

PROTECTING STATES IN THE BRAVE 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 The historic model of the local vertically-integrated utility has long been replaced by regional, complex, innovative electricity markets. Concurrent jurisdiction allows regulators to adapt more nimbly to changing market dynamics, unrestrained by the outdated formalism of the old Dual Federalism model.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 policymaking sphere and therefore improve the likelihood that policy decisions will be sensitive to federalism concerns.

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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. For the past eighty years the Court has 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. In the event of a jurisdictional dispute, the

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¹ Federal Power Act, ch. 687 Title II, 49 Stat. 847 (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 Federal Water Power Act, ch. 285, 41 Stat. 1063.

² See Federal Power Act, ch. 687 Title II, 49 Stat. 847 (codified as amended in scattered sections of 16 U.S.C.); Natural Gas Act, P.L. 688, 52 Stat. 821 (codified as amended at 17 U.S.C. § 717 et seq.). the 1935 Federal Power Act amended an earlier 1920 Act that granted the Federal Power Commission licensing authority over hydroelectric dams. See Federal Water Power Act, ch. 285, 41 Stat. 1063.

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.”³

But the Court has struggled at times to police this line,⁴ and in a recent trilogy of cases has recognized instead the possibility of concurrent jurisdiction over some facets of energy markets. Last term, the Court allowed the Federal Energy Regulatory Commission (FERC) to 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.⁵ Shortly thereafter, the Court invalidated Maryland’s attempt to guarantee new power plants a fixed price in federally-administered wholesale markets, but took care to explain that states may regulate within their sphere even when their efforts incidentally affect areas within FERC’s domain.⁶ These electricity cases follow a similar decision last term permitting the overlap of

³ See, e.g., *Panhandle Eastern Pipeline Co. v. Pub. Serv. Comm’n*, 332 U.S. 507, 517 (1947) (discussing the “bright line” between federal and state jurisdiction); *Public Util. Comm’n of Ohio v. United Fuel Gas Co.*, 317 U. S. 456, 469 (1943).

⁴ See, e.g., *New York v. FERC*, 535 U.S. 1, 7-8 (2002) (explaining how regionalization of electricity markets challenges the market assumptions informing the Federal Power Act’s division of regulatory authority).

⁵ *Federal Energy Regulatory Comm’n v. Electric Power Supply Ass’n*, 136 S.Ct. 760 (2016). *see also id.* at 784 (Scalia, J., dissenting). 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. See *Chamber of Commerce v. Environmental Protection 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.

state and FERC authority 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.⁷

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.⁸ 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 in the monopoly era.⁹

⁶ See *Hughes v. Talen Energy Marketing LLC*, 136 S.Ct. 1288 (2016).

⁷ See *ONEOK, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591 (2015); see also *id.* at 1603 (Scalia, J., dissenting).

⁸ See Joseph D. Kearney and Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1325 (1998); 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 electricity industry).

⁹ See, e.g., *New York*, 535 U.S. at 7-8 (“[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)).

This realignment was part of a broader movement that Joseph Kearney and Thomas Merrill dubbed the “Great Transformation of Regulated Industries Law,”¹⁰ through which several traditionally rate-regulated infrastructure industries were subjected to experiments in managed competition and increased consumer choice.¹¹

But in electricity as elsewhere, this great transformation in regulatory philosophy prompted an equally seismic shift in regulatory utility federalism.¹² To accomplish its 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. This spawned conflicts with state regulators eager to protect their jurisdiction and thwart initiatives they viewed as inconsistent with state regulatory objectives. 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

¹⁰ Kearney and Merrill, *supra* note 8.

¹¹ *Id.* at 1325.

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. Overall this is a positive development, as it aligns federalism doctrine more closely to the realities of the modern electricity market.¹³ 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.¹⁴

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 understanding of how broad federal policies should be tailored

¹² See, e.g., *New York*, 535 U.S. at 8.

¹³ See, e.g., Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399 (2016).

¹⁴ Cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175,

to fit local needs. Moreover, several federal initiatives (including the demand response program at issue in the *EPSA* decision) began in state laboratories of experimentation.¹⁵ For these and other reasons, states should maintain an active presence in this policy space—though 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. In this Brave New World of concurrent jurisdiction,¹⁶ federalism-related disputes are more likely to be settled in the political arena than in the courtroom.¹⁷ Drawing upon recent scholarship in negotiation theory¹⁸ and dynamic federalism,¹⁹ 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

1181 (1989).

¹⁵ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 285 (1932) (Brandeis, J., dissenting).

¹⁶ *Cf.* Rossi, *supra* note 13 (discussing the “Brave New Path of Energy Federalism”).

¹⁷ See, e.g., Rossi, *supra* note 13, at 407 (“[C]oncurrent jurisdiction emboldens political institutions (rather than courts) to consider and make decisions about the federalism balance for most interstate energy transactions.”).

¹⁸ See, e.g., Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011).

¹⁹ See, e.g., Hari M. Osofsky and Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773 (2013).

This section discusses the origin of the Dual Federalism model and the modern factors that have placed it under increasing stress. As discussed below, the 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. 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 state and federal regulators each exercising plenary authority within their respective zones of control. 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. 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...—federal and state regulatory bodies operating side by side, each active in its own sphere...without any confusion of functions.”²⁰

This division of authority was not accidental, but rather was an intentional feature designed during the New Deal, in part to protect pre-existing state regulators from federal intrusion.²¹ 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.²² 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. Consistent with this theory, Wisconsin’s public utility law represented a grand bargain between state regulators and 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

²⁰ *Public Util. Comm’n of Ohio v. United Fuel Gas Co.*, 317 U. S. 456, 467 (1943).

²¹ 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).

²² See Lyons, *supra* note 8, at 1626; Ari Peskoe, Note, *A Challenge for Federalism: Achieving National Goals in the Electricity Industry*, 18 MO. ENVTL. L & POL’Y REV. 209, 213 (2011).

utility.²³ 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. By 1920, nearly every state had a similar law governing the electricity industry.²⁴

As the Supreme Court has explained many times,²⁵ 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 Comm'n of Rhode Island v. Attleboro Steam & Electric Co.*²⁶ In that case, a Rhode Island utility that agreed to sell a small amount of surplus electricity production to a neighboring Massachusetts utility for delivery to Massachusetts consumers.²⁷ 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.²⁸ In doing so, the Court exposed a regulatory void wherein monopoly utilities could

²³ See Lyons, *supra* note 8, at 1626-27.

²⁴ See Peskoe, *supra* note 22, at 213.

²⁵ See, e.g., *New York v. FERC*, 535 U.S. 1, 20-21 (2002) (discussing *Attleboro* gap); *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 379-79 (1983) (same).

²⁶ 273 U.S. 83, 90 (1927).

²⁷ *Id.* at 85.

²⁸ *Id.* at 90.

sell electricity across state lines without governmental review to assure the transaction satisfied the public interest.

Shortly thereafter Congress enacted the Federal Power Act²⁹ to close this “*Attleboro* gap,” but when doing so 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 the Federal Power Commission (FERC’s predecessor) would be “a complement to and in no sense a usurpation of State regulatory authority.”³⁰ Similarly, FPC Commissioner Clyde Seavey testified before Congress in support of the bill, noting was “conceived entirely as a supplement to, and not as a substitution for State regulation.”³¹

To that end, the Federal Power Act defines the Commission’s jurisdiction in both positive and negative terms. Section 201 gives FERC jurisdiction two related grants of regulatory authority: the agency has power to regulate “the transmission of electric energy in interstate commerce” and “the sale of electric energy at wholesale in interstate commerce.”³² But the same passage then clarifies that the Commission “shall not have

²⁹ Federal Power Act, ch. 687 Title II, 49 Stat. 847 (codified as amended in scattered sections of 16 U.S.C.).

