: Hughes v. Talen Energy Marketing*

Shortly after deciding *EPSA*, the Court announced a potential limiting principle on concurrent jurisdiction in *Hughes v. Talen Energy Marketing, LLC*.¹⁷⁹ At issue in *Hughes* was Maryland’s initiative to stimulate the construction of new electricity generation facilities within the state. Maryland has several older coal-fired power plants that are scheduled to be phased out under the Environmental Protection Agency’s Clean Power Plan.¹⁸⁰ The state

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ 16 U.S.C. § 824j (2012).

¹⁷⁵ *EPSA*, 136 S. Ct. at 776.

¹⁷⁶ *Id.* at 786 (Scalia, J., dissenting) (quoting *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm’n*, 332 U.S. 507, 517 (1947)).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ 136 S. Ct. 1288 (2016).

¹⁸⁰ See Robert Walton, *What the Hughes v. Talen Energy Supreme Court Decision Means for State Power Incentives*, UTILITYDIVE (Apr. 25, 2016), <https://www.utilitydive.com/news/what-the-hughes-v-talen->

was concerned that existing FERC auctions failed to provide sufficient incentives to build new electricity generators in the state, and, because Maryland is on a particularly congested portion of the electricity grid, it is difficult to meet demand by importing electricity from other states.¹⁸¹ In response, the state subsidized new electricity generation by guaranteeing new generators a fixed contract price for electric capacity.¹⁸² The generators sell their electricity on wholesale markets governed by FERC, but if the wholesale price at which the electricity is sold is below the contract price, Maryland utilities make up the difference as a subsidy payment.¹⁸³

Opponents of Maryland's plan asserted, and the Court agreed, that the plan impermissibly interfered with wholesale electricity rates, over which FERC has "exclusive jurisdiction."¹⁸⁴ Quoting *EPSA*, the Court acknowledged that "[s]ince the FPA's passage, electricity has increasingly become a competitive interstate business, and FERC's role has evolved accordingly."¹⁸⁵ Justice Ginsburg's majority opinion reiterated *ONEOK*'s holding that states "may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain."¹⁸⁶ The key inquiry under *ONEOK* is determining "the *target* at which the state *aims*."¹⁸⁷ To answer that question, the Court focused on the fact that the Maryland subsidy required the generator to sell its capacity in FERC-regulated wholesale auctions, but guaranteed that the generator would receive the contract price—rather than the auction price—for that capacity.¹⁸⁸ The program thus set an interstate wholesale rate, an activity that the Federal Power Act vests exclusively in FERC.¹⁸⁹

But unlike pre-*ONEOK* cases that painted federal preemption with a broad brush, the Court closed by carefully explaining that its holding was narrow:

Our holding is limited: We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC.

supreme-court-decision-means-for-state-power-incen/418046/ (providing background about Maryland's initiative).

¹⁸¹ See *Hughes*, 136 S. Ct. at 1294.

¹⁸² *Id.* at 1295.

¹⁸³ *Id.* New Jersey, whose generation markets are similarly threatened by the Clean Power Plan, had enacted a similar subsidy program. *Id.* at 1295 n.4.

¹⁸⁴ *Id.* at 1297.

¹⁸⁵ *Id.* at 1292 (quoting *FERC v. Elec. Power Supply Ass'n (EPSA)*, 136 S. Ct. 760, 768 (2016)).

¹⁸⁶ *Id.* at 1298.

¹⁸⁷ *Id.* (quoting *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015)).

¹⁸⁸ *Id.* at 1297.

¹⁸⁹ *Id.*

We therefore 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. Nothing 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. 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 fatal defect that renders Maryland's program unacceptable.¹⁹⁰

4. *From Hemispheres to a Venn Diagram*

Read together, this trilogy signals a significant shift in the law governing energy federalism. First, the Court has explicitly abandoned the increasingly anachronistic notion, central to the dual federalism model, that the energy statutes divide the world into two separate, mutually exclusive realms of authority.¹⁹¹ All three cases reject the notion that a clear, bright line separates state and federal jurisdiction over energy law issues; rather, the Court recognizes—and is seemingly comfortable with the idea—that federal and state authorities may exercise concurrent jurisdiction over a particular practice or entity.¹⁹²

One can describe this jurisprudential change visually. Dual federalism imagines the energy industry as a single circle bisected by a line that creates two distinct hemispheres of federal and state authority. Each hemisphere is hermetically sealed from the other, and together they provide a comprehensive regulatory scheme for the industry. By comparison, the current Court might more accurately describe energy federalism as a Venn diagram with two overlapping circles. While the energy statutes contemplate areas of exclusive state and federal authority (the crescent-shaped portions on either end of the Venn diagram), the trilogy of cases described above acknowledge that many—perhaps most—activities by market participants are subject to regulation by either sovereign or both. When state or federal regulators act within this zone of shared regulatory authority, courts are unlikely to interfere merely because

¹⁹⁰ *Id.* at 1299 (internal quotation marks omitted).

¹⁹¹ *ONEOK*, 135 S. Ct. at 1599–600.

¹⁹² *See Hughes*, 136 S. Ct. at 1298; *FERC v. Elec. Power Supply Ass'n (EPSA)*, 136 S. Ct. 760, 776 (2016); *ONEOK*, 135 S. Ct. at 1601 (2015).

federal initiatives may incidentally affect ongoing state efforts and vice versa.¹⁹³

So how can one determine whether an activity falls within the overlapping area or remains the exclusive province of FERC or its state analogues? The trilogy suggests that the key question is the purpose of the regulation at issue. This contrasts with the dual federalism approach of asking whether the regulation had effects outside its sphere. The shift from effects to intent is present in all three cases. *ONEOK* explained that the relevant inquiry is “the target at which the state law aims.”¹⁹⁴ The Court permitted the state law claims at issue in that case because the state antitrust law was one of general applicability and the suits were focused on conduct in the retail market, even though that conduct affected wholesale rates as well.¹⁹⁵ The Court in *EPSA* was more explicit: it approved FERC’s demand-response program because the agency’s goal was to directly affect the wholesale rate; the fact that it also had some impact on state markets was “of no legal consequence.”¹⁹⁶ In contrast, Maryland’s cardinal sin in *Hughes* was to create a subsidy that sought to set the wholesale rate that the subsidized generators would receive.¹⁹⁷ Because the state *intended* to regulate an activity in the federal sphere, the subsidy was preempted—but the court explained that such subsidies would be permissible if “untethered to a generator’s wholesale market participation.”¹⁹⁸

The focus upon the regulator’s intent rather than the regulation’s effects is consistent with decisions in other regulated industries. For example, in *In re FCC 11–161*,¹⁹⁹ a coalition of states and regulated entities challenged a Federal Communications Commission order that denied federal universal service fund subsidies to telephone companies whose local telephone rates fell below a Commission-established floor rate.²⁰⁰ The subsidy was designed to offset the high fixed costs of rural telephone companies to keep telephone service affordable in rural areas. The Commission concluded that the floor was necessary so the subsidy did not flow to carriers whose rates were already affordable.²⁰¹ Petitioners argued that because affected carriers would raise local rates to the federal floor to avoid losing the subsidy, “the *de facto* effect

¹⁹³ See, e.g., *EPSA*, 136 S. Ct. at 776; *ONEOK*, 135 S. Ct. at 1599.

¹⁹⁴ *ONEOK*, 135 S. Ct. at 1599.

¹⁹⁵ *Id.* at 1600–01.

¹⁹⁶ *EPSA*, 136 S. Ct. at 776.

¹⁹⁷ *Hughes*, 136 S. Ct. at 1299.

¹⁹⁸ *Id.* (citation omitted).

¹⁹⁹ 753 F.3d 1015 (10th Cir. 2014).

²⁰⁰ *Id.* at 1067.

