LONG LIVE THE FEDERAL POWER ACT'S BRIGHT LINE

Matthew R. Christiansen & Joshua C. Macey

CONTENTS

LONG LIVE THE FEDERAL POWER ACT'S BRIGHT LINE

Matthew R. Christiansen[*] *& Joshua C. Macey*[**]

This Article interprets a trio of recent Supreme Court cases that addressed jurisdictional disputes in energy markets to identify which policies respect the Federal Power Act's (FPA) allocation of jurisdiction and which do not. While judges and scholars have considered how these cases implicate various jurisdictional disputes, they have so far failed to articulate a coherent framework for understanding when state or federal policies violate the FPA's jurisdictional silos.

This Article provides that framework. It argues that the Supreme Court's energy law trio lays the foundation for a doctrinally coherent and normatively compelling interpretation of the FPA. Specifically, these three cases do not, as scholars have maintained, reflect a doctrinal shift away from the venerable "bright line" jurisdictional division that has characterized the FPA since 1935. Those cases instead apply this bright line to the twenty-first-century electricity sector, which has been transformed by technological innovations and by regulatory attempts to introduce competitive forces. The FPA continues to prohibit state and federal energy regulators from interfering with matters reserved to the other's exclusive jurisdiction. The Court has simply clarified how the FPA applies in light of technological and economic developments that have created situations that implicate the responsibilities of state and federal regulators simultaneously. Rather than create regulatory gaps that would prevent energy regulators from supervising transactions over which the FPA expressly grants those regulators jurisdiction, the Court has prohibited only those unusual policies that (a) expressly decide an issue that the FPA leaves to the other regulator to resolve (for example, setting a rate in a market that is outside of the regulator's sphere of jurisdiction), (b) "aim at" or "target" matters that the FPA reserves to the other regulator, or (c) render it impossible for FERC to control matters within its regulatory domain. Recognizing that the bright line is alive and well resolves the doctrinal confusion that has plagued courts and clarifies which energy policies are permissible and which are not.

Introduction

In the past decade, state and federal regulators have taken ambitious steps to reshape the electricity sector. As of August 2020, thirty states and seven territories had committed to procuring a certain percentage

---

[*] Matthew Christiansen is currently a Legal Advisor to FERC Commissioner Richard Glick. The views expressed herein do not necessarily represent those of the Commission, individual Commissioners, or Commission Staff.

[**] Joshua Macey is an Assistant Professor at the University of Chicago Law School. Many thanks to Norman Bay, Lisa Bernstein, William Boyd, Jeff Dennis, Joel Eisen, William Eskridge, Miles Farmer, Sharon Jacobs, Hajin Kim, Alexandra Klass, Saul Levmore, Jerry Mashaw, Erica Hough, Jacob Mays, Ari Peskoe, Randy Picker, Eric Posner, Matt Price, Jim Rossi, Jackson Salovaara, David Spence, Steven Wellner, Shelley Welton, Anand Viswanathan, and Avi Zevin. We are also grateful to the *Harvard Law Review* for outstanding feedback and editorial assistance. Any errors are our own.

This Article is dedicated to Judge Stephen F. Williams, who, in his over thirty years on the bench, did more than anyone else to develop the jurisprudence of the Federal Power Act and Natural Gas Act.

of their electricity from clean or renewable sources.[1] At least thirteen of those states and territories, including California and New York, have pledged to procure one hundred percent of their electricity from carbon-free sources by 2050 or earlier.[2] Those plans build on a host of other measures, including renewable portfolio standards,[3] cap-and-trade programs,[4] and net metering policies,[5] that are designed to reduce power sector pollution. For its part, the Federal Energy Regulatory Commission (FERC) has ordered grid operators to allow emerging resources to compete with incumbent power providers on a level playing field.[6] Those state and federal efforts to shape the electricity sector are arguably the

---

1 *See, e.g.*, Renewable Energy Standard and Tariff, ARIZ. ADMIN. CODE §§ 14-2-1801, -1804 (2020); Renewable Energy Portfolio Standards Act, DEL. CODE ANN. tit. 26, §§ 351, 354 (2020); Future Energy Jobs Act, 2016 Ill. Laws 4581–82; Alternative Energy Production Law, IOWA CODE §§ 476.41–.45 (2020); Clean Energy Standard, 310 MASS. CODE REGS. 7.75 (2020); Clean and Renewable Energy and Energy Waste Reduction Act, MICH. COMP. LAWS §§ 460.1001, .1028 (2020); Renewable Energy Objectives, MINN. STAT. § 216B.1691 (2019); Renewable Energy Standard, MO. ANN. STAT. §§ 393.1020–.1030 (West 2020); Montana Renewable Power Production and Rural Economic Development Act, MONT. CODE ANN. §§ 69-3-2001, -2004 (2019); Electric Renewable Portfolio Standard, N.H. REV. STAT. ANN. §§ 362-F:1 to :3 (2020); N.J. STAT. ANN. § 48:3-87 (West 2020); Renewable Energy and Energy Efficiency Portfolio Standard, N.C. GEN. STAT. § 62-133.8 (2020); Renewable Portfolio Standards, OR. REV. STAT. §§ 469A.050–.055 (2020); Alternative Energy Portfolio Standards Act, 73 PA. STAT. AND CONS. STAT. § 1648.3 (West 2020); Renewable Energy Standard, 39 R.I. GEN. LAWS § 39-26-4 (2020); TEX. UTIL. CODE ANN. § 39.904 (West 2019); VT. STAT. ANN. tit. 30, §§ 8004–8005 (2020); *State Renewable Portfolio Standards and Goals*, NAT'L CONF. OF ST. LEGISLATURES (Apr. 17, 2020), https://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx [https://perma.cc/XU6E-FGHV].

2 *See, e.g.*, CAL. PUB. UTIL. CODE § 454.53 (West 2020); D.C. CODE § 34-1432 (2020); Guam Pub. L. 35-46 (2019); HAW. REV. STAT. § 269-92 (2019); ME. REV. STAT. ANN. tit. 35-A, § 3210(1-A)(B) (2020); NEV. REV. STAT. § 704.7820(2) (2020); N.M. STAT. ANN. §§ 62-15-34(A)(3)(c), 62-16-4(A)(6) (West 2020); Puerto Rico Energy Policy Act, 2019 P.R. Laws Act No. 17; VA. CODE ANN. § 56-585.5(C) (2020); WASH. REV. CODE §§ 19.405.010, .050 (2020); S. 6599, 242d Leg., Reg. Sess. (N.Y. 2019) (enacted) (codified at N.Y. ENV'T CONSERV. LAW §§ 75-0101 to -0119 (McKinney 2020)); Conn. Exec. Order No. 3 (Sept. 3, 2019); Wis. Exec. Order No. 38 (Aug. 16, 2019). At least one other state is considering similar legislation. *See* Clean and Renewable Energy Standard (CARES), S. 265, 2020 Gen. Assemb., 441st Sess. (Md. 2020).