³⁰ H.R. Rep. No. 1318, 74th Cong., 1st Sess., 7, 8, 27; see *Connecticut Light & Power Co. v. Federal Power Comm’n*, 324 U.S. 515, 526 (1945) (discussing legislative history).

³¹ Hearings on H.R. 5423, House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., 384; see *Connecticut Light & Power*, 324 U.S. at 525.

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.”³³ 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 States.”³⁴ While the Supreme Court has rightly interpreted this last phrase as a statement of policy rather than an independent restriction on Commission authority, the Court nonetheless explained that policy statement “is relevant and entitled to respect as a guide in resolving any ambiguity or indefiniteness” in the statute.³⁵

³² 16 U.S.C. § 824(b)(1).

³³ *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, which governed interstate railroads. 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. *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342, 351 (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). 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. REF. 383, 389 (2010). One may fairly assume that similar savings clauses in the Federal Power Act and the Natural Gas Act were included to give state regulators similar security that their spheres of authority were not at risk by the new federal regulators.

³⁴ 16 U.S.C. § 824(a).

³⁵ *Connecticut Light & Power*, 324 U.S. at 527.

For the next several decades, energy law was shaped by the notion that federal and state regulators each presided over distinct and mutually exclusive spheres of authority.³⁶ One could argue that this statutory Dual Federalism was a logical outgrowth of pre-New Deal conceptions of the limits the Commerce Clause placed upon federal power to regulate intrastate activity.³⁷ But long after cases like *Wickard v Filburn*³⁸ 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 one branch of government did not intrude into the realm of another.³⁹ 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. The Court explained, for example, that jurisdictional line in the Natural Gas Act (which parallels the Federal Power Act) was “clear and complete” and “cut sharply and cleanly” between federal and state authority

³⁶ One could argue that this division of authority has its origins in pre-New Deal conceptions of the limits the Commerce Clause placed upon federal power to regulate intrastate activity.

³⁷ See, e.g., Robert Post, *Federalism in the Taft Court Era: Can It Be Revived?* 51 DUKE L.J. 1513, 1513 (2002) (noting the “the pre-New Deal Court conceived federalism in terms of the ideal of dual sovereignty, which imagined that the federal government and the states regulated distinct and exclusive spheres of social and economic life”).

³⁸ 317 U.S. 111 (1942).

³⁹ 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, that just as pre-*Wickard* case law divided the country into federal and state jurisdiction as a constitutional matter, so post-New Deal case law created a similar two-sphere regulatory world as a statutory matter.

in a way that preserved state regulatory authority that existed “before the Act was passed.”⁴⁰ 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.”⁴¹

B. The Statutory Shift Toward Cooperative Federalism

1. Public Utility Regulatory Policies Act of 1978 (PURPA)

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 that electricity along high-voltage transmission lines, and distributed that energy to retail customers within its service territory.⁴² The Public Utility Holding Company Act of 1935 provided strong incentives for utilities to limit their operations to a single state.⁴³ As Jim Rossi has chronicled, the Federal Power Commission (and later FERC) aggressively

⁴⁰ *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Ind.*, 332 U.S. 507, 516 (1947); see Rossi, *supra* note 13, at 417.

⁴¹ *FPC v. Southern California Edison*, 376 U.S. 205, 215-16 (1964).

⁴² See RICHARD J. PIERCE JR. AND ERNEST GELLHORN, *REGULATED INDUSTRIES IN A NUTSHELL* 364 (4th ed. 1999).

⁴³ Public Utility Holding Company Act, ch. 687, 49 Stat. 803 (1935) (codified at 15

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.⁴⁴ 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, commonly known as PURPA.⁴⁵ 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 the country was not so reliant upon fossil fuels. But 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.⁴⁶ The statute spelled out the procedures by which state ratemakers must "consider" these federal suggestions⁴⁷ and

U.S.C. § 79 (2000)) (repealed 2005). See Lyons, *supra* note 8, at 1627; Peskoe, *supra* note 22, at 218-19.

⁴⁴ See Rossi, *supra* note 13, at 415-427.

⁴⁵ Pub. L. No. 95-617, 92 Stat. 3117 (codified at 16 U.S.C. § 2601 et seq).

⁴⁶ 16 U.S.C. §§ 2621(d), 2623, 2624.

⁴⁷ Id. §§ 2621(b); 2621(c)(2); § 2623; 15 U.S.C. § 3203.

required states to report their progress periodically to FERC.⁴⁸ 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.⁴⁹ 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.⁵⁰

As Joseph Kearney and Thomas Merrill have noted in their seminal article *The Great Transformation of Regulated Industries Law*,⁵¹ PURPA was part of a larger shift in America's infrastructure industries away from traditional rate-regulated monopolies. In railroads, airlines, trucking, telecommunications, electricity, and natural gas, policymakers began to emphasize competition rather than regulation as the primary guarantor of consumer protection.⁵² Commentators often described this change as "deregulation," though as Kearney and Merrill explain, "if 'deregulation'

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

⁴⁹ 16 U.S.C. § 824a. "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. It can be useful for small-scale buildings or complexes with significant heating or cooling needs such as office buildings or hospitals.

⁵⁰ *Id.* § 210.

⁵¹ See Kearney & Merrill, *supra* note 8.

⁵² See, e.g., Orloff v. FCC, 352 F.3d 415, 419 (D.C. Cir. 2003) ("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.") (internal quotation marks and citation omitted).

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.”⁵³ 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.

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 generation, Congress had to reach into a sphere—vertically integrated electricity utilities—that traditionally lay within the states’ sphere of 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*,⁵⁴ the first case to raise doubts about the inviolability of the

⁵³ Kearney and Merrill, *supra* note 10, at 1324-25.

⁵⁴ 456 U.S. 742 (1982).

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.⁵⁵ In a 5-4 decision, 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.⁵⁶ 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 States to continue regulating in the area on the condition that they consider the suggested federal standards.”⁵⁷ While “the choice put to the States—that of either abandoning regulation of the field altogether or considering the federal standards—may be a difficult one,”⁵⁸ it does not “involve the compelled exercise of Mississippi’s sovereign powers” and therefore does not unconstitutionally infringe upon the state’s sovereignty.⁵⁹

In *FERC v. Mississippi*, the Court recognized for the first time 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

⁵⁵ *Id.* at 752.

⁵⁶ *Id.* at 765.

⁵⁷ *Id.*

⁵⁸ *Id.* at 766.

neatly into the exclusive province of either FERC or its state analogues. 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, but states are enlisted to carry out the scheme and have some latitude to tailor policies in response to local conditions.⁶⁰

2. Energy Policy Act of 1992 (“EPAAct 1992”)

PURPA’s effort to jumpstart competition in the electricity generation market proved only to be the opening salvo in a lengthy battle to restructure the nation’s electricity markets. Kearney and Merrill note that PURPA “inadvertently created a lobby for open access” to utility-owned transmission networks.⁶¹ 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. Vertically integrated utilities had little incentive to provide transmission facilities to independent generators who competed against the utility’s own electricity

⁵⁹ *Id.* at 769-770.

⁶⁰ See Jonathan H. Adler, *Judicial Federalism and the Future of Environmental Regulation*, 90 IOWA L. REV. 377, 384 (2005); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1698 (2001).

⁶¹ Kearney and Merrill, *supra* note 10, at 1395; see also David B. Spence, *Regulation*,

generation facilities. But FERC 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”).⁶² Congress filled this gap with the Energy Policy Act of 1992,⁶³ which lifted most preexisting restrictions on FERC’s wheeling authority and instead allowed it to order specific utilities to wheel power upon request by an electricity generator, if FERC found wheeling would serve the public interest.⁶⁴

But in the spirit of promoting cooperative federalism, the Act provided two avenues for state regulators to 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.⁶⁵ This gave state regulators the opportunity upfront to air any objection to particular wheeling requests. Second, it provided that FERC shall terminate a wheeling order if the order required enlargement of

Climate Change, and the Electric Grid, 3 SAN DIEGO J. OF CLIMATE & ENERGY LAW 267, 276 (2012).