²⁰¹ *Id.* (citation omitted).

of the Order” was to set local telephone rates, which under the Communications Act is a power that lies exclusively within the purview of state regulators.²⁰² The Tenth Circuit rejected this challenge and explained that “no canon of administrative law requires [a reviewing court] to view the regulatory scope of agency actions in terms of their practical or even foreseeable effects.”²⁰³ Because the court was “not bound to examine the ‘practical effect’ of an agency order,” it “summarily reject[ed]” the challenge.²⁰⁴

Similarly, other regulatory utility cases reflect the distinction made in *ONEOK* between laws of general applicability and laws targeted at regulated entities. In *Cellco Partnership v. Hatch*, telephone companies challenged a Minnesota statute that prohibited wireless providers from increasing a customer’s rate unless the customer was notified sixty days in advance and opted in to the new rate.²⁰⁵ The telephone companies claimed that the statute regulated wireless telephone rates, which—unlike local landline rates at issue in *In re FCC 11-161*—the Communications Act places exclusively within the FCC’s purview.²⁰⁶ Minnesota replied that the statute was a consumer protection measure, which the Act permits states to regulate.²⁰⁷ The Eighth Circuit sided with the companies and found that the statute was preempted, in part because it targeted the pricing behavior of wireless companies in particular.²⁰⁸ Unlike in *ONEOK*, the statute in question was not a generally applicable consumer protection measure.²⁰⁹ Rather, the court noted that the statute “goes beyond traditional requirements of contract law” and prohibited wireless companies from engaging in practices that other entities were free to adopt under Minnesota law.²¹⁰ As in *Hughes*, the deliberate targeting of a federally regulated activity rendered the state law more susceptible to preemption.²¹¹

²⁰² *Id.* (citation omitted).

²⁰³ *Id.* at 1068 (quoting *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999)).

²⁰⁴ *Id.*

²⁰⁵ 431 F.3d 1077, 1079–81 (8th Cir. 2005).

²⁰⁶ *Id.* at 1080–82; *see also* 47 U.S.C. § 332(c)(3)(A) (2012).

²⁰⁷ *Cellco*, 431 F.3d at 1082.

²⁰⁸ *Id.* at 1083.

²⁰⁹ *Compare* *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1601 (2015) (declining to find state antitrust laws preempted in part because of their broad scope), *with* *Cellco*, 431 F.3d at 1083 (finding a state communications law preempted in part because it targeted a single industry).

²¹⁰ *Cellco*, 431 F.3d at 1083.

²¹¹ *Compare* *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1299 (2016) (“We reject Maryland’s program only because it disregards an interstate wholesale rate required by FERC.”), *with* *Cellco*, 431 F.3d at 1083 (“This statute effectively voids the terms of contracts currently used by providers in one industry, and substitutes by statute a different contractual arrangement.”).

B. *Defending Concurrent Jurisdiction*

As Professor Rossi and others have discussed,²¹² one important effect of the shift toward concurrent jurisdiction is an emphasis on functionalism rather than formalism to settle future jurisdictional disputes.²¹³ If the court's primary inquiry is into the intent of the regulation in question,²¹⁴ future jurisdictional disputes are likely to be decided by "a case-by-case analysis" of the regulator's purpose.²¹⁵ This is, of course, precisely the common-law-like approach eschewed by earlier dual federalism decisions.²¹⁶

It is perhaps unsurprising that this shift began in *ONEOK* with a disagreement between Justices Breyer and Scalia, as the latter has often opposed the former's bent toward functionalism (which he snidely derided as a "make-it-up-as-you-go-along approach to preemption").²¹⁷ Consistent with his preference for rules over standards,²¹⁸ Justice Scalia long advocated for field preemption as a powerful tool to resolve jurisdictional disputes.²¹⁹ The benefits of this approach are clarity and uniformity: field preemption leaves little uncertainty about whether a state may regulate within a sphere, and a uniform federal approach in those areas that Congress has chosen to regulate minimizes the risk of an actor being subject to multiple, potentially inconsistent regimes.²²⁰ These themes weighed heavily in cases decided during the dual federalism era, when uniformity and clarity were virtues benefitting the smooth operation of stable, static vertically integrated electric companies.²²¹ Justice Scalia's dissents in *ONEOK* and *EPSA* thus expose some significant risks associated with the shift toward concurrent jurisdiction: competition among

²¹² See generally Rossi, *supra* note 6 (describing the Court's shift towards a concurrent jurisdiction framework).

²¹³ See Matthew R. Christiansen, FERC v. EPSA: *Functionalism and the Electricity Industry of the Future*, 68 STAN. L. REV. ONLINE 100, 102 (2016). See generally Rossi, *supra* note 6.

²¹⁴ See *ONEOK*, 135 S. Ct. at 1599; see also Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1298 (2016) (quoting *ONEOK*, 135 S. Ct. at 1599).

²¹⁵ See *ONEOK*, 135 S. Ct. at 1607 (Scalia, J., dissenting) (citation omitted).

²¹⁶ See, e.g., Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215–16 (1964).

²¹⁷ *ONEOK*, 135 S. Ct. at 1603 (Scalia, J., dissenting).

²¹⁸ See generally Scalia, *supra* note 19 (arguing in favor of establishing clear rules for judges to follow rather than standards which provide room for judicial discretion).

²¹⁹ See, e.g., FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 786 (2016) (Scalia, J., dissenting); *ONEOK*, 135 S. Ct. at 1604 (Scalia, J., dissenting).

²²⁰ See, e.g., Steve A. Radom, *Balkanization of Securities Regulation: The Case for Federal Preemption*, 39 TEX. J. BUS. L. 295, 316–17 (2003) (noting that "preemption can . . . shield against . . . inconsistent standards").

²²¹ See, e.g., Fed. Power Comm'n, 376 U.S. at 215–16 (noting that "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis"); Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n, 332 U.S. 507, 517 (1947) (making a similar argument).

regulators may prove unworkable in practice and the potential for dual masters jeopardizes the stability that investors crave when funding high-fixed-cost industries such as electricity.²²²

But in today's complex and fast-moving energy markets, stability is probably less important than flexibility—which favors common-law-like standards over more rigid rules.²²³ As Justice Kagan emphasized in *EPSA*, a helpful and common sense policy initiative could be hindered by over- or under- inclusive jurisdictional rules that prevent actors from acting.²²⁴ Justice Kagan also noted that demand response is an eminently reasonable policy initiative to solve the problem of peak demand—even the FERC Commissioner who dissented from its adoption on jurisdictional grounds conceded that the program's purpose was sound.²²⁵ It would be unfortunate, she wrote, for rigid, inflexible rules such as those promoted by the dissent to prevent the public from taking advantage of beneficial policy initiatives.²²⁶ After all, if, as the dissent suggested, FERC cannot undertake demand response at the wholesale level because of its effect on retail markets, neither could states impose wholesale demand response because that would be impermissibly regulating wholesale markets.²²⁷ This leaves a regulatory gap in which good policy cannot be achieved—and it was precisely to avoid a similar regulatory gap in *Attleboro* that Congress first elected to enact the Federal Power Act.²²⁸

Overall, the Court's embrace of concurrent jurisdiction aligns federalism doctrine more closely with the realities of the modern electricity industry. The effect—indeed, the goal—of the great transformation (in electricity and other infrastructure industries) was to make static, unchanging electricity markets more nimble, disruptive, and competitive.²²⁹ The rigid formalism of the dual

²²² *EPSA*, 136 S. Ct. at 787–88 (Scalia, J., dissenting); *ONEOK*, 135 S. Ct. at 1603 (Scalia, J., dissenting).

²²³ Cf. Scalia, *supra* note 19, at 1180–81.

²²⁴ See *EPSA*, 136 S. Ct. at 780.