3 Renewable portfolio standards require utilities to purchase a certain percentage of electricity from clean energy sources. *See* sources cited *supra* note 2.

4 Cap-and-trade programs set an upward limit on emissions — often on emissions from industrial activity. *See, e.g.*, *AB 32 Global Warming Solutions Act of 2006*, CAL. AIR RES. BD. (Sept. 28, 2018), http://www.arb.ca.gov/cc/ab32/ab32.htm [https://perma.cc/HL63-RM7X].

5 Net metering policies compensate homeowners for installing rooftop solar panels. *See State Net Metering Policies*, NAT'L CONF. OF ST. LEGISLATURES (Nov. 20, 2017), https://www.ncsl.org/research/energy/net-metering-policy-overview-and-state-legislative-updates.aspx [https://perma.cc/7MSD-2X43].

6 *See, e.g.*, Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators, Order No. 841, 83 Fed. Reg. 9,580, 9,582 (Mar. 6, 2018) (codified at 18 C.F.R. pt. 35) [hereinafter FERC Order No. 841] (ordering energy markets to accommodate storage resources); *see also* Rich Glick & Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L.J. 1, 16–24 (2019) (discussing the Commission's efforts to break down barriers to competition and new technologies).

single most significant step the United States is taking to address climate change.[7]

State and federal regulators are pursuing these policies against a backdrop of unprecedented change in the electricity sector. New technologies, including batteries and distributed energy resources,[8] along with maturing technologies, such as wind and solar, are reshaping the generation mix in a way that is rapidly rendering obsolete the regulatory and economic models that prevailed for nearly a century. Together, the combination of technological change, competitive forces, and state efforts to address climate change has the potential to create an electricity sector that would have been virtually unrecognizable just a few years ago. We'll call this the transition to the electricity grid of the future.

But getting to the electricity grid of the future will not be easy. Efforts to reshape the grid are already encountering a host of political, regulatory, and legal obstacles. This Article analyzes what could be the principal legal impediment to state and federal efforts to shape modern electricity markets — a New Deal statute with a vaguely Orwellian name: the Federal Power Act[9] (FPA). The FPA was enacted in the midst of the Great Depression[10] and with the primary goal of protecting customers from economic exploitation at the hands of monopoly utilities.[11] The law gave the federal government near plenary authority over sales of electricity from power plants and over the transmission facilities that moved that electricity long distances to the people who consume it.[12] At the same time, Congress explicitly reserved oversight of several important parts of the electricity sector for exclusive regulation by the states,[13] including retail sales of electricity and the facilities that generate electric power.[14] In the 1930s, those lines demarcated clear federal

[7] *See* William Boyd & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law*, 63 UCLA L. REV. 810, 816–17, 891–93 (2016).

[8] Distributed energy resources are generally resources that participate in the electricity grid at the local level — rooftop solar panels, residential appliances, such as water heaters and air conditioning units, and, perhaps in the not-too-distant future, electric cars. *See* Tanuj Deora, Lisa Frantzis & Jamie Mandel, *Distributed Energy Resources 101: Required Reading for a Modern Grid*, ADVANCED ENERGY ECON. (Feb. 13, 2017, 9:45 AM), https://blog.aee.net/distributed-energy-resources-101-required-reading-for-a-modern-grid [https://perma.cc/J64M-Z94U].

[9] 16 U.S.C. §§ 791a–828c.

[10] The FPA was enacted in 1920 as the Federal Water Power Act to regulate hydroelectric plants. *See* 16 U.S.C. § 791; Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920). It was amended in 1935, when Congress passed the Public Utility Act. *See* Public Utility Act of 1935, tit. II, ch. 687, 49 Stat. 803, 838–63 (codified as amended at 16 U.S.C. §§ 791a–828c).

[11] *See, e.g.*, Joshua C. Macey, *Zombie Energy Laws*, 73 VAND. L. REV. 1077, 1098 (2020); *see also id.* at 1096–1105 (showing that numerous energy doctrines originated in the utility era to protect consumers).

[12] *See* 16 U.S.C. § 824(b)(1). The primary exception was for sales of electricity that were not in interstate commerce. *See id.*

[13] *See id.* § 824(a).

[14] *See id.* § 824(b)(1).

and state spheres of authority. For that reason, the FPA was often described as drawing a "bright line" between state and federal jurisdiction.[15]

How things have changed. Today's electricity sector has matured into the "most complex machine ever made."[16] And that machine is now evolving faster than at any point in its century-plus history. Since the mid-1990s, both federal and state regulators have pursued concerted campaigns to take advantage of rapid technological change and introduce competition into what had always been a monopoly industry.[17] Those efforts have redrawn the industry along lines that no longer trace the neat jurisdictional divisions laid out in 1935. In addition, a host of relatively new technologies — including batteries, low-cost wind and solar facilities, and technologies that allow customers to respond to price fluctuations — are rapidly being deployed across the grid.[18] While these technologies promise enormous economic and environmental benefits, they likewise do not fit easily within the jurisdictional lines drawn in 1935. As a result, some have argued that what was once a "bright line" between federal and state jurisdiction has become a "hazy" one.[19]

The bounds of that line — whether bright or hazy — have become increasingly consequential as the industry transitions to the electricity grid of the future. In recent years, entities that stand to lose out from particular efforts to address climate change and increase competition in electric power markets have sought to weaponize the FPA's division of authority, repeatedly arguing that state or federal policies are invalid because they exceed their progenitor's jurisdiction.[20] Battles about the

---

[15] *See, e.g.*, Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 374 (1988) ("Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates."); FPC v. S. Cal. Edison Co., 376 U.S. 205, 215–16 (1964) ("Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction . . . .").

[16] PHILLIP F. SCHEWE, THE GRID: A JOURNEY THROUGH THE HEART OF OUR ELECTRIFIED WORLD 1 (2007).

[17] *See* Paul L. Joskow, *The Difficult Transition to Competitive Electricity Markets in the United States*, *in* ELECTRICITY DEREGULATION: CHOICES AND CHALLENGES 31, 31–32 (James M. Griffin & Steven L. Puller eds., 2005).

[18] *See, e.g.*, Coley Girouard, *Time Varying Rates: An Idea Whose Time Has Come?*, ADVANCED ENERGY ECON. (Mar. 12, 2015, 1:33 PM), https://blog.aee.net/time-varying-rates-an-idea-whose-time-has-come [https://perma.cc/DC63-WMTU]; Pippa Stevens, *The Battery Decade: How Energy Storage Could Revolutionize Industries in the Next 10 Years*, CNBC (Dec. 30, 2019, 3:25 PM), https://www.cnbc.com/2019/12/30/battery-developments-in-the-last-decade-created-a-seismic-shift-that-will-play-out-in-the-next-10-years.html [https://perma.cc/4ZES-3YG7] (estimating that the market for storage provided by lithium-ion batteries could reach $426 billion in the next decade).