⁶²As the Supreme Court noted in an antitrust case brought by the government against a recalcitrant utility, the Federal Power Commission had “limited authority” to order interconnection and “no authority” to order wheeling. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 375 (1973). PURPA later gave FERC limited authority to order wheeling, but because of the conditions Congress placed on that authority, FERC never exercised it. 92 Stat. 3117, § 203.

⁶³ Pub. L. No. 102-486, 106 Stat. 2776.

⁶⁴ *Id.* § 721, 106 Stat. at 2915, codified at 16 U.S.C. § 824j.

⁶⁵ 16 U.S.C. § 824j. This provision was included in PURPA’s original, restricted grant

existing transmission facilities and the utility, after making a “good faith effort,” was unable to get siting approval from the relevant state or local authorities.⁶⁶ This meant that, if the wheeling order required expansion but the state saw no in-state benefit to the wheeling, it could effectively block the FERC order by failing to issue the necessary siting approvals, as long as its efforts were consistent with underlying state siting laws.⁶⁷

C. Order 888 and The Administrative Push Toward Concurrent Jurisdiction

In the years following PURPA, 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

of wheeling authority to FERC. See 92 Stat. 3117, § 203.

⁶⁶ *Id.* § 721, 106 Stat. at 2915, codified at 16 U.S.C. § 824j.

⁶⁷ 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. 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. In response, the Energy Policy Act of 2005 grants FERC limited backstop authority to grant siting approval of new transmission facilities even without state approval, if the proposed line is in an area designated by the Department of Energy as a National Interest Electric Transmission Corridor. Pub. L. No. 109-58, § 1221(b), 119 Stat. 947 (2005) (codified at 16 U.S.C. § 824p(a)–(b) (2012)). But use of this authority has thus far been stymied by litigation over procedures through which the Department of Energy has designated existing corridors, and 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. Fed. Energy*

networks. Section 203 of the Federal Power Act requires FERC approval of mergers involving any utility subject to FERC jurisdiction.⁶⁸ In the late 1980s and early 1990s, FERC often conditioned its merger approvals on a commitment by the post-merger entity to provide transmission services to competitors on a nondiscriminatory basis.⁶⁹ The agency justified these requirements as necessary to mitigate the potential market power that could result from the merger.⁷⁰ Over time, the agency hoped to cajole the industry into voluntarily providing the wheeling services that it lacked the ability to impose directly.

By its own admission, FERC “aggressively” exercised the additional wheeling authority granted to it by the Energy Policy Act of 1992.⁷¹ Between 1992 and 1996, FERC issued twelve separate orders requiring a utility to provide wheeling services for a complaining wholesale competitor.⁷² Ultimately the agency concluded that piecemeal wheeling was too costly and time-consuming and was not achieving the level of market

Regulatory Comm’n, 558 F.3d 304, 310 (4th Cir. 2009).

⁶⁸ 16 U.S.C. § 824b.

⁶⁹ See, e.g., *Montana Power Co.*, 56 F.E.R.C. ¶ 61,296 (1991); *Kansas Power & Light Co.*, 56 F.E.R.C. ¶ 61,356 (1991); *Utah Power & Light Co.*, 47 F.E.R.C. ¶ 61,209 (1989) (transmission conditions imposed on merger authorization).

⁷⁰ Jeffrey D. Watkiss & Douglas W. Smith, *The Energy Policy Act of 1992—A Watershed for Competition in the Wholesale Market*, 10 YALE J. ON REG. 447, 458-59 (1993).

⁷¹ See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 61 Fed. Reg. 21,540-01, 21,547 (1996) (hereafter “Order 888”).

⁷² Order 888, *supra* note 71, at 21,547.

reform that it sought.⁷³ In response, the Commission adopted its landmark Order 888 in 1996, which mandated industry-wide wheeling in all markets that FERC regulated.⁷⁴ 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.⁷⁵ It also imposed a similar requirement on retail transmission, if the retailer sold transmission on an unbundled basis (meaning, if the utility voluntarily offered transmission to competitors as a standalone service) in interstate commerce.⁷⁶ 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.⁷⁷ The agency 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.⁷⁸

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.”⁷⁹ This concern was largely due to the Order’s sweeping assertion of authority over

⁷³ See *New York v. FERC*, 535 U.S. 1, 9 (2002).

⁷⁴ See generally Order 888, *supra* note 71.

⁷⁵ *Id.* at 21,552; see *New York*, 535 U.S. at 11.

⁷⁶ Order 888, *supra* note 71, at 21,571-72; see *New York*, 535 U.S. at 11.

⁷⁷ 16 U.S.C. § 824e.

⁷⁸ See *New York*, 535 U.S. at 10 (quoting Notice of Proposed Rulemaking, FERC

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. 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.*,⁸⁰ a retail transmission could be jurisdictionally interstate even if the seller and buyer are in the same state, if the transmission line is connected to a larger interconnection grid and therefore the electricity in question is “commingled” with electricity sold in interstate commerce. This meant that Order 888 reached virtually all retail sales outside of those in Alaska, Hawaii, and parts of Texas (where transmission lines were not connected to larger interstate grids), unless the utility chose not to offer retail transmission on an unbundled basis.⁸¹

Concerned about losing control over retail transmission lines, New York challenged Order 888’s assertion of jurisdiction over unbundled retail

Stats. & Regs., Proposed Regs., 1988-1999, ¶ 32,514, 33,049).

⁷⁹ Order 888, supra note 71, at 21,542.

⁸⁰ 404 U.S. 453 (1972).

⁸¹ Justice Douglas predicted this federal jurisdictional grab two decades before it happened. 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).

sales. The state argued that the legislative history of the Federal Power Act showed that by granting FERC authority over wholesale markets, Congress meant to leave retail electricity markets to the states.⁸² 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.⁸³ Under this plain language, FERC had authority to apply Order 888 to unbundled retail transmissions in interstate commerce.⁸⁴ The Court went on to reaffirm the holding in *Florida Power and Light* that “transmissions on the interconnected national grids constitute transmissions in interstate commerce.”⁸⁵

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: “we 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.”⁸⁶ 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

⁸² *New York*, 535 U.S. at 20-24.

⁸³ *Id.* at 17.

⁸⁴ *Id.* at 24.

⁸⁵ *Id.* at 16.

legislative history and would “impede sound energy policy.”⁸⁷ 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 the current court’s shift toward concurrent jurisdiction, the *New York* court noted repeatedly that “the landscape of the electric industry has changed since the enactment of the FPA, when the electricity universe was ‘neatly divided into spheres of retail versus wholesale sales.’”⁸⁸ Indeed, this shift soothed any apprehension the *New York* 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.⁸⁹

⁸⁶ *Id.* at 19.

⁸⁷ *Id.* at 24.

⁸⁸ *Id.* at 16.

⁸⁹ *Id.* at 23.

The court is correct that modern electricity markets have moved far away from the local vertically-integrated monopoly model that shaped the Federal Policy Act. Even before FERC began experimenting with wheeling, local utilities were integrating their grids with one another because of the benefits of greater economies of scale, such as greater reliability and the ability to buy or sell excess electricity from neighboring utilities. Over time, these pooling arrangements have united the contiguous United States into three regional grids, known as “interconnections.”⁹⁰ 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.⁹¹

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 *New York* Court did, that “a customer in Vermont may purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma.”⁹² After all, there are only a handful of ties between the Western and Eastern Interconnections, and electricity dissipates as it travels long distances over transmission lines

⁹⁰ Stan Mark Kaplan, *Electric Power Transmission: Background and Policy Issues*, CONGRESSIONAL RESEARCH SERVICE 7-5700 , at 3 (Apr. 14, 2009)

⁹¹ *Id.*

⁹² *New York*, 535 U.S. at 8 (quoting *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 681 (D.C. Cir. 2000)).