²²⁵ See *id.* at 781; see also Demand Response Compensation in Organized Wholesale Energy Markets, 76 Fed. Reg. 16,658, 16,679 (Mar. 24, 2011) (Moeller, Comm'r, dissenting) (codified at 18 C.F.R. pt. 35) (“While the merits of various methods for compensating demand response were discussed at length in the course of this rulemaking, nowhere did I review any comment or hear any testimony that questioned the benefit of having demand response resources participate in the organized wholesale energy markets. On this point, there is no debate. The fact is that demand response plays a very important role in these markets by providing significant economic, reliability, and other market-related benefits.”).

²²⁶ *EPSA*, 136 S. Ct. at 781.

²²⁷ *Id.* at 780 n.10.

²²⁸ *Id.* at 767, 780; see Rossi, *supra* note 6, at 408–10.

²²⁹ See Kearney & Merrill, *supra* note 10, at 1325–26.

federalism model is ill-suited to govern such a dynamic economic environment. Concurrent jurisdiction is more flexible and adaptable to changing market conditions. The line between federal and state jurisdiction is no longer drawn in broad strokes by law interpreting general statutory phrases, but instead by the fine point of policy judgments about the regime under consideration.²³⁰

C. Concurrent Jurisdiction's Threat to Energy Federalism

But while recognition of concurrent jurisdiction aligns judicial doctrine more closely with the realities of the modern electricity industry, it raises important questions about the future of energy federalism, particularly for state officials. The embrace of concurrent jurisdiction is effectively a form of judicial minimalism: at least within the area of the Venn diagram where courts recognize overlapping authority, the law will no longer protect states from intrusion as frequently as it did under the dual federalism regime. As Professor Rossi discusses, within the judicially cognizable sphere of concurrent jurisdiction, the ultimate line between state and federal authority becomes a political or policy question, rather than a legal one.²³¹

To understand the effect on states of the Court's embrace of concurrent jurisdiction, one must examine the ramifications of this change in the political sphere. If concurrent jurisdiction draws jurisdictional boundaries based upon policy judgments rather than statutory interpretation or broader federalism principles, this means that FERC is likely the most influential decision maker to define the limits on state power (at least within the sphere of authority that courts identify as concurrent). While Congress always has the option to amend or augment the Federal Power Act by statute, FERC will realistically make most of the individual policy judgments that directly affect the states.

Therefore, the risk to states under a concurrent jurisdiction scheme depends upon the likelihood that FERC will recognize federalism values and provide sufficient opportunities for state input into its decision making. Professors Brian Galle and Mark Seidenfeld argue that agencies such as FERC are structurally more capable than Congress or courts at taking federalism values into consideration when considering regulatory matters.²³² First, they argue that agency decision making is transparent: the Administrative Procedure Act

²³⁰ Rossi, *supra* note 6, at 402–03.

²³¹ *See id.* at 407.

²³² *See* Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1938 (2008).

and other procedural mandates require agencies to act in the public eye, particularly through the notice-and-comment process, giving adequate notice of potential agency action before making binding decisions.²³³ Second, agencies are deliberative: they are intimately familiar with the subject of regulation and, through the notice-and-comment process, can easily be informed of the effect a proposed rule would have on state interests.²³⁴ Finally, they are at least indirectly politically accountable to congressional and presidential oversight, which can help correct agency excesses.²³⁵

Professors Galle and Seidenfeld are correct that the Administrative Procedure Act contains substantial procedural requirements to assure that interested parties (including state regulators) will be heard before the agency takes action; however, by vesting questions about optimal jurisdictional analysis primarily in agency hands, there remain risks to federalism. One is the sheer volume of agency action: agencies face fewer veto gates than Congress (which must go through bicameralism and presentment before it can act) or courts (which can only act upon cases presented to them), meaning agencies will make many more decisions and therefore will have more opportunities to intrude on state interests.²³⁶ Moreover, there is no intrinsic state perspective helping to guide the decision maker. While it is important not to put too much emphasis on the political safeguards of federalism, one should note that Congress is comprised of representatives elected from the states and therefore, at the margin, is more likely to be sensitive to state concerns than federal agencies, whose constituency is national in scope.²³⁷

Moreover, federal law recognizes two doctrines that give FERC and other federal agencies the upper hand in political power struggles with their state counterparts. The first is the power to preempt state law, which has been the subject of criticism from scholars who argue that agencies should not be permitted to preempt state law without clear authority from Congress.²³⁸ This means that in the event of a political struggle between agencies and state

²³³ *Id.* at 1955–57.

²³⁴ *Id.* at 1975–77.

²³⁵ *Id.* at 1981–83.

²³⁶ *See, e.g.,* Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 750, 753–57 (2008).

²³⁷ While some federal regulators are indeed drawn from the ranks of their state counterparts, this is not a requirement of FERC Commissioners. *See, e.g., Biography: Chairman Kevin J. McIntyre*, FED. ENERGY REG. COMMISSION, <https://www.ferc.gov/about/com-mem/mcintyre/mcintyre-bio.asp> (last updated Mar. 13, 2018) (“Prior to joining the Commission, Chairman McIntyre was the co-leader of the global Energy Practice at the law firm Jones Day, where he practiced law for most of his nearly 30-year legal career.”).

²³⁸ *See* Galle & Seidenfeld, *supra* note 232, at 1937 (summarizing the debate).

interests, the tie will go to the federal authority by virtue of the Supremacy Clause.²³⁹

The second is the *Chevron* doctrine, which requires courts to defer to an agency's reasonable interpretation of ambiguities in the agency's organic statute.²⁴⁰ Relevant to this discussion, the Court recently clarified that *Chevron* applies to an agency's interpretation of the jurisdictional limits that the organic statute places upon its authority.²⁴¹ This doctrine suggests that courts are less likely to apply a critical eye to federal jurisdictional claims and, as many commentators argue, creates incentives for agencies to aggrandize authority at the expense of their state counterparts.²⁴² Professor Philip Weiser has argued that courts should give *Chevron* deference to state agency interpretations of federal statutes for the same reasons we extend it to federal agency interpretations.²⁴³ But this approach has not caught on, meaning that, on the whole, courts will scrutinize state claims to authority more closely than they will scrutinize federal claims.

III. NEGOTIATING ENERGY FEDERALISM IN A WORLD OF CONCURRENT JURISDICTION

Therefore one likely effect of the Supreme Court's trilogy will be to shift the primary battleground for energy federalism from the courtroom to the political arena.

This Part examines the effect this shift in terrain will likely have on the ability of state officials to advocate for their preferred policy outcomes. Despite the difficulties states will face as FERC becomes the primary arbiter of the line between federal and state authority,²⁴⁴ this Part highlights the continued importance of regulatory federalism in modern electricity markets.²⁴⁵ Drawing upon recent scholarship in negotiation theory, it then highlights several tools that state regulators can and do use to "negotiate

²³⁹ See U.S. CONST. art. VI, cl. 2.

²⁴⁰ *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

²⁴¹ See *City of Arlington v. FCC*, 569 U.S. 290, 299–301 (2013).

²⁴² See, e.g., Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1504 (2009) (discussing the phenomena of agencies taking self-aggrandizing positions and noting that "[a]gencies might focus on matters that advance their own institutional interests, as distinct from the interests Congress tasked them with serving").

²⁴³ Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 3–4 (1999).

²⁴⁴ See *supra* text accompanying notes 231–43.