[19] Robert R. Nordhaus, *The Hazy "Bright Line": Defining Federal and State Regulation of Today's Electric Grid*, 36 ENERGY L.J. 203, 207 (2015) (noting that the bright line is no longer "easily ascertained"); *see also* Steven Ferrey, *Supreme Court Strips States of Their Power over the World's Second Most Important Technology*, 69 BAYLOR L. REV. 315, 317 (2017) (describing the "impenetrable" bright line once created by the Supreme Court).

[20] *See, e.g.*, North Dakota v. Heydinger, 825 F.3d 912, 926 (8th Cir. 2016) (finding that the FPA preempts a Minnesota clean energy law).

electricity grid of the future are thus being waged over a jurisdictional line that Congress drew nearly a hundred years ago.

For example, in just the past few years, several state clean energy policies have been challenged — and some invalidated — on preemption grounds.[21] Federal regulations have also been challenged, with a major case involving a FERC rule to facilitate energy storage resources' (for example, batteries') participation in energy markets decided just last year.[22] Faced with that reality, some have argued that the FPA is out of date and only dramatic revisions can prevent it from becoming a barrier to state and federal efforts to adapt to the changing electricity grid.[23]

We disagree. As it stands, the FPA should catalyze the transition to the energy grid of the future, not impede it. A trio of recent Supreme Court cases has the potential to create an enduring jurisdictional framework that can accommodate the transition to the electricity grid of the future while respecting the FPA's federalist vision. In 2015 and 2016, the Supreme Court issued three decisions addressing jurisdictional challenges to various state and federal energy laws.[24] Scholars have argued

---

[21] *See* Coal. for Competitive Elec. v. Zibelman, 906 F.3d 41, 54 (2d Cir. 2018); Elec. Power Supply Ass'n v. Star, 904 F.3d 518, 522–24 (7th Cir. 2018); *Heydinger*, 825 F.3d at 926; *see also* New Eng. Ratepayers Ass'n, 168 FERC ¶ 61,169, para. 43 (Sept. 19, 2019) (finding that "the FPA preempts" a New Hampshire clean energy law because the law "sets an interstate wholesale rate, contravening the [FPA's] division of authority between state and federal regulators" (alteration in original) (quoting Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1297 (2016))); Nat'l Ass'n of Regul. Util. Comm'rs v. FERC (*NARUC*), 964 F.3d 1177, 1181 (D.C. Cir. 2020).

[22] *See NARUC*, 964 F.3d at 1182–83. At least two other major jurisdictional disputes are pending in the courts of appeals. *See* Petition for Review, Sierra Club v. FERC, No. 20-1333 (D.C. Cir. Aug. 31, 2020); Petition for Review of FERC Orders, Ill. Com. Comm'n v. FERC, No. 20-1645 (7th Cir. Apr. 20, 2020); Zack Hale, *7th Circuit, Not DC Circuit, to Hear Challenges to PJM Capacity Market Overhaul*, S&P GLOB. MKT. INTEL. (May 6, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/7th-circuit-not-dc-circuit-to-hear-challenges-to-pjm-capacity-market-overhaul-58484554 [https://perma.cc/MG3P-QWBY].

[23] *See, e.g.*, Sharon B. Jacobs, *Bypassing Federalism and the Administrative Law of Negawatts*, 100 IOWA L. REV. 885, 940–42, 944 (2015) (endorsing a legislative amendment to clarify federal authority over demand response in wholesale markets); Sharon B. Jacobs, *The Energy Prosumer*, 43 ECOLOGY L.Q. 519, 522 (2016) ("[K]ey statutory language in energy law is, at least at the federal level, badly out of date."); Nordhaus, *supra* note 19, at 215 ("If Congress is unable to address the issues presented by the current regulatory division of labor, then the FERC and the courts will have to try, if they can, to make the existing framework function. Whether this is even possible is a significant question. But in any case, muddling through will entail litigation, uncertainty, and delay . . . ."); Ari Peskoe, *Easing Jurisdictional Tensions by Integrating Public Policy in Wholesale Electricity Markets*, 38 ENERGY L.J. 1, 5–6 (2017) ("The FPA, written in 1935, does not explicitly contemplate wholesale auction markets, let alone demand response programs in those markets that have proliferated due to advances in computing and communications technologies."); *see also* William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1110 ("[A] modest statutory amendment to . . . federal . . . energy laws, or a freestanding enactment addressing state climate and clean energy regulatory authority would help ensure that state and regional clean energy and climate regulation efforts do not run afoul of federal statutory law . . . .").

[24] *See Hughes*, 136 S. Ct. at 1298 (stating that states cannot "second-guess the reasonableness of interstate wholesale rates"); FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 776 (2016)

that these cases adopted a "functionalist approach to managing . . . jurisdictional and federalism concerns,"[25] "recognized agency authorization for concurrent federal-state jurisdiction,"[26] and embraced "a federal-state relationship that is 'complementary' and 'marked by interdependence.'"[27] Regardless of whether the trio of Supreme Court cases marks a departure from past practice (we think it does not), such observations are only the first step. An additional challenge lies in developing a coherent framework that applies the FPA's jurisdictional divide to the host of legal, economic, and technological challenges presented by the modern electricity sector.[28]

This Article provides that framework. The Supreme Court's trio of energy law cases[29] recognized that economic and technological developments have produced an electricity sector that no longer follows the "Platonic ideal" of neatly divided state and federal spheres of jurisdiction.[30] As FERC and the states have broken down barriers to competition and allowed new technologies to displace incumbent generators, the electricity sector has evolved such that many of the most critical issues

("[A] FERC regulation does not run afoul of § 824(b)'s proscription [of FERC regulating retail rates] just because it affects — even substantially — the quantity or terms of retail sales."); Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599–600 (2015) (finding that the Natural Gas Act (NGA), 15 U.S.C. §§ 717–717z, did not preempt state antitrust law because the "target at which the state law aims," *Oneok*, 135 S. Ct. at 1599 (emphases omitted), is not a matter reserved to FERC's jurisdiction).

25 Matthew R. Christiansen, Essay, FERC v. EPSA*: Functionalism and the Electricity Industry of the Future*, 68 STAN. L. REV. ONLINE 100, 101 (2016); *see id.* at 101–02.

26 Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 403 (2016).

27 Peskoe, *supra* note 23, at 19 (first quoting *EPSA*, 136 S. Ct. at 780; and then quoting *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring)); *see also* Joel B. Eisen, *Dual Electricity Federalism Is Dead, but How Dead, and What Replaces It?*, 8 GEO. WASH. U. J. ENERGY & ENV'T L. 3, 3 (2017); Daniel A. Lyons, *Protecting States in the New World of Energy Federalism*, 67 EMORY L.J. 921, 924–26 (2018).