(a phenomenon known as “line loss”).⁹³ 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. Sharon Jacobs has described this pattern as “bypassing federalism.”⁹⁴ 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.”⁹⁵ 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.⁹⁶

But as Hannah Wiseman has noted,⁹⁷ the phenomenon that Jacobs describes may more accurately be described as the inevitable byproduct of

⁹³ Lyons, *supra* note 8, at 1648-49.

⁹⁴ Sharon B. Jacobs, *Bypassing Federalism and the Administrative Law of Negawatts*, 100 IOWA L. REV. 885 (2015).

⁹⁵ *Id.* at 890.

⁹⁶ *Id.*

⁹⁷ Hannah J. Wiseman, *Moving Past Dual Federalism to Advance Electric Grid*

regulating increasingly complex and interdependent electricity markets. The *New York* court is correct that the world is no longer “neatly divided into spheres of retail versus wholesale sales.”⁹⁸ Initiatives undertaken in one corner of that world are likely to have ripple effects on other 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.

II. Defining, and Defending, Concurrent Jurisdiction

A. Defining Concurrent Jurisdiction

The demise of dual federalism and the erosion of the traditionally impregnable sphere of state authority over regulatory industry has left some uncertainty regarding how competing federalism claims should be resolved. At the same time, the increasingly porous nature of the federal-state divide and the growing complexity of regulated industries has arguably increased the number of federalism-related disputes that the court must address. As cases such as *New York v. FERC* show,⁹⁹ the Supreme Court has increasingly recognized the growing mismatch between the realities of

Neutrality, 100 IOWA L. REV. BULL. 97, 97-100 (2015).

⁹⁸ *New York*, 535 U.S. at 16.

modern electricity markets and the Dual Federalism model that has historically shaped its interpretation of federal energy laws. This past term, a trilogy of cases seemed to signal a shift by the Court away from the increasingly anachronistic formalism of Dual Federalism, and acceptance of the possibility that the statute can accept pockets of concurrent jurisdiction.

*I. The Precursor: ONEOK Inc. v. Learjet Inc.*¹⁰⁰

The 2015 decision in *ONEOK v Learjet* was the first to suggest the possibility that federal energy laws might be flexible enough to support concurrent jurisdiction over particular conduct. *ONEOK* arises out of trading practices during the 2000-2002 energy crisis.¹⁰¹ The petitioners were natural gas traders. Respondents, who purchase natural gas at retail, alleged that the petitioners manipulated the natural gas market by reporting false sales data to trade publications whose pricing surveys served as reference points for natural gas prices, and by artificially inflating sales volumes through wash sales, wherein a trader agrees to execute a buy and simultaneously executes an equal and opposite sell on another trading platform.¹⁰² Respondents alleged that these practices violated various state antitrust laws and filed suit.¹⁰³ After removing the case to federal court,

⁹⁹ 535 U.S. 1 (2002).

¹⁰⁰ 135 S.Ct. 1591 (2015).

¹⁰¹ *Id.* at 1598.

¹⁰² *Id.* at 1597-99.

¹⁰³ *Id.* at 1591.

petitioners sought summary judgment on the ground that these state law claims were preempted by the Natural Gas Act.¹⁰⁴

The preemption question upon which certiorari was granted presents 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. Section 1(b) of the Act gives the Federal Energy Regulatory Commission authority generally to regulate interstate and wholesale natural gas operations.¹⁰⁵ It also contains a savings clause that explicitly preserves state regulatory authority over retail natural gas sales.¹⁰⁶ But who has jurisdiction over conduct which, as here, affects both wholesale and retail markets?

Consistent with prior case law interpreting the NGA through a Dual Federalism lens, petitioners pressed a field preemption argument. They asserted that the Court should find that the Natural Gas Act "occupies the field" with regard to any conduct affecting wholesale rates. 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)

¹⁰⁴ *Id.*

¹⁰⁵ 15 U.S.C. §717(b).

¹⁰⁶ *Id.*; see *Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kan.*, 489 U. S. 493, 507 (1989).

jurisdictional rates.”¹⁰⁷ Because the conduct at issue affected wholesale prices as well as the retail prices that the respondents paid, they argued that any manipulation resulting from those practices fell within FERC’s exclusive jurisdiction.¹⁰⁸ In fact, they noted that following the energy crisis FERC adopted a code of conduct that prohibited the very conduct at issue in this case.¹⁰⁹ Allowing state actions to proceed would risk state courts reaching conclusions about this conduct that is inconsistent with FERC’s rulings, creating the risk of inconsistent judgments. As a result, they argued, the court should find that the state law antitrust claims fall within the preempted field.¹¹⁰

While the court described these arguments as “forceful,” it ultimately disagreed that field preemption was appropriate in this case.¹¹¹ Justice Breyer’s majority opinion began by noting that the Natural Gas Act was enacted “with meticulous regard for the continued exercise of state power.”¹¹² Therefore, the Court explained, if—as here—a state law can be applied to both FERC-jurisdictional rates and rates outside FERC’s jurisdiction, the court should find preemption only where a detailed

¹⁰⁷ 15 U.S.C. §717d(a).

¹⁰⁸ *Oneok* at 1599.

¹⁰⁹ *Id.* at 1598; see 68 Fed. Reg. 66324 (2003).

¹¹⁰ *Oneok* at 1599.

¹¹¹ *Id.*

¹¹² *Id.* at 1599 (quoting *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm’n of Ind.*, 332 U.S. 507, 517–518 (1947)).

examination convincingly demonstrates that the matter falls within the preempted field.¹¹³

In the process of rejecting this field preemption argument, the Court questioned whether it makes sense to continue interpreting the Act as creating two mutually-exclusive spheres of authority over natural gas markets. “Petitioners and the dissent argue that there is, or should be, a clear division between areas of state and federal authority in natural-gas regulation. But that Platonic ideal does not describe the natural gas regulatory world.”¹¹⁴ Instead, the Court framed the relevant inquiry as focusing upon the “target at which the state law aims.”¹¹⁵ 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 the claims. But where the state regulation 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 the regulation might have some effect on FERC-jurisdictional rates. Here, the court found that because the lawsuits are focused on retail sales, which are within the states’ purview, and because state antitrust laws at issue are aimed at all

¹¹³ *Id.*

¹¹⁴ *Id.* at 1601.

¹¹⁵ *Id.*

businesses in the marketplace, rather than just FERC-jurisdictional entities, the Natural Gas Act does not preempt those claims.¹¹⁶

Justice Scalia dissented, joined by Chief Justice Roberts.¹¹⁷ Echoing themes of traditional Dual Federalism, the dissent took issue with the majority's decision to focus on the purpose of state regulation.¹¹⁸ The relevant inquiry, he 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."¹¹⁹ 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.¹²⁰ The majority's purposive approach, Scalia wrote, sacrifices the clarity of Dual Federalism in favor of a "make-it-up-as-you-go-along approach to preemption" that he predicts will "prove unworkable in practice."¹²¹

2. *Recognizing Concurrent Jurisdiction over Electricity Markets:*

FERC v. Electric Power Supply Ass'n¹²²

The following term, Justice Kagan's opinion in *FERC v. Electric Power Supply Association* ("EPSA") signaled that *ONEOK* was not an isolated decision, using language that even more forcefully rejected the

¹¹⁶ *Id.* at 1601.

¹¹⁷ *Id.* at 1603 (Scalia, J., dissenting).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1604 (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988)).

¹²⁰ *Id.* ("Straightforward application of these precedents would make short work of the case at hand.")

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 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.¹²³ Petitioner, a trade association representing electricity generators, challenged the demand response rule as an impermissible intrusion on state authority. 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.¹²⁴

The D.C. Circuit, applying a traditional Dual Federalism framework, rejected the demand response program as unwarranted intrusion onto matters reserved exclusively for the states.¹²⁵ The opinion began with the traditional recognition that the Federal Power Act “splits jurisdiction over the sale and delivery of electricity between the federal government and the states on the basis of the type of service being provided and the nature of

¹²¹ *Id.* at 1603.