²⁴⁵ See *infra* text accompanying notes 247–75.

federalism” by influencing the development of energy law in ways that reflect ongoing state concerns.²⁴⁶

A. *The Ongoing Importance of Energy Federalism*

Importantly, the question of proper allocation of authority between federal and state regulators regarding energy law issues does not rise to the level of a constitutional concern. The Court in *FERC v. Mississippi* correctly noted that Congress has the power under the Commerce Clause to preempt electricity markets completely and eliminate any state regulation in this area.²⁴⁷ Therefore the discussion below about how best to negotiate federalism involves the *policy* question of how best to divide jurisdiction within constitutionally permissible parameters. This is independent of the question of whether political safeguards of federalism are sufficient to patrol the *constitutional* boundary between state and federal power, a topic that is (far) beyond the scope of this Article.²⁴⁸

But given that Congress could federalize the entire electricity industry, it seems important to ask at the outset whether the American public is served by the ongoing presence of state regulators. In other infrastructure industries affected by the Great Transformation—telecommunications, for example—increased competition, and greater economies of scale have led to the reduction or even elimination of state regulation.²⁴⁹ What benefits do we receive from ongoing state oversight in the electricity sector? While federalism scholars have identified a wide range of rationales for the preservation of state

²⁴⁶ See *infra* text accompanying notes 274–344.

²⁴⁷ *FERC v. Mississippi*, 456 U.S. 742, 765 (1982).

²⁴⁸ See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (giving a seminal account of federalism’s “political safeguards”); Note, *The Lesson of Lopez: The Political Dynamics of Federalism’s Political Safeguards*, 119 HARV. L. REV. 609 (2005) (arguing that states have political incentives to surrender authority to federal officials and therefore political safeguards are insufficient to patrol the constitutional boundary between federal and state power).

²⁴⁹ See, e.g., Lyons, *supra* note 10 (arguing that modern telecommunications markets are largely regional in scope, suggesting the need for a more circumscribed role for state regulators); Daniel A. Lyons, *Technology Convergence and Federalism: The Case of VoIP Regulation*, 1 U. MICH. J.L. REFORM ONLINE 56 (2012) (arguing that ongoing state regulation of telecommunications service can jeopardize technological advancement in VoIP service).

autonomy,²⁵⁰ three stand out in the electricity context: diversity and local knowledge, experimentation, and state capacity and expertise.²⁵¹

1. Diversity and Local Knowledge

One risk of national uniformity is the loss of potentially significant distinctions among regional subpopulations. Preserving a zone of local authority can help assure that policy decisions account for differentiation among various regions of the country. The Supreme Court has explained that federalism helps assure that government “will be more sensitive to the diverse needs of a heterogeneous society.”²⁵² Because they are responsible for a smaller number of constituents, state decision makers have greater local knowledge about the ways in which a state differs from the nation as a whole, facts which might be lost on a regulator viewing issues from a national perspective.

As I have discussed elsewhere, regional diversity should and does play an important role in energy policy.²⁵³ Although it is no longer accurate to describe electricity markets as primarily intrastate, it is equally mistaken to assume they are national in scope. Unlike in telecommunications, where regulatory reform and technological innovation created a largely national market for telephone and Internet service, today’s electricity markets are primarily regional in scope.²⁵⁴ What is often described colloquially as “the electricity grid” is in fact three separate grids covering the continental United States that are only minimally connected with one another.²⁵⁵ Within these three “interconnections” lie approximately 130 separate balancing authorities, each

²⁵⁰ See, e.g., Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503 (2007) (discussing rationales for preserving state autonomy).

²⁵¹ As Professors Galle and Seidenfeld note, one can identify two distinct sets of federalism values. The first, which some commentators have dubbed “abstract federalism,” can be described as political- or rights-oriented. This category encompasses the bundle of benefits citizens receive from the continued existence of states as rivals to federal power, such as keeping the risk of federal tyranny at bay. The second, more concrete, set of values focuses upon the effect of state authority to help produce better public policy outcomes. Galle & Seidenfeld, *supra* note 232, at 1941–42. Because preemption of energy law does not materially affect the continued ability of state governments generally to provide the benefits of abstract federalism, this Article focuses on the latter bundle of values.

²⁵² *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

²⁵³ Lyons, *supra* note 10, at 1652.

²⁵⁴ *Id.* at 1648.

²⁵⁵ *Id.* at 1648–49.

of which is responsible for matching electricity supply and demand within a specific geographic area on a real-time basis.²⁵⁶

Regional differences can have a significant effect on energy policy. One need not look further than the *Hughes* decision. Because Maryland was more dependent than other states on older coal-fired power plants that are scheduled for retirement by the Federal Clean Power Plan, it faced a larger potential generator shortage than other states.²⁵⁷ And, while other states could make up that shortfall by importing power, Maryland's placement within a particularly congested portion of the PJM Interconnection made it difficult for that state to do so.²⁵⁸ As a result, FERC wholesale auction rules that were designed to incentivize efficient electricity generation nationally were insufficient to meet Maryland's future generation needs.²⁵⁹ While the Court rejected Maryland's specific plan to lure new generation by using contracts tied to FERC wholesale auction prices, it specifically encouraged the state to use its authority in other ways to meet this unique need.²⁶⁰

Similarly, geographic differences can affect the optimal fuel mix for electricity generation within a region. They can affect the choice between traditional and renewable energy, and can affect the choice of which forms of renewable energy are optimal.²⁶¹ In Texas and the Midwest, an abundance of wind resources has driven construction of wind farms—which in Texas support intrastate load centers,²⁶² while Midwestern wind resources face the challenge of adding transmission capacity to reach load centers in other states.²⁶³ Wind turbine construction is less common in southern states, but the ecology of the area makes it a unique environment to test biomass-based generation that is not viable in other parts of the country.²⁶⁴ Meanwhile, an abundance of fossil fuels in coal-dense states like West Virginia makes renewable energy less cost-effective as a substitute for traditional energy resources.²⁶⁵

²⁵⁶ *Id.* at 1650.

²⁵⁷ *See* Walton, *supra* note 180.

²⁵⁸ *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1294 (2016).

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 1299.

²⁶¹ Lyons, *supra* note 10, at 1654.

²⁶² *See id.* at 1649 (noting that Texas is on the separate ERCOT interconnection, unconnected to other states, and discussing the state's Competitive Renewables Energy Zones).

²⁶³ *See id.* at 1623 ("Renewable energy potential is highest in the Midwest and southwestern states, where wind and sunshine are abundant. But it is likely to be consumed by load centers several hundred miles away.").

²⁶⁴ *Id.* at 1654.

²⁶⁵ *Id.* at 1665.

Finally, local policies can reflect different cultural mores across regions. For example, states have set different renewable portfolio standards, which dictate the minimum amount of electricity generation that a local utility must source from renewable resources such as wind and solar. California has set an aggressive target of 33% of its energy from renewable resources by 2020 and 50% by 2030.²⁶⁶ By comparison, North Carolina has targeted merely 12.5% by 2021, while states such as Mississippi, Alabama, and Georgia have declined to adopt a minimum requirement.²⁶⁷ While renewable energy is considered more environmentally friendly than traditional fossil fuels (because it generates little to no carbon emissions), it is also more expensive per megawatt than traditional energy.²⁶⁸ Arguably, the different standards reflect the premium that a local population is willing to pay for more environmentally friendly energy consumption. Californians are willing to pay a significant premium to reduce the state's carbon footprint; populations in southern states are less willing to make that tradeoff, and their values are reflected in the choices made by their state policymakers.

2. *Experimentation*

Another risk of national uniformity is that by choosing one solution to a public policy problem, the regulator might overlook potentially superior alternatives. Justice Brandeis famously highlighted that federalism allows states to experiment with different potential solutions to public policy problems. "It is one of the happy incidents of the federal system," he wrote, "that a single courageous [s]tate may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."²⁶⁹

In the electricity context, numerous federal initiatives began as state-level public policy experiments that allowed observers to test the viability of a potential solution before imposing it upon the rest of the country. For example, before FERC adopted the wholesale demand-response program at issue in *EPSA*, several states had experimented with demand-response programs to

²⁶⁶ CAL. PUB. UTIL. CODE § 399.30(c)(2) (West Supp. 2018).