28 We are not the first to try to harmonize these three cases. *See, e.g.*, Joel B. Eisen, *The New (Clear?) Electricity Federalism: Federal Preemption of States' "Zero Emissions Credit" Programs*, 45 ECOLOGY L. CURRENTS 149, 162 (2018) ("A useful decision rule would allow the states and FERC to proceed independently as long as neither attempts to consciously disregard the other."); Lyons, *supra* note 27, at 949–50 (describing the Supreme Court's triumvirate as a "Venn diagram" of overlapping jurisdiction, *id.* at 949, and arguing that "the key question is the purpose of the regulation at issue[, which] contrasts with the dual federalism approach of asking whether the regulation had effects outside its sphere," *id.* at 950); Rossi, *supra* note 26, at 457 ("[T]he Supreme Court has replaced energy field preemption with an assessment of obstacle preemption (in the setting of wholesale rates, under FERC's substantive jurisdiction) or conflict preemption (in assessing FERC's exercise of remedial jurisdiction over practices affecting rates).").

29 Two of these cases involve the FPA, *Hughes*, 136 S. Ct. at 1292; *EPSA*, 136 S. Ct. at 773, and the third involves the NGA, *Oneok*, 135 S. Ct. at 1594, which was enacted three years after the FPA and was largely modeled after the FPA, including in its allocation of jurisdiction, *see* Lyons, *supra* note 27, at 924 nn.1–2, 928–31. Given the similarities between the two statutes, the Supreme Court "has routinely relied on NGA cases in determining the scope of the FPA, and vice versa." *Hughes*, 136 S. Ct. at 1298 n.10.

30 *Oneok*, 135 S. Ct. at 1601 (explaining that the natural gas sector does not adhere to a "Platonic ideal" of the "clear division between areas of state and federal authority" that undergirds both the FPA and the NGA).

lie "at the confluence of State and Federal jurisdiction."[31] As a result, now more than ever, the federal and state spheres of jurisdiction are, to use Justice Kagan's memorable phrase, "not hermetically sealed."[32] A jurisdictional framework that prevents cross-jurisdictional effects would necessarily handicap at least one sovereign — and perhaps both — in a way that is inconsistent with the FPA's dual-federalist structure.

The Court's trio of energy law cases avoids that result. It establishes a theoretical framework that balances the two sovereigns' respective interests in a way that preserves the FPA's division of jurisdiction in the modern electricity sector. Equally important, it does so while remaining consistent with ninety years of FPA jurisprudence demarcating a bright line between state and federal authority. The bright line divide prohibits state and federal energy regulations only when they actually regulate a matter over which the other sovereign has exclusive jurisdiction. That occurs in only two situations. First, state and federal regulators cannot "directly regulate" a matter over which the other sovereign has exclusive jurisdiction. The phrase "directly regulate" has a precise meaning here. It prohibits a federal or state regulator from expressly deciding an issue left to the other regulator to resolve. Thus, a state cannot "set" a wholesale rate, and FERC likewise cannot set a retail rate or prohibit the development of generation or distribution facilities.[33] Second, state and federal regulators cannot implement policies that "aim[] at" or "target" matters that Congress reserved to the other sovereign.[34] This prohibition is a limited one. It closes the loophole that would arise if energy regulators were permitted to pass laws that nominally regulate one aspect of the electricity sector but that in practice regulate a matter over which the sovereign lacks jurisdiction. For example, a state cannot use its authority over distribution facilities to dictate the terms of resources' participation in wholesale markets.[35]

---

[31] Demand Response Compensation in Organized Wholesale Energy Markets, Order No. 745, 76 Fed. Reg. 16,658, 16,676 (Mar. 24, 2011) (codified at 18 C.F.R. pt. 35) [hereinafter FERC Order No. 745].

[32] *EPSA*, 136 S. Ct. at 776. As discussed below, it has always been true that state regulations affect the federal sphere and vice versa. *See infra* p. 1412. Our point is that the transition to the electricity grid of the future is making those effects more pronounced.

[33] *See EPSA*, 136 S. Ct. at 778 ("Our decisions uniformly speak about rates, for electricity and all else, in only their most prosaic, garden-variety sense.").

[34] *Hughes*, 136 S. Ct. at 1298 (emphasis omitted) (first quoting *Oneok*, 135 S. Ct. at 1600; and then quoting *id.* at 1599). "Aiming at" is not a matter of legislative intent. It is rather a test to determine whether a policy is actually regulating a matter over which the other sovereign has jurisdiction. *See* Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1905–06 (2019); Miles Farmer, Response, *State Motives Do Not Control the Preemption Inquiry Under the Federal Power Act*, 91 N.Y.U. L. REV. ONLINE 27, 27–29 (2016).

[35] Nat'l Ass'n of Regul. Util. Comm'rs v. FERC (*NARUC*), 964 F.3d 1177, 1187–88 (D.C. Cir. 2020).

When a state or federal regulator transgresses either of those limitations, it prevents the other sovereign from supervising matters that are within that other sovereign's exclusive jurisdiction. Such transgressions are inconsistent with the bright line approach not because they *affect* matters over which the other sovereign has jurisdiction, but because they *regulate* matters over which the other sovereign has jurisdiction. When a state policy does not cross the bright line but nevertheless affects a matter over which FERC has jurisdiction, only the doctrine of conflict preemption determines whether the policy is consistent with the FPA.[36]

Conflict preemption must be invoked judiciously. If the FPA barred state and federal energy regulators from implementing policies that affect matters reserved to the other sovereign, as some have suggested,[37] *both* federal and state regulators would be severely handicapped, unable to achieve the FPA's vision of an electricity sector that is just and reasonable and not unduly preferential or discriminatory.[38] Moreover, such an overly strict interpretation would create regulatory gaps in which no regulator would have authority to supervise important parts of the industry, again contrary to the text and history of the FPA.[39] Recognizing that such an aggressive approach to conflict preemption would undermine the FPA's federalist structure, the Court has found state policies

[36] *Cf. EPSA*, 136 S. Ct. at 776 ("When 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, § 824(b) imposes no bar."). Because the Supremacy Clause of the U.S. Constitution provides a rule of decision in which federal law prevails over a conflicting state law, *see* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1383 (2015), an irreconcilable conflict resulting from cross-jurisdictional effects can result only in preemption of the state law, and not vice versa. Conflict preemption refers to situations in which state law poses an obstacle to federal law. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 775 (1994). A subset of conflict preemption that is especially relevant to the FPA is impossibility preemption, which recognizes that state law is conflict preempted when it is actually impossible to comply with both state and federal law simultaneously. *See* Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 372–73 (1988) (explaining that a state may not prevent a utility from recovering through retail rates the costs of paying a rate that FERC has already found to be just and reasonable); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986) ("Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable."); FPC v. La. Power & Light Co., 406 U.S. 621, 631–34 (1972) (explaining that Congress gave the Federal Power Commission, FERC's predecessor, authority to create a uniform national system for establishing curtailment plans to address natural gas shortages, meaning that individual state law programs to do the same would conflict with the federal scheme); *see also Oneok*, 135 S. Ct. at 1601–02 (describing *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, and *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, as conflict preemption cases); *infra* pp. 1400–02. Courts' application of conflict preemption under the FPA has always accommodated state policies that simply affect but that do not control matters within FERC's exclusive jurisdiction. The FPA conflict preempts a state policy only if the state law makes it truly impossible to comply with federal energy regulations. *See infra* section II.B.3, pp. 1399–405.