¹²² 136 S.Ct. 760 (2016).

¹²³ *Id.* at 767.

¹²⁴ *Id.* at 778-79.

¹²⁵ *Electric Power Supply Ass’n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014).

the energy sale”¹²⁶ and that “FERC’s jurisdiction over the sale of electricity has been specifically confined to the wholesale market.”¹²⁷ But demand response, explained the circuit court, is not a “wholesale sale of electricity.”¹²⁸ Rather, it is a payment to reduce retail demand and therefore “directly regulat[ed] a matter subject to state control,” namely “the retail market.”¹²⁹ The circuit court 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.¹³⁰

But Justice Kagan’s majority opinion directly and forcefully rejected this Dual Federalism approach to FERC’s jurisdictional quandary. Unlike the D.C. Circuit, the Supreme Court did not focus upon whether the federal agency had intruded upon an area of the market reserved to the states. Instead, the Court asked in isolation whether the Federal Power Act gives FERC a jurisdictional hook to support its rule.¹³¹ 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.¹³² The Court acknowledged the lower court’s concern about the potentially

¹²⁶ *Id.* at 219 (quoting *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 824 (D.C. Cir. 2006) (internal modifications omitted)).

¹²⁷ *Id.* (quoting *New York v. FERC*, 535 U.S. 1, 19 (2002)).

¹²⁸ *Id.* at 221.

¹²⁹ *Id.* at 222.

¹³⁰ *Id.* at 221.

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.”¹³³

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. But in a passage that is jarring to students of energy federalism, the opinion boldly declares that this fact is “of no legal consequence.”¹³⁴ 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 retail sales.”¹³⁵ 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.”¹³⁶ Section 201(b) prohibits FERC from directly regulating generation facilities, local

¹³¹ *EPSA*, 136 S.Ct. at 774.

¹³² *Id.*

¹³³ *Id.* at 774.

¹³⁴ *Id.* at 776.

¹³⁵ *Id.*

¹³⁶ *Id.*

distribution, and purely intrastate transmission lines.¹³⁷ The majority opinion holds that “[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.”¹³⁸

Unsurprisingly, Justice Scalia once again dissented, in what would be his final published opinion. As in *Oneok*, Justice Scalia would have focused categorically on who the initiative seeks to regulate, rather than what the purpose of the initiative might be. Quoting previous Dual Federalism cases, 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.”¹³⁹ Here, the demand response initiative seeks to regulate retail consumers, in an attempt to persuade them not to consume electricity in retail markets. Because it regulates entities on the state side of the line, Justice Scalia would have found the program beyond FERC’s purview.¹⁴⁰

3. *Limits on Concurrent Jurisdiction: Hughes v. Talen Energy Marketing*¹⁴¹

¹³⁷ 16 U.S.C. § 824j.

¹³⁸ *EPSA*, 136 S.Ct. at 776,

¹³⁹ *Id.* at 786 (Scalia, J., dissenting) (quoting *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 517 (1947)).

¹⁴⁰ *Id.*

¹⁴¹ 136 S.Ct. 1288 (2016).

Shortly after deciding *EPSA*, announced a potential limiting principle on concurrent jurisdiction in *Hughes v. Talen Energy Marketing, LLC*. At issue in this case is 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 EPA’s Clean Power Plan. The state 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.¹⁴² In response, the state subsidized new electricity generation by guaranteeing new generators a fixed contract price for electric capacity.¹⁴³ 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.¹⁴⁴

Opponents asserted, and the Court agreed, that Maryland’s plan impermissibly interfered with wholesale electricity rates, over which FERC has “exclusive jurisdiction.”¹⁴⁵ Quoting *EPSA*, the Court acknowledged that

¹⁴² *See id.* at 1294.

¹⁴³ *Id.* at 1295.

¹⁴⁴ *Id.* New Jersey, whose generation markets are similarly threatened by the Clean Power Plan, enacted a similar subsidy program that was stayed pending the outcome of the *Hughes* litigation.

¹⁴⁵ *Id.* at 1297.

“[s]ince the FPA’s passage, electricity has become a competitive interstate business and FERC’s role has evolved accordingly” vis-à-vis the states.¹⁴⁶ 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.”¹⁴⁷ The key inquiry under *ONEOK* is “the *target* at which the state *aims*.”¹⁴⁸ Here, the operative fact was 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.¹⁴⁹ The program thus set an interstate wholesale rate, an activity that the Federal Power Act vests exclusively in FERC.¹⁵⁰

But unlike earlier cases that painted federal preemption with a broad brush, the Court closed by carefully explaining the limits of its holding:

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

¹⁴⁶ *Id.* at 1292.

¹⁴⁷ *Id.* at 1299.

¹⁴⁸ *Id.* (quoting *ONEOK, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1599 (2015)).

¹⁴⁹ *Id.* at 1297.

¹⁵⁰ *Id.*

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.¹⁵¹

B. Defending Concurrent Jurisdiction: From Hemispheres to a Venn Diagram

Together, this trilogy signals at least two significant changes 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. 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. Dual Federalism imagines the energy industry as a single circle bisected by a line that creates two distinct hemispheres. 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 of the Venn diagram), *ONEOK*, *EPSA*, and *Hughes* all acknowledge that many—perhaps most—activities

¹⁵¹ *Id.* at 1299.

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

Second, and related, is an emphasis on functionalism rather than formalism to settle future jurisdictional disputes. In *ONEOK*, Justice Breyer emphasized that to determine whether a state action is preempted by federal law, the court should not treat labels in the Act as dispositive, but instead should determine the “target at which the state aims.”¹⁵² This means that future jurisdictional disputes are likely to be decided by “a case-by-case analysis” of the purpose of the initiative in question—which is precisely the common-law-like approach eschewed by earlier Dual Federalism decisions.¹⁵³

It is perhaps unsurprising that this shift began 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”).¹⁵⁴ Consistent with his preference for rules over standards,¹⁵⁵ Justice Scalia has long advocated for field preemption as a powerful tool to resolve jurisdictional disputes. The

¹⁵² *ONEOK, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1599 (2015); accord *Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288, 1299 (2016).

¹⁵³ See, e.g., *FPC v. Southern California Edison*, 376 U.S. 205, 215-16 (1964).

¹⁵⁴ *ONEOK*, 135 S.Ct. at 1603 (Scalia, J., dissenting).

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. These themes weighed heavily in cases decided during the Dual Federalism era, where uniformity and clarity were virtues benefitting the smooth operation of stable, static vertically-integrated electric companies. Justice Scalia's dissents in *ONEOK* and *EPSA* thus expose one of the most significant risks associated with the shift toward concurrent jurisdiction, namely the risk that competition among regulators may prove unworkable in practice and lacks the stability that companies desire when investing in high-fixed-cost industries such as electricity.

But in today's complex and fast-moving energy markets, stability is probably less important than flexibility. Eschewing rigid rules for more flexible common-law-like standards seems fitting for modern utilities regulation for the reasons that one might generally choose standards over rules in a given situation. As Justice Kagan emphasizes in *EPSA*, a helpful and common-sense policy initiative could be hindered by over- or under-inclusive jurisdictional rules that prevent actors from acting. Justice Kagan notes that demand response is an eminently reasonable policy initiative to

¹⁵⁵ See generally Scalia, *supra* note 14.

solve the problem of peak demand, and even those FERC Commissioners who dissented from its adoption on jurisdictional grounds conceded that the purpose of the program was sound. It would be unfortunate, she writes, for rigid, inflexible rules such as those promoted by the dissent to prevent the public from taking advantage of beneficial policy initiatives. After all, if, as the dissent suggests, 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. 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.

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. 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. 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.