²⁶⁷ See *Renewable Portfolio Standard Policies*, DATABASE FOR ST. INCENTIVES FOR RENEWABLES & EFFICIENCY (Aug. 2016), <http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2014/11/Renewable-Portfolio-Standards.pdf> (giving an overview of the renewable portfolio standard policies of states and territories).

²⁶⁸ See Lyons, *supra* note 10, at 1636 (describing the comparative costs of fossil fuel and renewable energy).

²⁶⁹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

curtail peak-time demand at the retail level,²⁷⁰ a fact that Justice Scalia noted in his dissent.²⁷¹ Professor Jacobs notes that these experiments “highlighted best practices” for successful demand-response strategies for utilities and identified “pitfalls to avoid,”²⁷² which FERC could look to when enacting its own wholesale-level program. Professors Hari Osofsky and Hannah Wiseman have similarly documented how state-level efforts to improve the reliability of the electricity grid led to the formation of the North American Electric Reliability Corporation, which FERC designated as its official organization to ensure transmission grid reliability in 2005.²⁷³

3. *Capacity and Expertise*

Finally, Professor Erin Ryan highlights the advantages of state regulators’ additional capacity and expertise.²⁷⁴ By virtue of their long history in the industry, state regulators have expertise in managing those areas of the grid that lay within their borders. And the fifty state public utility commissions collectively have greater capacity to act than FERC, whose reach is limited by time and budgetary constraints.²⁷⁵ The existence of state regulators therefore helps mitigate the risk that a public policy dilemma will go unattended because of natural limits on the federal regulator’s capacity.

B. Negotiating Federalism: A Taxonomy of Options for States to Bargain with FERC

Thus, it is important that states maintain an active presence in electricity regulation, despite the potential difficulties posed by the decline in judicially enforceable jurisdictional limits. But these difficulties are only one facet of the federalism struggle. While *EPSA* allows FERC a freer hand to enact programs like demand response that may intrude on state interests, *ONEOK* similarly invites states to regulate conduct that traditionally would have fallen within FERC’s portfolio. And in addition to these new unilateral assertions of authority, the Court’s recognition of concurrent jurisdiction implicitly opens

²⁷⁰ See Jacobs, *supra* note 121, at 905–06 (discussing state-level efforts).

²⁷¹ FERC v. Elec. Power Supply Ass’n (*EPSA*), 136 S. Ct. 760, 788 (2016) (Scalia, J., dissenting).

²⁷² Jacobs, *supra* note 121, at 906.

²⁷³ Hari M. Osofsky & Hannah J. Wiseman, *Hybrid Energy Governance*, 2014 U. ILL. L. REV. 1, 36–37 (2014). For additional examples of the benefits of state experimentation in electricity markets, see generally William Boyd & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law*, 63 UCLA L. REV. 810 (2016).

²⁷⁴ Ryan, *supra* note 25, at 78–81, 90.

²⁷⁵ See *id.* at 90 (“[S]tates thus wield powerful leverage in spending power negotiations because they control a reservoir of local expertise, resources, and authority that federal counterparts cannot replicate . . .”).

the door for greater bilateral action as well. Going forward, jurisdictional boundaries will not be decided, but negotiated.

Examining energy federalism as a negotiation rather than as a matter of statutory interpretation provides a more complete view of how states will fare in the era of concurrent jurisdiction. As Professor Ryan has noted, while many contemporary theorists treat federalism as a unilateral, zero-sum competition, the reality is that “the boundary between state and federal authority is actually negotiated on scales large and small, and on a continual basis.”²⁷⁶ By focusing on jurisdictional overlap not as a struggle between sovereigns but as a negotiation—directly or indirectly—across federal–state lines, one recognizes greater opportunities for cooperation and gains a more complete picture of the reality of policymaking in complex regulatory environments.

Indeed, states have numerous tools available with which they may negotiate with FERC—and in fact have been doing so regularly since PURPA set the electricity industry down the path toward restructuring almost four decades ago. What follows is a non-exhaustive list of options that state regulators can use to cajole, convince, and cooperate with their federal counterparts in the messy negotiations over jurisdictional boundaries.

1. *Litigation*

Despite the Court’s seeming willingness to avoid strict enforcement of the traditional jurisdictional boundaries between federal and state actors, litigation remains a viable strategy through which states can exert pressure on FERC. Professor Ryan notes that even when statutory lines are clear, the use of lawsuits can be a viable indirect negotiating tactic.²⁷⁷ While the Court has recognized a zone of concurrent jurisdiction, the Federal Power Act still imposes a defined limit on federal authority and carves out a zone of authority reserved exclusively for the states (one of the crescents in the Venn Diagram referenced above).²⁷⁸ As noted above, FERC is prohibited by statute from regulating local generation, local distribution, and purely intrastate transmission lines.²⁷⁹ The Court in *EPSA* also noted that FERC’s authority to regulate activity related to wholesale rates—which ultimately supported its

²⁷⁶ *Id.* at 4.

²⁷⁷ *Id.* at 36–37 (discussing federal–state negotiations in the administrative context and noting that “negotiation is common in the settlement of litigation over interstate water allocation in which both parties have interests”).

²⁷⁸ See *supra* Section II.A.4.

²⁷⁹ 16 U.S.C. § 824(b)(1) (2012).

demand-response program—is limited to programs that “directly” affect such rates.²⁸⁰ States can, and do, force FERC to respect these jurisdictional limits through actual and threatened lawsuits.²⁸¹

The anticipation of such a lawsuit likely shaped the contours of FERC’s demand-response program at the center of the *EPSA* decision. Jacobs explains that the agency was dissatisfied with the small effect that state demand-response regimes had on retail energy consumption.²⁸² But rather than regulating retail markets directly or seeking additional regulatory authority from Congress, FERC crafted a wholesale demand-response program that was “scrupulously careful not to challenge jurisdictional boundaries directly.”²⁸³ Arguably to avoid a lawsuit or strengthen its position in the event of litigation, FERC allowed any state to prohibit its retail customers from participating in the program, conceding that “jurisdiction over demand response is a complex matter that lies at the confluence of [s]tate and [f]ederal jurisdiction.”²⁸⁴ The Court subsequently explained that this opt-out provision “removes any conceivable doubt” as to the legality of the program because “[s]tates retain the last word” about how the program applies in practice.²⁸⁵

Importantly, it is in the public interest for states to continue to protect their zone of exclusivity provided in the Federal Power Act, even if, as many believe, the Act’s provisions are “artificial” and “increasingly irrelevant” to modern energy markets.²⁸⁶ Retaining an exclusive sphere of authority gives states additional leverage in negotiations.²⁸⁷ Professor Ryan notes that in other contexts, “spending power deals” (in which states voluntarily agree to surrender jurisdiction in exchange for federal funds) and other forms of

²⁸⁰ FERC v. Elec. Power Supply Ass’n (*EPSA*), 136 S. Ct. 760, 774 (2016).

²⁸¹ See, e.g., *New York v. FERC*, 535 U.S. 1 (2002) (unsuccessfully challenging Order 888).

²⁸² Jacobs, *supra* note 121, at 912 & n.12 (“It can be frustrating when certain states believe that consumers shouldn’t have choices and shouldn’t be able to choose to participate in the wholesale DR markets.” (quoting *Guest Interview with Chairman Jon Wellinghoff (FERC)*, ASS’N FOR DEMAND RESPONSE & SMART GRID, <http://www.demandresponsesmartgrid.org/page-1334126> (last visited Mar. 9, 2018) [<https://web.archive.org/web/20160819194331/http://www.demandresponsesmartgrid.org/page-1334126>]).

²⁸³ *Id.* at 918 n.162.

²⁸⁴ Demand Response Compensation in Organized Wholesale Energy Markets, 76 Fed. Reg. 16,658, 16,676 (Mar. 24, 2011) (codified at 7 C.F.R. pt. 35).