[37] *See EPSA*, 136 S. Ct. at 786 (Scalia, J., dissenting).

[38] *See id.* at 780 (majority opinion) ("[T]he statute prevents the creation of any regulatory 'no man's land.'" (quoting FPC v. Transcon. Gas Pipe Line Corp., 365 U.S. 1, 19 (1961))).

[39] *See id.*

conflict preempted only when the policy makes it actually impossible for an entity to comply with the FPA or FERC's regulations.[40]

This Article's core insight is that the Supreme Court has not replaced the bright line approach that governed energy market jurisdiction for nearly a hundred years. Instead, the Court has applied that framework in a way that accommodates the technological and market developments that are revolutionizing the energy sector. Under that framework, every dispute involving the FPA's jurisdictional line can be resolved by answering no more than three questions.

The first question asks whether an action directly regulates a matter over which the regulator has jurisdiction. If the answer is yes, we proceed to the second question. If the answer is no — that is, if the action directly regulates a matter left to the other sovereign to decide — then it is categorically invalid. For example, a FERC regulation setting a retail rate or a state regulation setting a wholesale rate is invalid without any further analysis.

The second question asks whether the regulator has nevertheless aimed at or targeted a matter that the FPA gives the other sovereign exclusive jurisdiction to resolve. As the Court explained in its most recent FPA case, a law that nominally regulates one aspect of the electricity sector can, in practice, be used to regulate another aspect of the electricity sector entirely.[41] Where that is the case, the regulation in question is invalid, just as if the regulator had directly regulated within the other sovereign's sphere.[42] This "aiming at" inquiry is an objective one that turns on what the regulation does and the justification given, not on an assessment of the regulator's subjective intent.[43] If a FERC

---

[40] *See infra* section II.B.3, pp. 1399–405.

[41] *See* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1299 (2016) (noting that a regulation that nominally governs generation facilities "operates *within*" the wholesale market, indicating that it aims at matters within FERC's exclusive jurisdiction (emphasis added)); *see also* N. Nat. Gas Co. v. State Corp. Comm'n, 372 U.S. 84, 89, 91–92 (1963) (explaining that a state's regulations dealing with wellhead purchases of natural gas, while nominally regulating only production facilities, in practice "necessarily deal with matters which directly affect the ability of the Federal Power Commission to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act," *id.* at 91–92, and "therefore invalidly invade the federal agency's exclusive domain," *id.* at 92).

[42] *See N. Nat. Gas Co.*, 372 U.S. at 91–92.

[43] *See* Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1905 (2019) ("[T]his Court has generally treated field preemption inquiries like this one as depending on *what* the State did, not *why* it did it." (citing, inter alia, *Hughes*, 136 S. Ct. 1288)); *cf.* Dep't of Com. v. New York, 139 S. Ct. 2551, 2573–74 (2019) (explaining that a court reviewing agency action under the Administrative Procedure Act will not conduct an extra-record "judicial inquiry into 'executive motivation,'" *id.* at 2573 (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977)), absent a "strong showing of bad faith or improper behavior," *id.* at 2574 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971))). The explanation given for the law or regulation — whether in the form of the rationale provided for an administrative order or in any findings

regulation survives these first two questions, it is consistent with the FPA's allocation of jurisdiction and that is the end of the jurisdictional inquiry.[44]

A state regulation that survives the first two steps of this inquiry faces one additional question: whether the state law has made compliance with the FPA or a FERC regulation *actually* impossible. If so, then the state law is conflict preempted. If not, then the law is consistent with the FPA's allocation of jurisdiction.

Just because the FPA's dividing line is bright, however, does not mean that applying that line will always be easy. To the contrary, many jurisdictional questions may prove challenging, especially where one sovereign is alleged to have aimed at the other's jurisdiction. The enduring feature of the bright line is that it provides a strict delineation between federal and state authority based on the matter that is regulated, not the effects of that regulation.[45] As a result, jurisdictional inquiries under the FPA turn on the single question of what is the object of the regulation, not on the sort of multifactor balancing tests that characterize other jurisdictional boundaries in administrative law.[46] That is the sense in which the line is "bright."

The framework advanced in this Article departs from most existing scholarship in significant respects. Most importantly, we do not think that the Supreme Court has abandoned the bright line in favor of a more nebulous approach based on concurrent jurisdiction. Indeed, our framework leaves no role for concurrent jurisdiction and only a vanishingly small one for conflict preemption. It may be doctrinally correct to observe that state and federal regulators occasionally share jurisdiction over the same *resources*, and that the instances in which they do are

---

included in the text of a state statute — will typically inform how that law or regulation works in practice and what it actually regulates.

[44] Step three applies only to state actions. When it is impossible to comply with a state and federal regulation simultaneously, the Supremacy Clause means that the federal action trumps the state action. *See* Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 963–64, 966 (1986).

[45] *See* JEFFERY S. DENNIS, SUEDEEN G. KELLY, ROBERT R. NORDHAUS & DOUGLAS W. SMITH, FEDERAL/STATE JURISDICTIONAL SPLIT: IMPLICATIONS FOR EMERGING ELECTRICITY TECHNOLOGIES 4 (2016), https://www.energy.gov/sites/prod/files/2017/01/f34/Federal%20State%20Jurisdictional%20Split--Implications%20for%20Emerging%20Electricity%20Technologies.pdf [https://perma.cc/F4NF-MU69] ("The 'bright line' in Part II of the FPA uses factors such as transaction and customer type (wholesale v. retail), facility type (generation v. transmission v. distribution), geography (interstate commerce v. intrastate commerce), and regulatory action (e.g., rate regulation v. facility permitting) to divide exclusive regulatory responsibilities between federal and state regulators.").

[46] *See, e.g.*, County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1469–70, 1476–77 (2020) (holding that the scope of certain permitting requirements under the Clean Water Act turns on a multifactor balancing test, as opposed to a "bright-line" standard, *id.* at 1470 (quoting Brief for Petitioner at 28, *County of Maui*, 140 S. Ct. 1462 (No. 18-260))); *id.* at 1478–79 (Kavanaugh, J., concurring) (explaining his view that the statutory text requires the consideration of multiple factors rather than a "bright-line" rule).

becoming more common as the electricity sector evolves. But that does not mean that they share jurisdiction over the same *issues*. Instead, federal and state regulators retain separate spheres of exclusive jurisdiction.

This Article proceeds in three parts. Part I describes the origins of the FPA, the bright line jurisdictional divide that governed energy markets for the better part of ninety years, and the changes that have challenged this jurisdictional division. Part II analyzes three Supreme Court cases — *Hughes v. Talen Energy Marketing, LLC*,[47] *FERC v. Electric Power Supply Ass'n*[48] (*EPSA*), and *Oneok, Inc. v. Learjet, Inc.*[49] — and argues that these cases have established that the bright line is alive and well, and that conflict preemption should apply only when a state regulation renders it impossible to comply with a state and federal regulation simultaneously. Part III explains how to apply the bright line framework to jurisdictional disputes arising under the FPA. Part IV applies this framework to recent energy disputes in which lower courts have struggled to apply the FPA's federalist system to modern energy disputes.