III. Negotiating Energy Federalism in a World of Concurrent Jurisdiction

But while recognition of concurrent jurisdiction aligns judicial doctrine more closely with the realities of the modern electricity industry, it raises some important questions about the future of energy federalism, particularly for state officials. The embrace of concurrent jurisdiction is effectively a form of judicial abdication: 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 Jim Rossi notes, 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.¹⁵⁶ 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.

¹⁵⁶ See Rossi, *supra* note 13, at 407.

This section examines the effect this shift in terrain is likely to have upon the ability of state officials to advocate for their preferred policy outcomes. After reinforcing the continued importance of regulatory federalism in modern electricity markets, this section highlights the potential difficulties that states will face as FERC becomes the primary arbiter of the line between federal and state authority. Drawing upon recent scholarship in negotiation theory, it then highlights several tools that state regulators can, and do, use to “negotiate federalism” by influencing the development of energy law in ways that reflect ongoing state concerns.

A. The Ongoing Importance of Energy Federalism

Importantly, the question of proper allocation of authority between federal and state regulators with regard to 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.¹⁵⁷ 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

¹⁵⁷ *FERC v. Mississippi*, 456 U.S. 742, 765 (1982).

patrol the *constitutional* boundary between state and federal power, a topic that lies (far) beyond the scope of this article.¹⁵⁸

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 (for example, telecommunications), increased competition and greater economies of scale have led to the reduction or even elimination of state regulation.¹⁵⁹ What benefits do we receive from ongoing state oversight in the electricity sector? Federalism scholars have identified a wide range of rationales for the preservation of state autonomy,¹⁶⁰ three stand out in the federalism context: diversity and local knowledge, experimentation, and state capacity and expertise.¹⁶¹

¹⁵⁸ See 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); 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).

¹⁵⁹ See, e.g., Lyons, *supra* note 33 (arguing that modern telecommunications markets are largely regional in scope, suggesting the need for a more circumscribed role for state regulators); Daniel A. Lyons, Comment, *Technology Convergence and Federalism: The Case of VOIP Regulation*, 1 U. MICH. J. LAW REFORM ONLINE 57 (2012) (arguing that ongoing state regulation of telecommunications service can jeopardize technological advancement in VOIP service).

¹⁶⁰ 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) (listing rationales).

¹⁶¹ As 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

I. 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.”¹⁶² Because they are responsible for a smaller number of constituents, state decisionmakers have greater local knowledge about the ways in which a particular 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.¹⁶³ 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 unleashing competition created a largely national market for telephone and Internet service, today’s electricity markets are primarily regional in

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. 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. See Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 *Duke L.J.* 1933, 1941-42 (2008).

¹⁶² *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

scope.¹⁶⁴ 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.¹⁶⁵ Within these three “interconnections” lie approximately 130 separate balancing authorities, each of which is responsible for matching electricity supply and demand within a specific geographic area on a real-time basis.¹⁶⁶

Regional differences can have a significant effect on energy policy. One need look no 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. 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. 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. 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.

¹⁶³ Lyons, *supra* note 8, at 1652.

¹⁶⁴ *Id.* at 1648.

¹⁶⁵ *Id.* at 1648-49.

¹⁶⁶ *Id.* at 1650.

Similarly, geographic differences can affect the optimal fuel mix for electricity generation with a region, both between traditional and renewable energy and which forms of renewable energy are optimal.¹⁶⁷ In Texas and the Midwest, an abundance of wind resources has driven construction of wind farms—which in Texas are supporting intrastate load centers, while Midwestern wind resources face the challenge of adding transmission capacity to reach load centers in other states. 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. Meanwhile, an abundance of fossil fuels in coal-dense states like West Virginia make renewable energy less cost-effective as a substitute for traditional energy resources.

Finally, local policies can reflect different cultural mores across regions. For example, different states have set different renewable portfolio standards, which represent 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 half by 2050.¹⁶⁸ By comparison, North Carolina has targeted merely 12.5 percent by 2021, while states such as Mississippi, Alabama, and Georgia have declined to adopt an RPS

¹⁶⁷ *Id.* at 1654.

¹⁶⁸ CAL. PUB. UTIL. CODE § 399.30(c)(2).

requirement.¹⁶⁹ 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. One can therefore consider the different RPS requirements by state to 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 the oversight of other, 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 state may, if its citizens choose, serve as a

¹⁶⁹ See *Renewable Portfolio Standard Policies*, DATABASE FOR STATE INCENTIVES FOR RENEWABLES & EFFICIENCY (August 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).

laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁷⁰

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 curtail peak-time demand at the retail level¹⁷¹--a fact that Justice Scalia highlighted in his dissent.¹⁷² Jacobs notes that these experiments helped “highlight[] best practices” when pursuing successful demand response strategies, as well as “pitfalls to avoid” when FERC enacted its own wholesale-level program.¹⁷³ 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 trustee of transmission grid reliability in 2005.¹⁷⁴

3. *Capacity and Expertise*

¹⁷⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting).

¹⁷¹ See Jacobs, *supra* note 94, at 906 (discussing state-level efforts).

¹⁷² *FERC v. Electric Power Supply Ass’n*, 136 S.Ct. 760,788 (2016) (Scalia, J., dissenting).

¹⁷³ Jacobs, *supra* note 94, at 906.

¹⁷⁴ Hari M. Osofsky & Hannah J. Weisman, *Hybrid Energy Governance*, 2014 ILL. L. REV. 1. For additional examples of the benefits of state experimentation in electricity markets, see generally William Boyd & Ann E. Carlson, *Accidents of Federalism*:

Finally, Erin Ryan highlights the advantages that state regulators bring in terms of additional capacity and expertise.¹⁷⁵ By virtue of their long history in the industry, state regulators have expertise in managing those areas of the grid that historically lay within its sphere. And the fifty state public utility commissions collectively have greater capacity to act than FERC, whose reach is limited by time and budgetary constraints.¹⁷⁶ The existence of state regulators therefore helps mitigate the risk that a particular public policy dilemma will go unattended because of natural limits on the federal regulator's capacity.

B. Concurrent Jurisdiction's Threat to Energy Federalism

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, as discussed above, concurrent jurisdiction draws jurisdictional boundaries based upon policy judgments rather than statutory interpretation or broader federalism principles, this means that FERC is likely to be 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.

Ratemaking and Policy Innovation in Public Utility Law, 63 UCLA L. REV. 810 (2016).

¹⁷⁵ Ryan, *supra* note 18, at 79-80.

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. In an influential article, 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.¹⁷⁷ First, they argue that agency decisionmaking is transparent: the Administrative Procedure Act 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.¹⁷⁸ 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.¹⁷⁹ Finally, they are at least indirectly politically accountable to congressional and presidential oversight, which can help correct agency excesses.¹⁸⁰

While Galle and Seidenfeld are correct that the APA contains substantial procedural requirements to assure that interested parties (including state regulators) will be heard before the agency takes action,

¹⁷⁶ *Id.*

¹⁷⁷ Galle & Seidenfeld, *supra* note 161, at 1938.

¹⁷⁸ *Id.* at 1955-57.

¹⁷⁹ *Id.* at 1975-77.

there remain some risks to vesting questions about optimal jurisdictional analysis primarily in agency hands. One is the sheer volume of agency action: agencies face fewer veto gates than Congress (which must go through bicameralism and presentment) 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.¹⁸¹ Moreover, there is no intrinsic state perspective helping guide the decisionmaker. 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.¹⁸²

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.¹⁸³ This means that in the event of a political struggle between

¹⁸⁰ *Id.* at 1981-83.

¹⁸¹ See, e.g., Thomas W. Merrill, *Preemption and Institutional Choice*, 102 *Nw. U. L. REV.* 727, 750, 753-57 (2008).

¹⁸² While some federal regulators are indeed drawn from the ranks of their state counterparts, this is not a requirement of FERC Commissioners.