²⁸⁵ *EPSA*, 136 S. Ct. at 780.

²⁸⁶ Wiseman, *supra* note 124, at 97.

²⁸⁷ Cf. Ryan, *supra* note 25, at 50 (“States have particularly strong bargaining leverage when the project implicates a state’s proprietary water rights.”).

“bargained-for encroachment” are common forms of negotiation that adjust the federal–state boundary in ways that are mutually beneficial to both parties.²⁸⁸

2. *Exercising Independent Regulatory Authority*

Perhaps most obviously, states can act unilaterally to regulate conduct that lies within the zone of concurrent jurisdiction. From a negotiation perspective, such a move could serve a variety of purposes. The state may be acting to fill what it perceives as a policymaking gap caused by FERC inaction, or to remedy a state-specific problem that, although within FERC’s purview, is not sufficiently important to warrant a national response. The state may also enact such a program to encourage the creation of federal policy, using its jurisdiction as a case study to illustrate what the results of a national policy might look like in practice.²⁸⁹ As noted above, demand-response programs and renewable portfolio standards are both examples of unilateral state action designed to either fill a regulatory void or to offer a test case at the state level to prompt federal policymakers toward national action.²⁹⁰

At its most extreme, the state may enact a policy directly adverse to a FERC initiative to signal disagreement with federal policy and push unilaterally for change. Professor Ryan notes that this model of “intersystemic signaling negotiations” explains the ongoing battle between state and federal officials over medical marijuana.²⁹¹ Within the energy policy sphere, the state antitrust suit in *ONEOK* offers one such example. Although FERC had authority under section 5 of the Natural Gas Act to regulate the sham transactions allegedly committed by defendants, it neither enacted rules to prohibit such behavior during the energy crisis nor moved to punish that behavior afterward.²⁹² It thus at least implicitly permitted the practice. By providing an alternative forum for victims of transactions to sue via the antitrust laws, the states at issue expressed disagreement with FERC’s decision

²⁸⁸ See *id.* at 38–44 (discussing spending power deals and bargained-for encroachment in the context of federalism negotiations).

²⁸⁹ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous [s]tate may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

²⁹⁰ See, e.g., Lincoln L. Davies, *Power Forward: The Argument for a National RPS*, 42 CONN. L. REV. 1339, 1375–76 (2010) (marshaling evidence from state renewable portfolio standard experiments as evidence to consider when designing federal renewable portfolio standard legislation).

²⁹¹ Ryan, *supra* note 25, at 70.

²⁹² See *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1597 (2015) (describing FERC’s enforcement prior to the energy crisis as “(1) ex ante examinations of jurisdictional sellers’ market power, and (2) the availability of a complaint process under § 717d(a) [of the Natural Gas Act]”).

not to act immediately upon the market manipulation allegations. Only after the state antitrust cases were filed did FERC adopt a Code of Conduct that expressly prohibited wash trades and other forms of collusion designed to manipulate market conditions.²⁹³

3. *Participating in FERC Decision Making*

State regulators also have the option of participating directly in FERC proceedings, in which several procedural restrictions require the agency to read and respond to states' (and other interested parties') concerns. As discussed above, the Administrative Procedure Act requires FERC to publish a notice of proposed rulemaking and allow opportunities for interested parties to file comments with the agency before deciding a final rule.²⁹⁴ State regulators regularly file comments to inform FERC commissioners of a particular state's views on proposed federal action.²⁹⁵ The agency is generally required to address such comments in its final rule and failure to do so risks vacatur of the rule upon judicial review.²⁹⁶ In the *EPSA* case, the D.C. Circuit vacated the order permitting demand response in part because the agency failed to consider and engage arguments filed by commenters—and reiterated by dissenting Commissioner Moeller—that the program would result in unjust and unreasonable rates.²⁹⁷

In addition to benefiting from the procedural protections afforded all commenters, states sometimes receive additional access to FERC decision makers through statutorily mandated consultations with affected state

²⁹³ Amendments to Blanket Sales Certificates, 68 Fed. Reg. 66,323, 66,326–30 (Nov. 26, 2003) (codified at 18 C.F.R. pt. 284); *see also ONEOK*, 135 S. Ct. at 1598.

²⁹⁴ *See supra* note 233 and accompanying text.

²⁹⁵ Just as a routine example, the New York State Department of Environmental Conservation filed comments regarding the environmental effects of a particular hydroelectric power plant scheduled for relicensing. *See* Letter from Joseph Murray, Analyst, N.Y. State Dep't of Envtl. Conservation, to Kimberly D. Bose, Sec'y, Fed. Energy Regulatory Comm'n (Feb. 28, 2018), https://elibrary.ferc.gov/idmws/File_list.asp?document_id=14646450. Of course, it is somewhat of a myth to suggest that a state speaks with a unified voice. Sometimes, for example, FERC can become a battleground for competing intrastate voices, such as when the Massachusetts Attorney General's office filed comments at FERC challenging the state Department of Public Utilities' decision on a pipeline project. *See* Letter from Rebecca Tepper, Chief, Energy and Telecoms. Div., Office of Mass. Attorney Gen., to Kimberly D. Bose, Sec'y, Fed. Energy Regulatory Comm'n (Sept. 21, 2015), <http://www.mass.gov/ago/docs/energy-utilities/letter-ferc-docket-14-22-000.pdf>.

²⁹⁶ *See, e.g., NorAM Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) ("[I]t most emphatically remains the duty of this court to ensure that an agency engage the arguments raised before it." (quoting *K N Energy, Inc. v. FERC*, 986 F.2d 1295, 1303 (D.C. Cir. 1992)).

²⁹⁷ *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216, 225 (D.C. Cir. 2014). The Supreme Court disagreed, finding the agency's treatment of the issue to be sufficient. *FERC v. Elec. Power Supply Ass'n (EPSA)*, 136 S. Ct. 760, 782–84 (2016).

regulators. As discussed above, FERC's authority under the Energy Policy Act of 1992 to order a utility to wheel power was conditioned upon giving each affected state regulatory authority notice and an opportunity to be heard on the issue.²⁹⁸ Similarly, before FERC exercised its statutory authority to form Regional Transformation Organizations (RTOs), it held eleven conferences in nine different cities to hear the views of state regulators and other interested stakeholders.²⁹⁹ FERC held these conferences because Congress had conditioned FERC's rulemaking authority on it granting affected state regulators notice and opportunity to be heard.³⁰⁰ Various state commissioners used these meetings to advocate for an explicit state regulatory presence in the governance of any RTO within the state, leading FERC to establish a formal state presence in RTO formation and administration.³⁰¹

Finally, state officials often collaborate with agency staff on various workshops, presentations, and other events within the agency. Sometimes these meetings are facilitated by the National Association of Regulatory Utility Commissioners (NARUC), an interest group governed by and reflecting the interests of state regulatory commissioners.³⁰² For example, in May 2016, NARUC sent a letter to FERC requesting that six named state commissioners be included as panelists at a FERC technical conference on transmission development practices.³⁰³ Four of the six individuals that NARUC suggested were invited to speak at the conference.³⁰⁴

4. *Lobbying Congress*

State interest groups also lobby Congress formally and informally on various energy-related matters. Congress has ultimate oversight of FERC operations, and in the event of a disagreement with the agency, it can call FERC commissioners for hearings, cut the agency's budget, or, in drastic

²⁹⁸ 16 U.S.C. § 824j (2012).

²⁹⁹ Regional Transmission Organizations, 65 Fed. Reg. 810, 816 (Jan. 6, 2000) (codified at 35 C.F.R. pt. 35).

³⁰⁰ 16 U.S.C. § 824a.

³⁰¹ See Regional Transmission Organizations, 65 Fed. Reg. at 816–17, 937–38.