I. THE FEDERAL POWER ACT AND THE CHANGING ELECTRICITY SECTOR

This Part traces the origins of the FPA's bright line and explains why that approach was straightforward in the early days of the FPA. It then explains how the development of new technologies and the introduction of competitive forces into the energy sector have created situations that simultaneously affect wholesale and retail rates.

A. *The Origins of the FPA's Bright Line*

In the early twentieth century, state and local governments regulated all aspects of the electricity industry.[50] That became impossible in 1927, however, after the Supreme Court held that the dormant commerce clause prevented states from regulating transactions between electric

---

[47] 136 S. Ct. 1288 (2016).

[48] 136 S. Ct. 760 (2016).

[49] 135 S. Ct. 1591 (2015). Scholars have adopted different capitalization practices when citing *Oneok*. Some have capitalized all of the letters. *See, e.g.*, Rossi, *supra* note 26, at 405 ("*ONEOK*"). Others have capitalized some of the letters. *See, e.g.*, Shelley Welton, *Electricity Markets and the Social Project of Decarbonization*, 118 COLUM. L. REV. 1067, 1120 (2018) ("*OneOK*"). Recognizing that eminently reasonable minds may differ here, we will follow the Supreme Court's practice of capitalizing only the first letter. *See Hughes*, 136 S. Ct. at 1298 ("*Oneok*"); *EPSA*, 136 S. Ct. at 776 (same).

[50] *See EPSA*, 136 S. Ct. at 767 ("In the early 20th century, state and local agencies oversaw nearly all generation, transmission, and distribution of electricity."); Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 535–36 (2008); Rossi, *supra* note 26, at 401 n.5 (quoting New York v. FERC, 535 U.S. 1, 5 (2002)).

utilities located in different states.[51] The ruling created what has come to be known as the "*Attleboro* gap."[52]

Title II of the FPA closed the *Attleboro* gap.[53] Section 201 of the Act gave the Federal Power Commission (FERC's predecessor) authority over the rates for "the sale of electric energy at wholesale in interstate commerce" and "the transmission of electric energy in interstate commerce."[54] Congress also gave the Commission authority over certain rates, charges, and practices in connection with or affecting those wholesale rates.[55] The FPA did not, however, give federal regulators plenary authority over the electricity sector.[56] Instead, it preserved exclusive state jurisdiction over retail sales of electricity, "facilities used for the generation of electric energy" (that is, power plants), and "facilities used in local distribution" of electricity.[57]

That jurisdictional divide quickly came to be understood as creating a bright line between state and federal regulators. As far back as the 1940s, the Court explained that "[t]he line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise."[58] In 1964, the Supreme Court invoked the "bright line" language for the first time,[59] and the phrase has been used to characterize the FPA's jurisdictional divide ever since.

From early on, the bright line demarcated exclusive spheres of jurisdiction. The Court recognized that state and federal regulators could not directly regulate matters reserved to the other sovereign *or* use their authority to regulate indirectly that which they were prohibited from

[51] Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 84, 90 (1927) (holding that electricity sales that involved companies located in two different states were "not subject to regulation by either of the two States," *id.* at 90).

[52] *See* Rossi, *supra* note 26, at 403–04 (explaining that when Congress passed the FPA, it "was legislating to close the '*Attleboro* gap' attributed to dormant commerce clause limits on state regulation," *id.* at 404 (footnote omitted)).

[53] FPC v. S. Cal. Edison Co., 376 U.S. 205, 215 (1964) ("Part II [of the Power Act] is a direct result of *Attleboro*. They are to be read together." (alteration in original) (quoting United States v. Pub. Utils. Comm'n of Cal., 345 U.S. 295, 311 (1953))).

[54] 16 U.S.C. § 824(b)(1).

[55] *See id.* §§ 824d(b), 824e(a).

[56] FPC v. Panhandle E. Pipe Line Co., 337 U.S. 498, 502–03 (1949) ("[T]he Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution."). As noted, the Supreme Court has an established practice of treating the equivalent provisions of the FPA and NGA interchangeably. *See supra* note 29.

[57] 16 U.S.C. § 824(b)(1).

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

[59] FPC v. S. Cal. Edison Co., 376 U.S. 205, 215 (1964).

regulating directly.[60] To that end, the Court held state regulations to be preempted when a state set a retail rate that disallowed a FERC-approved wholesale rate.[61] Similarly, it found federal regulations to be beyond the federal government's jurisdiction when the policy set a retail rate or controlled a local distribution facility.[62]

In addition, the Court also prohibited policies that aimed at or targeted matters subject to the other regulator's exclusive jurisdiction.[63] This "aiming at" inquiry emerged as a consequence of Congress's decision in the FPA to divide jurisdiction over a single, integrated industry between federal and state regulators. Without an inquiry along those lines, it would have been possible for one regulator to use its authority under the FPA in a way that regulated a matter left for the other sovereign to decide. For example, the "aiming at" standard prevented states from taking an action that nominally regulated retail rates, but that in reality regulated wholesale transactions.[64] Thus, the Court recognized that while cross-jurisdictional effects are an inevitable result of the FPA's bifurcation of jurisdiction, allowing one regulator to use those effects to assert jurisdiction over matters reserved to the other sovereign could upset the FPA's jurisdictional scheme every bit as much as if the

---

[60] *See* N. Nat. Gas Co. v. State Corp. Comm'n, 372 U.S. 84, 93–94 (1963); *see also* Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599–600 (2015) (explaining that the Court has "'consistently recognized' that the 'significant distinction' for purposes of pre-emption in the natural-gas context is the distinction between 'measures aimed directly at interstate purchasers and wholesales for resale, and those aimed at' subjects left to the States to regulate" (emphases omitted) (quoting *N. Nat. Gas Co.*, 372 U.S. at 94)).

[61] *See* Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 371 (1988) ("States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair. FERC-mandated allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates."); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986) ("Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.").

[62] FPC v. Conway Corp., 426 U.S. 271, 276–77 (1976) ("The Commission has no power to prescribe the rates for retail sales of power companies. Nor, accordingly, would it have power to remedy an alleged discriminatory or anticompetitive relationship between wholesale and retail rates by ordering the company to increase its retail rates."); Conn. Light & Power Co. v. FPC, 324 U.S. 515, 531 (1945) ("Congress has said without qualification that the Commission shall not, unless specifically authorized elsewhere in the Act, have jurisdiction 'over facilities used in local distribution.' To construe this as meaning that, even if local, facilities come under jurisdiction of the Federal Commission because power from out of state, however trifling, comes into the system, would nullify the exemption and as a practical matter would transfer to federal jurisdiction the regulation of many local companies that we think Congress intended to leave in state control.").