¹⁸³ See *id.* at 1937 (summarizing debate).

agencies and state interests, the tie will go to the federal authority by virtue of the Supremacy Clause.

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.¹⁸⁴ 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.¹⁸⁵ 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.¹⁸⁶ Although Phil 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,¹⁸⁷ this approach has not caught on, meaning that on the whole, state claims to authority will be scrutinized more closely by courts than federal claims.

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

¹⁸⁴ *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁸⁵ See *City of Arlington v FCC*, 133 S.Ct. 1863 (2013).

¹⁸⁶ See, e.g., Nathan A. 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.”)

¹⁸⁷ Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1(1999).

While the preceding discussion highlights the potential deficiencies of the administrative safeguards of federalism, it is important to recognize that this is only one facet of the federalism struggle. While *EPISA* 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 would traditionally 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 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 realm of concurrent jurisdiction. As Erin 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."¹⁸⁸ 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

¹⁸⁸ Ryan, *supra* note 18, at 4.

complete picture of the reality of policymaking in complex regulatory environments.

Viewed through this lens, one recognizes that states have numerous tools available with which they may bargain with FERC—and in fact have been doing so regularly since PURPA sent the electricity industry down the path of restructuring almost four decades ago. What follows is a (likely 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 abandon the field with regard to many energy federalism disputes, litigation remains a viable strategy through which states can exert pressure on FERC. Ryan notes that even when statutory lines are clear, the use of lawsuits can be a viable indirect negotiating tactic.¹⁸⁹ While the Court recognized a zone of concurrent jurisdiction, the Federal Power Act still retains a definable limit on federal authority that carves out a zone of authority reserved exclusively for the states (one of the crescents in the Venn Diagram referenced above). As noted above, FERC is prohibited by statute from regulating local generation, local distribution, and purely intrastate transmission lines.¹⁹⁰

¹⁸⁹ *Id.* at 19-21.

¹⁹⁰ 16 U.S.C. §824j.

EPSA also notes that FERC’s authority to regulate activity related to wholesale rates (which ultimately supported its demand response program) is limited to programs that “directly” affect such rates.¹⁹¹ States can, and do, force FERC to respect these jurisdictional limits through actual and threatened lawsuits.

The fear 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.¹⁹² But rather than regulate retail markets directly or seek additional regulatory authority from Congress, FERC crafted a wholesale demand response program that was “scrupulously careful not to challenge jurisdictional boundaries directly.”¹⁹³ Arguably to avoid a lawsuit or strengthen its position in the event of litigation, FERC conceded that “demand response is a complex matter that lies at the confluence of State and Federal jurisdiction,” FERC allowed any state to prohibit its retail customers from participating in the program.¹⁹⁴ The *EPSA* court explained that this opt-out provision “removes

¹⁹¹ *FERC v. Electric Power Supply Ass’n*, 136 S.Ct. 760, 774 (2016).

¹⁹² Jacobs, *supra* note 94, at 912 (citing Guest Interview with Chairman Jon Wellinghoff (FERC), ASS’N FOR DEMAND RESPONSE & SMART GRID, <http://www.demandresponsesmartgrid.org/page-1334126> (last visited Jan. 21, 2015) (“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.”).

¹⁹³ Jacobs, *supra* note 94, at 918 n.162.

¹⁹⁴ Demand Response Compensation in Organized Wholesale Energy Markets, 76 Fed. Reg. 16,658-01, 16.676 ¶ 114 (2011).

any conceivable doubt” as to the legality of the program because “States retain the last word” about how the program applies in practice.¹⁹⁵

Importantly, it is in the public interest for states to continue to protect their zone of exclusivity provided in the act, even if one believes (as most do) that the Act’s provisions are “anachronistic,” “artificial,” and “increasingly irrelevant” to modern energy markets.¹⁹⁶ By possessing an exclusive sphere of authority, states have an additional chip to use as leverage in negotiations.¹⁹⁷ 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 “bargained-for encroachment” are not uncommon forms of negotiation that adjust the federal-state boundary in ways that are mutually beneficial to both parties.

2. *Exercising Independent Regulatory Authority*

Perhaps most obviously, states can unilaterally act 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 act 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 as a way to encourage

¹⁹⁵ *Electric Power Supply Ass’n*, 136 S.Ct. at 780.

¹⁹⁶ Wiseman, *supra* note 97, at 97.

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. As noted above, both demand response programs and renewable portfolio standards are 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.¹⁹⁸

At its most extreme, the state may enact a policy directly adverse to a FERC initiative, as a way to signal disagreement with federal policy and push unilaterally for change. Ryan notes that this model of “intersystemic signaling negotiations” explains the ongoing battle between state and federal officials over medical marijuana.¹⁹⁹ Within the energy policy sphere, one might argue that the state antitrust suit in *ONEOK* is another example. Although FERC had authority under Section 5 of the 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 (thus at least implicitly permitted the practice). By providing an alternative forum for victims of transactions to sue, the states at issue expressed disagreement with FERC’s decision not to act immediately upon the market manipulation allegations. Only after the state

¹⁹⁷ Ryan, *supra* note 18, at 40.

¹⁹⁸ See, e.g., Lincoln L. Davies, *Power Forward: The Argument for a National RPS*, 42 CONN. L. REV. 1339, 1376 (2010) (marshaling evidence from state RPS experiments to advocate for federal RPS legislation).

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.²⁰⁰

3. *Participating in FERC Decisionmaking*

State regulators also have the option of participating directly in FERC proceedings, where 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. State regulators regularly file comments to inform FERC commissioners of a particular state's views on proposed federal action. The agency is generally required to address such comments in its final rule; failure to do so risks vacatur of the rule on judicial review.²⁰¹ In the *EPSA* case, the DC Circuit vacated the order permitting demand response in part because the agency failed to consider and engage arguments filed by

¹⁹⁹ *Id.* at 69.

²⁰⁰ Amendments to Blanket Sales Certificates, 68 Fed. Reg. 66,323-01 (2003); see *ONEOK Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1598 (2015).

²⁰¹ 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.”).

commenters (and reiterated by dissenting Commissioner Moeller) that the program would result in unjust and unreasonable rates.²⁰²

In addition to benefiting from the procedural protections afforded all commenters, states sometimes receive additional access to FERC decisionmakers by virtue of statutorily-mandated consultations with affected state 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.²⁰³ Similarly, before FERC exercised its statutory authority to form Regional Transformation Organizations, it held eleven conferences in nine different cities to hear the views of state regulators and other interested stakeholders,²⁰⁴ because Congress had conditioned that authority on FERC granting affected state regulators notice and opportunity to be heard.²⁰⁵ 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.²⁰⁶

²⁰² See *Electric Power Supply Ass'n v. FERC*, 753 F.3d 216, 225 (2014). The Supreme Court opinion disagreed, finding the agency's treatment of the issue to be sufficient. *FERC v. Electric Power Supply Ass'n*, 136 S.Ct. 760, 783 (2016).

²⁰³ 16 U.S.C. § 824j.

²⁰⁴ *Regional Transmission Organizations*, 89 FERC 61,285;

²⁰⁵ 16 U.S.C. § 824a.

²⁰⁶ *Id.*

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. As a simple example, earlier this year 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.²⁰⁷ Four of the six personnel that NARUC suggested were invited to speak at the conference.²⁰⁸

4. Lobbying Congress

State interests 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, can call FERC commissioners for hearings, cut the agency's budget, or in drastic cases pass supplemental legislation to override or modify a FERC decision. 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

²⁰⁷ See Letter to Norman Bay, May 19, 2016, available at <http://pubs.naruc.org/pub/E845A207-94FB-0C08-8B58-4BC6E69DC471>.

²⁰⁸ See Competitive Transmission Development Technical Conference Agenda, June 27-28, 2016, available at

approximately sixty interest groups dedicated to representing state and local interests in Washington, known collectively as the intergovernmental lobby.²⁰⁹ NARUC is perhaps the most active on energy issues, though it is far from the only such group with an interest in the field. 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.