³⁰² *About Us*, NAT'L ASS'N REG. UTIL. COMMISSIONERS, <https://www.naruc.org/about-naruc/about-naruc/> (last visited Feb. 12, 2018).

³⁰³ See Letter from Travis Kavulla, President, Nat'l Ass'n of Regulatory Util. Comm'rs, to Norman Bay, Chairman, Fed. Energy Regulatory Comm'n (May 19, 2016), <http://pubs.naruc.org/pub/E845A207-94FB-0C08-8B58-4BC6E69DC471>.

³⁰⁴ See *Competitive Transmission Development Technical Conference Agenda*, FED. ENERGY REG. COMMISSION 4, 7–8, <http://www.ferc.gov/CalendarFiles/20160627084845-Final%20Agenda.pdf> (last visited Apr. 13, 2018).

cases, pass supplemental legislation to override or modify a FERC decision.³⁰⁵ Unlike FERC, Congress is naturally predisposed to hear state regulators' concerns: each state regulator has several natural allies in the legislature who depend on that state's voters for reelection and support. There are approximately sixty interest groups dedicated to representing state and local interests in Washington, known collectively as the "intergovernmental lobby."³⁰⁶ NARUC is perhaps the most active on energy issues,³⁰⁷ although it is far from the only such group with an interest in the field.³⁰⁸ In addition to providing information to individual members of Congress, NARUC and other lobbying groups often provide testimony at congressional hearings on energy law issues.³⁰⁹

As a negotiating tactic, lobbying Congress can be an effective way to pressure FERC into altering course, even if Congress ultimately takes no formal action against the agency. For example, in 2002, FERC proposed a series of measures designed to bring uniformity to wholesale markets, known collectively as Standard Market Design (SMD).³¹⁰ The proposal was deeply unpopular with many commenters, including states, which criticized the proposal for dismissing too quickly the significance of regional variation within those markets.³¹¹ Opposition was particularly fierce from regulators in the Pacific Northwest and the South, regions that had successfully opted out of FERC's earlier efforts to impose regional uniformity on markets through voluntary participation in RTOs.³¹² In addition to filing comments in the SMD rulemaking proceeding, NARUC and state officials lobbied Congress to force

³⁰⁵ See, e.g., Press Release, House Energy & Commerce Comm., Walden Announces Budget Oversight Hearings (Feb. 5, 2018), <https://energycommerce.house.gov/news/press-release/walden-announces-budget-oversight-hearings/> (summoning all FERC Commissioners to a March 1, 2018, budget hearing before the House Subcommittee on Energy).

³⁰⁶ See Note, *supra* note 248, at 621.

³⁰⁷ See, e.g., Letter from John Betkoski, President, Nat'l Ass'n of Regulatory Util. Comm'rs, to the Chairman and Comm'rs, Fed. Energy Regulatory Comm'n (Dec. 18, 2017), <https://pubs.naruc.org/pub/35409F29-0A60-FF1C-39C2-9985EDFCF478> (highlighting the need for PURPA reform).

³⁰⁸ For example, the National League of Cities works to assure FERC rates are just and reasonable, and to shield municipally owned utilities from FERC jurisdiction. See NAT'L LEAGUE OF CITIES, 2017 NATIONAL MUNICIPAL POLICY AND RESOLUTIONS 25 (2016).

³⁰⁹ See *Policy & Advocacy*, NAT'L ASS'N REG. UTIL. COMMISSIONERS, <https://www.naruc.org/policy-and-advocacy/congressional-advocacy/> (last updated Feb. 22, 2018) (listing recent congressional testimony by NARUC members).

³¹⁰ See Lynne Kiesling & Brian Mannix, *Standard Market Design in Wholesale Electricity Markets: Can FERC's Proposed Structure Adapt to the Unknown?*, ELECTRICITY J., Mar. 2003, at 11, 12.

³¹¹ See *id.*

³¹² See Clinton A. Vance et al., *What Is Happening and Where in the World of RTOs and ISOs?*, 27 ENERGY L.J. 65, 75–76 (2006).

FERC to withdraw the proposal.³¹³ Congress asked the Department of Energy—which oversees FERC—to review the SMD proposal, which effectively stayed the proceeding at the agency.³¹⁴ The following year, FERC released a revised proposal that sought to address opponents' concerns,³¹⁵ although the changes did little to stem opposition. As Congress began considering the Energy Policy Act of 2005, pressure mounted by lobbyists to add a provision in the statute that would have delayed adoption of the SMD proposal by several years.³¹⁶ Although the requested language did not make it into the final bill,³¹⁷ the pressure was sufficient to cause FERC to withdraw the SMD proposal in July 2005.³¹⁸

5. *Participating in Regional Cooperative Structures*

Finally, states can negotiate policy through participation in associations designed to foster greater regional cooperation on energy issues. As discussed above, most electricity markets are best understood as neither intrastate nor national, but instead are regional in scope.³¹⁹ In federalism scholarship, the matching principle generally states that the size of the geographic area affected by a specific decision should determine the appropriate level of government to regulate to avoid the risks of spillover effects (if a jurisdiction is too small) and the loss of relevant local knowledge (if the jurisdiction is too large).³²⁰ The matching principle suggests that many energy law issues should be considered at the regional level.³²¹

There are two ways states might formally cooperate to construct regional-level governance structures. The first is through interstate compacts, agreements between two or more states that require congressional approval

³¹³ See Harvey Reiter, *The Contrasting Policies of the FCC and FERC Regarding the Importance of Open Transmission Networks in Downstream Competitive Markets*, 57 FED. COMM. L.J. 243, 260 & n.88 (2005) (discussing efforts by state officials to challenge SMD proposal in agency comments and congressional testimony).

³¹⁴ Vance et al., *supra* note 312, at 75.

³¹⁵ *Id.* at 75–76.

³¹⁶ Mark S. Hegedus, *Points Well-Taken: Comments on Professor Peter Carstensen's Paper "Creating Workably Competitive Wholesale Markets in Energy"*, 1 ENVTL. & ENERGY L. & POL'Y J. 145, 147 (2005).

³¹⁷ *Id.*

³¹⁸ Vance et al., *supra* note 312, at 75–76.

³¹⁹ See *supra* note 11 and accompanying text.

³²⁰ See Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. 23, 25 (1996); see also Lyons, *supra* note 10, at 1648 (applying the matching principle to electricity market decisions).

³²¹ See Lyons, *supra* note 10, at 1648 ("Using the Matching Principle, one quickly realizes the error in traditional preemption analysis: for many issues, the relevant geographic area is not national, but regional.").

under the Compact Clause.³²² One example is the Western Interstate Energy Board (WIEB), an organization approved by the Western Interstate Nuclear Compact³²³ that comprises the eleven western states and three Canadian provinces that make up the Western Interconnection.³²⁴ WIEB includes a Committee on Regional Electric Power Cooperation, which works to improve the efficiency of the western power grid.³²⁵ Organizations founded on interstate compacts such as WIEB are useful bottom-up counterweights to potential FERC efforts to provide regional regulation from the top down, and can thus help states work together to negotiate a larger voice in regional affairs.

The other method of regional governance involves establishing FERC-administered regional structures designed to promote cooperative federalism. As Professor Weiser notes, “[T]he cooperative federalism regulatory strategy makes sense where the benefits of allowing for diversity in federal regulatory programs outweigh the benefits of demanding uniformity in all situations.”³²⁶ It thus works well when the federal government has a broad policy that it wishes to pursue but lacks a clear consensus regarding precisely how that policy should be achieved. Cooperative federalism regimes thus seek to capture many of the benefits of federalism and decentralized policymaking, while using a light federal touch to make sure state and local experimentation do not disrupt broader national objectives.³²⁷

Cooperative federalism can come in a wide array of structures. This category includes highly centralized, federally administered programs with a state opt-out such as the demand-response program in *EPSA*, which the Court explicitly called out as a “program of cooperative federalism, in which the [s]tates retain the last word.”³²⁸ Or it could be far more decentralized, in which the federal government sets broad strokes and leaves others to fill in the details. Professors Osofsky and Wiseman have discussed in significant detail the benefits to federalism that flow from FERC’s creation of regional transmission organizations, which are bottom-up nongovernmental organizations dedicated to managing transmission grids and often include state

³²² U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.”).