[63] *E.g.*, *N. Nat. Gas Co.*, 372 U.S. at 94 ("Thus our cases have consistently recognized a significant distinction . . . between conservation measures aimed directly at interstate purchasers and wholesales for resale, and those aimed at producers and production. The former cannot be sustained when they threaten, as here, the achievement of the comprehensive scheme of federal regulation.").

[64] *See id.* at 91.

regulator directly addressed a matter within the other sovereign's exclusive jurisdiction.[65]

In those early days, disputes about the FPA's allocation of jurisdiction were rare.[66] That is largely because, for much of the FPA's history, vertically integrated utilities produced their own electricity, transmitted it over their own transmission and distribution systems, and sold it directly to their retail customers, all using technologies that roughly resembled those in place when the FPA was originally enacted.[67] As a result, enforcing the FPA's jurisdictional lines was a relatively straightforward affair. For example, determining whether a sale was wholesale or retail turned on the identity of the buyer.[68] If the sale was to an end-user, it was a retail sale subject to state jurisdiction, but if it was to a distribution company that served a separate service area, it was a wholesale sale. The thorny jurisdictional questions that have come to define the FPA in recent years rarely arose.

B. Competitive Electricity Markets

The old model began to crumble in the late 1970s as the electricity industry was increasingly exposed to market forces.[69] This process is

---

[65] Still, the Court repeatedly stressed that the FPA was designed to close the regulatory gap created by the decision in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), and insisted that the Act did not create jurisdictional no-man's lands where neither federal nor state regulators had authority to regulate. *See, e.g.*, Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 384 (1983) ("Congress' purpose in 1935 was to fill a regulatory gap, not to perpetuate one."); FPC v. S. Cal. Edison Co., 376 U.S. 205, 214 (1964) ("What Congress did was to adopt the test developed in the *Attleboro* line which denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate consumers.'" (quoting Ill. Nat. Gas Co. v. Cent. Ill. Pub. Serv. Co., 314 U.S. 498, 504 (1942))); FPC v. Panhandle E. Pipe Line Co., 337 U.S. 498, 513 (1949) ("The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry."); Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n, 332 U.S. 507, 517 (1947) ("[T]his unusual legislative precision was not employed with any view to relieving or exempting any segment of the industry from regulation."); *id.* at 519 ("It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption.").

[66] *See* Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1595–96 (2015) (explaining that jurisdictional disputes were less common in vertically integrated markets).

[67] *See id.*

[68] *See, e.g.*, Conn. Light & Power Co. v. FPC, 324 U.S. 515, 531 (1945) ("The test [of FPA jurisdiction] is whether they are local distribution facilities. There is no specific provision for federal jurisdiction over accounting except as to 'public utilities.' The order must stand or fall on whether this company owned facilities that were used in transmission of interstate power and which were not facilities used in local distribution."); Appalachian Power Co. v. Pub. Serv. Comm'n, 812 F.2d 898, 902 (4th Cir. 1987) (finding a state program preempted because "it create[d] the obligations owed by or payable to utility companies for the privilege of exchanging interstate electricity").

[69] *See Oneok*, 135 S. Ct. at 1596–97; DENNIS ET AL., *supra* note 45, at 9 (explaining that many jurisdictional disputes were the result of "courts [being] asked to draw the line between federal and

generally referred to as restructuring.[70] As the grid became more integrated and as utilities traded more and more electricity among themselves, economists and policymakers began to question the view that all segments of the industry were natural monopolies.[71] The push to expose generators to competition traces back to 1978, when Congress enacted the Public Utility Regulatory Policies Act[72] (PURPA). Things really got going in the early 1990s. In 1992, Congress amended its energy laws to make it easier for independent power producers to sell electricity.[73] Shortly thereafter, states began restructuring by forcing utilities to divest their generation assets and encourage "retail choice" programs, which allowed consumers to select from different electricity providers.[74]

FERC, too, took steps to encourage competition. In 1996, FERC required transmission owners "[t]o file open access non-discriminatory transmission tariffs"[75] and "functionally unbundle"[76] by providing separate rates for transmission and generation services.[77] That allowed competitors to access transmission facilities under the same terms as utilities' own generation facilities.[78] Nearly four years later, FERC issued Order 2000, which encouraged the formation of Regional Transmission Organizations (RTOs).[79] RTOs had to be independent,

---

state jurisdiction in a vertically-integrated industry that was increasingly becoming more interconnected").

[70] The process by which regulators introduced competition into energy markets is usually referred to as deregulation or restructuring. Deregulation, though it appears in the academic literature, is not an entirely accurate term because the introduction of competitive forces did not eliminate regulation altogether but rather replaced one regulatory design with another. *See* Joshua C. Macey & Jackson Salovaara, *Rate Regulation Redux*, 168 U. PA. L. REV. 1181, 1186 & n.18 (2020). We therefore use the word "restructuring" to describe the shift away from rate regulated vertically integrated utilities.

[71] *See* James M. Griffin & Steven L. Puller, *Introduction: A Primer on Electricity and the Economics of Deregulation*, *in* ELECTRICITY DEREGULATION: CHOICES AND CHALLENGES, *supra* note 17, at 1, 2–3.

[72] Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 15, 16, 30, 42, and 43 U.S.C.). PURPA required utilities to purchase power from nonutility power producers, known as qualifying facilities (QFs), when QFs were able to produce electricity as cheaply as the utility. *See id.* § 210, 92 Stat. at 3144–47.

[73] *See* Energy Policy Act of 1992, Pub. L. No. 102-486, § 711, 106 Stat. 2776, 2905–10 (repealed 2005).

[74] *See* MATHEW J. MOREY & LAURENCE D. KIRSCH, CHRISTENSEN ASSOCS. ENERGY CONSULTING LLC, RETAIL CHOICE IN ELECTRICITY: WHAT HAVE WE LEARNED IN 20 YEARS?, at 1, 20 (2016).

[75] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Order No. 888, 61 Fed. Reg. 21,540, 21,541 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385).

[76] *Id.* at 21,590.

[77] *See id.* at 21,541.

[78] *See id.* at 21,540–41.