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.”²¹⁰ The proposal was deeply unpopular with many states, which criticized the proposal for dismissing too quickly the significance of regional variation within those markets.²¹¹ Opposition was particularly fierce from regulators in the Pacific Northwest and the South, which had successfully opted out of FERC’s earlier efforts to impose regional uniformity on markets through voluntary

<http://www.ferc.gov/CalendarFiles/20160627084845-Final%20Agenda.pdf>.

²⁰⁹ See *Lesson of Lopez*, supra note 158, at 621.

²¹⁰ See Lynne Kieslong & Brian Mannix, *Standard Market Design in Wholesale Electricity Markets: Can FERC’s Structure Adapt to the Unknown?*, Reason Public Policy Institute Public Policy Study 301 (Nov. 2002).

²¹¹ See *id.*

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participation in RTOs.²¹² In addition to filing comments in the SMD
rulemaking proceeding, NARUC and state officials lobbied Congress to
force FERC to withdraw the proposal. Congress asked the Department of
Energy (which oversees FERC) to study the merits of the SMD proposal,
which effectively stayed the proceeding at the agency.²¹³ The following
year FERC released a revised proposal that sought to address opponents'
concerns, though 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 stripping FERC of its authority to
enact the SMD proposal. Although the requested language did not make it
into the final bill, the pressure was sufficient to cause FERC to withdraw
the SMD proposal in July 2005.²¹⁴

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 or national, but are regional in scope. In Federalism
scholarship, the Matching Principle states that generally, the size of the
geographic area affected by a specific decision should determine the

²¹² 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).

²¹³ *Id.* at 75.

²¹⁴ *Id.*

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).²¹⁵ The Matching Principle suggests that many energy law issues should be considered at the regional level.

There are two ways states might formally cooperate to construct regional-level governance structures. The first is through interstate compacts, an agreement between two or more states that requires congressional approval under the Compact Clause.²¹⁶ One example is the Western Interstate Energy Board, an organization approved by the Western Interstate Nuclear Compact²¹⁷ that comprises the eleven western states and three Canadian provinces that make up the Western Interconnection. WIEB includes a Committee on Regional Electric Power Cooperation, which works to improve the efficiency of the western power grid. 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.

²¹⁵ 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 (1996); see also Lyons, *supra* note 8, at 1648 (applying the Matching Principle to electricity market decisions).

²¹⁶ U.S. CONST. ART. I, SEC. 10, CL. 3 ("No State shall, without the Consent of Congress... enter into any Agreement or Compact with another State.").

The other method of regional governance involves entering into FERC-administered regional structures designed to promote cooperative federalism. As discussed above, “the cooperative federalism regulatory strategy makes sense where the benefits of allowing diversity in federal regulatory programs outweigh the benefits of demanding uniformity in all situations.”²¹⁸ It thus works well when the federal government has a broad policy that it wishes to pursue, but there is no 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.²¹⁹

Cooperative federalism can come in a wide array of structures. The category includes highly centralized, federally administered programs with a state opt-out such as the demand response program in *EPISA*, which the court explicitly called out as a “program of cooperative federalism” in which “states retain the last word.”²²⁰ Or it could be far more decentralized, in which the federal government sets broad strokes and leaves others to fill in the details. Osofsky and Wiseman have discussed in significant detail the

²¹⁷ Pub. L. 91-461.

²¹⁸ Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 NYU L. REV. 1692, 1698 (2001).

²¹⁹ *Id.*

benefits to federalism that flow from FERC's creation of regional transmission organizations, bottom-up nongovernmental organizations dedicated to managing transmission grids that often include state and local policymakers among other relevant stakeholders within their governance structures.²²¹

D. Efforts to Improve Opportunities for Federalism Bargaining

Reconceptualizing 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 the proper level of state or federal jurisdiction, one asks instead what changes can be made to improve the overall bargaining process, increasing the likelihood of reaching mutually agreeable outcomes through joint decisionmaking.²²² Ryan suggests multiple potential avenues to improve federalism bargaining, two of which stand out most in the energy law sphere: procedural reforms aimed at fostering federalism values, and creating intelligently-designed forums for federal-state bargaining to occur.

1. Creating Procedural Reforms to Foster Federalism Values

²²⁰ EPSCA, __ U.S. at __.

²²¹ Osofsky & Weisman, *supra* note 174.

²²² *Cf.* Ryan, *supra* note 18, 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.”).

Ryan suggests that to improve bargaining over federalism issues, legislators and administrators should “foster federalism values through purposeful procedural design.”²²³ The purpose of such reforms is to assure that bargaining parties adequately consider the implications their actions will have on federalism. The key questions with which federalism is concerned, including uniformity versus diversity, spillover effects vs 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.

Because, as noted above, FERC is most often likely to be the final decisionmaker on energy policy issues, procedural reforms should be aimed at assuring federalism values are properly considered in the agency’s deliberations. One group of reforms are analogous to what Ernest Young has termed “resistance norms” in constitutional federalism debates.²²⁴ These are rules that “raise obstacles to particular governmental actions without

²²³ *Id.* at 129.

²²⁴ Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585 (2000).

barring those actions entirely.”²²⁵ In this 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 13132. EO13132 instructs agencies that “national action limiting the policymaking discretion of the states shall be taken only when 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.”²²⁶ Agencies should construe a Federal statute to preempt State law only where (1) the statute expressly preempts State law; (2) “there is some other clear evidence that the Congress intended preemption of State law”; or (3) “where the existence of State authority conflicts with the exercise of Federal authority under the Federal statute.”²²⁷ Moreover, agencies proposing to preempt state law through adjudication or rulemaking “shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings.”²²⁸

The federalism executive order fosters federalism values by assuring that agencies explain why intruding on state authority is necessary and by giving a forum for state officials to negotiate with the agency before the

²²⁵ *Id.*

²²⁶ Exec. Order. 13132 (1999).

²²⁷ *Id.*

²²⁸ *Id.*

agency action takes effect. While the order is currently in force, it suffers two defects that limit its usefulness to energy federalism disputes. First, the order explicitly does not apply to independent agencies such as FERC.²²⁹ Second, it lacks an enforcement mechanism, meaning that even those agencies that are bound by the order often ignore it or conduct poor-quality analyses to satisfy the order's minimum requirements.²³⁰ 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*

Ryan also suggests that legislators and administrators draw “from the lessons of federalism engineering” by “creating forums for state-federal bargaining.”²³¹ These forums should “seek opportunities to reduce transaction cost barriers” by “increas[ing] information flow” and “build[ing] working relationships between bargaining participants.”²³² Consciously building forums for federal-state dialogue would increase opportunities for bargaining and therefore maximize the opportunity to reach optimal policy solutions.

²²⁹ *Id.*

²³⁰ See Nina A. Mendelson, *Chevron and Preemption*, 107 MICH. L. REV. 737, 782-84 (2004).

²³¹ Ryan, *supra* note 18, at 128.

²³² *Id.*

In the energy sector, this recommendation would encourage greater reliance on regional cooperative federalism structures such as RTOs. As 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.²³³ 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.²³⁴ 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 a permanent forum within which federalism bargaining can occur.

IV. Conclusion

The Court’s recent trilogy 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 shared regulatory space. Concurrent jurisdiction provides a set of principles with which to navigate this shared space, by setting the proper jurisdictional boundary based on individual assessments of what

²³³ Osofsky & Wiseman, *supra* note 174 at 54-55.

²³⁴ See generally *id.*

arrangement makes sense as a matter of policy, rather than deferring to rigid statutory rules.

Because of this reality, energy federalism more closely resembles a negotiation between state and federal policymakers. While states suffer some disadvantage in this arena because of the advantages 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, confident in the reality that state regulators will make themselves heard, just as they have in policy debates throughout the messy history of electricity deregulation.