³²³ Act of Oct. 16, 1970, Pub. L. 91-461, art. II, 84 Stat. 979, 979–80.

³²⁴ *What We Do*, W. INTERSTATE ENERGY BOARD, <http://westernenergyboard.org/wieb-board/who-what/> (last visited Feb. 13, 2018).

³²⁵ *Id.*

³²⁶ Weiser, *supra* note 74, at 1698.

³²⁷ *See id.*

³²⁸ *FERC v. Elec. Power Supply Ass’n (EPSA)*, 136 S. Ct. 760, 780 (2016).

and local policymakers among other relevant stakeholders within their governance structures.³²⁹

C. Efforts to Improve Opportunities for Federalism Bargaining

Re-conceptualizing energy federalism as a negotiation rather than a battle also shifts the focus of normative claims for further reforms. Rather than fretting about the substantive question of what the proper level of state or federal jurisdiction should be, one asks instead what changes can be made to improve the overall bargaining process, thus increasing the likelihood of reaching mutually agreeable outcomes through joint decision making.³³⁰ Professor Ryan suggests multiple potential avenues to improve federalism bargaining, two of which stand out most in the energy law sphere and are thus discussed below in turn: (1) creating procedural reforms aimed at fostering federalism values and (2) establishing intelligently designed forums for federal–state bargaining to occur.

1. Creating Procedural Reforms to Foster Federalism Values

Professor Ryan suggests that to improve bargaining over federalism issues, “legislators and administrators can foster federalism values through purposeful procedural design.”³³¹ The purpose of such reforms is to assure that bargaining parties adequately consider the implications their actions will have on federalism.³³² The key ideas with which federalism is concerned—including uniformity versus diversity, spillover effects versus local knowledge, and the relative expertise and capacity of institutional actors—are important factors that can help guide negotiations to reach the optimal policy outcome. But these factors are also esoteric and can potentially get lost amidst the minutiae of specific federal–state negotiations. Procedural reforms that bring federalism values back to the forefront will therefore increase the likelihood that any negotiation will take federalism values into account.

³²⁹ See Osofsky & Wiseman, *supra* note 273 (arguing in favor of the establishment of “hybrid” institutions that include both private and public actors and actors from several levels of government to coordinate energy regulation).

³³⁰ Cf. Ryan, *supra* note 25, at 5 (“[G]overnment actors move forward by substituting procedural consensus for substantive clarity about the central federalism inquiry—who gets to decide?—in individual regulatory contexts.”).

³³¹ *Id.* at 129.

³³² *Id.* at 128–29 (discussing possible changes to the federal–state bargaining structure).

Because, as noted above, FERC is most often likely to be the final decision maker on energy policy issues,³³³ procedural reforms should be aimed at assuring federalism values are properly considered in the agency's deliberations. One group of reforms is analogous to what Professor Ernest Young has termed "resistance norms" in constitutional federalism debates.³³⁴ These are "rules that raise obstacles to particular governmental actions without barring those actions entirely."³³⁵ In the energy law context, resistance norms would help assure that, before FERC acts on a proposal that would displace state authority, it has considered the federalism implications of that action.

One useful resistance norm would be to ensure FERC compliance with Executive Order 13,132. The order instructs agencies that "[n]ational action limiting the policymaking discretion of the [s]tates shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance."³³⁶ Agencies should construe a federal statute to preempt state law only when (1) the statute expressly preempts state law, (2) "there is some other clear evidence that the Congress intended preemption of [s]tate law," or (3) "the existence of [s]tate authority conflicts with the exercise of [f]ederal authority under the [f]ederal statute."³³⁷ Moreover, agencies proposing to preempt state law through adjudication or rulemaking "shall provide all affected [s]tate and local officials notice and an opportunity for appropriate participation in the proceedings."³³⁸

Executive Order 13,132 fosters federalism values by assuring that agencies explain why intruding on state authority is necessary and by giving state officials a forum where they can negotiate with the agency before the agency action takes effect. While the order is currently in force, it suffers from two defects that limit its usefulness to energy federalism disputes. First, the order explicitly does not apply to independent agencies such as FERC.³³⁹ Second, it lacks an enforcement mechanism, meaning that even those agencies that are bound by the order often ignore it or conduct low-quality analyses to satisfy

³³³ See *supra* Section II.C.

³³⁴ Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585 (2000).

³³⁵ *Id.*

³³⁶ Exec. Order No. 13,132, 3 C.F.R. § 206(3)(b) (2000).

³³⁷ *Id.* § 206(4)(a).

³³⁸ *Id.* § 206(4)(e).

³³⁹ *Id.* § 206(1)(c); see also 44 U.S.C. § 3502(5) (2012) ("[T]he term 'independent regulatory agency' means . . . the Federal Energy Regulatory Commission.").

the order's minimum requirements.³⁴⁰ An enforceable executive order that binds FERC (or an equivalent change to FERC's organic statute that would impose these procedures by law) would help improve the influence of federalism values on FERC deliberations.

2. *Establishing Forums for Federal–State Bargaining to Occur*

Professor Ryan also suggests that legislators and administrators “draw from the lessons of federalism engineering” by “creating forums for state-federal bargaining.”³⁴¹ Through these forums, legislators and administrators “should seek opportunities to reduce transaction cost barriers . . . through legal structures that could increase information flow . . . and build working relationships between bargaining participants.”³⁴² Consciously building forums for federal–state dialogue would increase opportunities for bargaining and therefore maximize the opportunity to reach optimal policy solutions.

In the energy sector, this recommendation would encourage greater reliance on regional cooperative-federalism structures such as RTOs. As Professors Osofsky and Wiseman note, RTOs bring together utilities, state regulators, federal officials, and others into a single forum that “cross-cut[s] the levels of government” to solve difficult policy questions.³⁴³ It is perhaps in these forums where the greatest opportunities for mutually beneficial negotiations between federal and state policymakers may be found, as such structures become the situs of reiterated interactions between players at multiple levels of government.³⁴⁴ Additional structures such as these can help increase the points of contact between federal and state actors, forcing them to cooperate to solve regional policy challenges and providing them with a permanent forum within which federalism bargaining can occur.

CONCLUSION

The Court's recent trilogy of cases embracing concurrent jurisdiction is both long overdue and a better reflection of the realities of modern electricity markets. Going forward, state and federal policymakers will increasingly operate in a shared regulatory space. Concurrent jurisdiction provides a set of

³⁴⁰ See Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 782–84 (2004).

³⁴¹ Ryan, *supra* note 25, at 128.

³⁴² *Id.*

³⁴³ Osofsky & Wiseman, *supra* note 273, at 53–55.

³⁴⁴ See *id.* at 53 (“RTOs help to create a bridge both vertically between the federal and state governments and horizontally among their member states.”).

principles with which to navigate this shared space, by setting the proper jurisdictional boundaries based on individual assessments of what arrangement makes sense as a matter of policy, rather than deferring to rigid statutory rules.

Because of this reality, energy federalism needs to more closely resemble a negotiation between state and federal policymakers. While states suffer some disadvantage in this arena because of the benefits that administrative law affords federal agencies, they nonetheless retain a wide range of tools with which to assert state interests in policy debates. Going forward, reformers should look for opportunities to improve the ability of federal and state authorities to negotiate the line between their respective jurisdictions. Such reforms would allow state regulators to retain a voice in decisionmaking and improve the likelihood that policy decisions will be sensitive to federalism concerns.