[79] *See* Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 810, 811 (Dec. 20, 1999) (codified at 18 C.F.R. pt. 35). Note that grid operators organized after Order 2000 are called Regional Transmission Organizations (RTOs) instead of Independent System Operators (ISOs). *See*

possess operational authority over all transmission facilities under their control, be "[a]ppropriate [in] scope and regional configuration," and enjoy "[e]xclusive authority to maintain short-term reliability."[80]

These reforms had a dramatic effect on electric power markets. Among other things, RTOs are now responsible for operating transmission lines and dispatching resources in real time.[81] As Professor Jim Rossi has explained:

> An electric-power sector once dominated by the staid, vertically integrated utility has evolved into a diverse range of energy suppliers and related service providers, many lacking the same service obligations as utilities. Customers who were once captive to regulated utilities now face choices of energy suppliers and are exposed to price volatility.[82]

That transformation also laid the foundation for fierce jurisdictional disputes. By giving up authority over a single integrated company, states have come to rely much more heavily on markets — or market-like constructs — including the RTOs that FERC regulates.[83] And FERC has pushed the RTO structure to break down barriers to entry far more aggressively than the states have. As a result, and especially within RTOs, state and federal policies interact much more than in the old days, creating many more of the tensions that can mature into full-blown jurisdictional disputes.[84]

C. Technological Developments

Technological developments have also complicated the FPA's jurisdictional picture. For much of the FPA's history, the electricity sector was characterized by one-way flows of electricity over relatively short distances from large, centralized generators to consumers.[85] Keeping

---

Danny Cullenward & Shelley Welton, *The Quiet Undoing: How Regional Electricity Market Reforms Threaten State Clean Energy Goals*, 36 YALE J. REGUL. BULL. 106, 109 n.16 (2018).

[80] Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. at 842. For the past twenty years, RTOs have taken on more and more responsibilities. *See* Macey & Salovaara, *supra* note 70, at 1203–06; Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, CALIF. L. REV. (forthcoming 2021) (manuscript at 21–22), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3564682 [https://perma.cc/7HRX-6QAD].

[81] This is true in two-thirds of the country. Macey & Salovaara, *supra* note 70, at 1204–06. Much of the West and the Southeast did not restructure. *Id.* at 1204 n.120. Vertically integrated rate regulated utilities continue to dominate the electricity industry in these regions. *Id.*

[82] Rossi, *supra* note 26, at 401 (footnote omitted); *see* Emily Hammond & David B. Spence, *The Regulatory Contract in the Marketplace*, 69 VAND. L. REV. 141, 156 (2016); David B. Spence, *Can Law Manage Competitive Energy Markets?*, 93 CORNELL L. REV. 765, 769–70, 772–75 (2008) (discussing the process of unbundling beginning in the 1980s).

[83] *See* Hammond & Spence, *supra* note 82, at 143.

[84] *See id.* at 194.

[85] *See* Marilyn A. Brown & Shan Zhou, *Smart-Grid Policies: An International Review*, *in* ADVANCES IN ENERGY SYSTEMS 129, 129 (Peter D. Lund et al. eds., 2019).

the system in balance was mostly about ensuring that suppliers generated enough electricity to meet demand.[86] Over the last two decades, however, new technologies have created a far more complex landscape. Electricity increasingly flows two ways and consumers play an increasingly important role in balancing the system.[87] Although those developments have greatly improved the efficiency and reliability of the electricity sector, they have also presented a series of thorny legal questions that, to use FERC's phrase, "lie[] at the confluence of State and Federal jurisdiction."[88] This section describes three of these technological areas and the jurisdictional disputes that they produced.

1. Demand Response. — Demand response programs in wholesale markets illustrate how new technologies can straddle the FPA's jurisdictional divide. Those programs compensate electricity users for voluntarily reducing consumption when electric supply is scarce.[89] Most consumers pay fixed electricity rates based on the average cost of electricity,[90] which eliminates their incentive to reduce demand when prices are high. As a result, there is no market signal to conserve electricity, even when doing so is much more economically efficient.[91] Demand response programs help to address that problem by paying market participants to reduce their consumption when doing so costs less than paying generators to increase production.[92] In this way, demand response puts "downward pressure" on energy market prices while also boosting reliability and helping to mitigate market power.[93]

But demand response does not fit neatly within the FPA's jurisdictional boundaries. It is not a sale for resale; indeed, it is not a sale of electricity at all. Moreover, the entities that participate in wholesale markets through demand response programs are ordinarily retail purchasers.[94] Nevertheless, in Order No. 745, the Commission sought to

---

[86] *See* Reinier A.C. van der Veen & Rudi A. Hakvoort, *The Electricity Balancing Market: Exploring the Design Challenge*, 43 UTILS. POL'Y 186, 186 (2016).

[87] *See* FERC Order No. 745, *supra* note 31, at 16,660.

[88] *Id.* at 16,676.

[89] 18 C.F.R. § 35.28(b)(4) (2016) (defining demand response as "a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy"); *see also* FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 767 (2016).

[90] AHMAD FARUQUI, BRATTLE GRP., A GLOBAL PERSPECTIVE ON TIME-VARYING RATES 1 (2015), http://files.brattle.com/files/5923_a_global_perspective_on_time-varying_rates_faruqui_061915.pdf [https://perma.cc/7E3C-UDD7]; Larry Blank & Doug Gegax, *Residential Winners and Losers Behind the Energy Versus Customer Charge Debate*, ELEC. J., May 2014, at 31, 31 (describing situation in which consumers have no choice but to use fixed rates).

[91] *See* FARUQUI, *supra* note 90, at 4.

[92] *See EPSA*, 136 S. Ct. at 763.

[93] *Id.* at 777 (quoting FERC Order No. 745, *supra* note 31, at 16,660).

[94] *See Markets FAQs*, PJM LEARNING CTR., https://learn.pjm.com/three-priorities/buying-and-selling-energy/markets-faqs/what-is-demand-response.aspx [https://perma.cc/HWE5-QS9H] ("Demand response is a voluntary PJM program that allows end use customers to reduce their

break down barriers to demand response in wholesale markets by requiring that demand response resources receive compensation equivalent to traditional generators for the wholesale market services they provide.[95] Recognizing that demand response technically does not involve a wholesale sale — market participants are compensated for *not* using electricity — FERC invoked its authority to regulate practices "affecting" wholesale rates.[96] Order No. 745 was challenged in court, where the D.C. Circuit held it violated the FPA's allocation of jurisdiction before the Supreme Court intervened and upheld the Order,[97] as discussed in Part II.

2. Energy Storage. — Resources that store electricity, such as batteries, are another technology that does not align neatly with the FPA's jurisdictional lines. Depending on how storage is used, it can look like a generator, a distribution or transmission line, or an end-use consumer.[98] For example, if the operator of a battery purchases electricity in wholesale markets and sells electricity at a later point in time when prices increase, it is a wholesale buyer when it purchases electricity and a wholesale seller when it sells electricity. Those transactions are federally regulated.[99] By contrast, if the battery purchases electricity to consume (but at a later point in time), then it is acting like an ordinary retail consumer — and its transaction is state regulated.[100]

---

electricity usage during periods of higher power prices. In exchange, end-use (retail) customers are compensated through PJM members known as Curtailment Service Provider [sic] for decreasing their electricity use when requested by PJM.").

[95] FERC Order No. 745, *supra* note 31, at 16,659. FERC had previously required RTOs and ISOs to permit demand response resources to participate in wholesale markets, but without addressing their compensation level. *See* Wholesale Competition in Regions with Organized Electric Markets, Order No. 719-A, 74 Fed. Reg. 37,776, 37,777 (July 29, 2009) (codified at 18 C.F.R. pt. 35). That step encountered little opposition compared to the decision to require equivalent compensation.

[96] FERC Order No. 745, *supra* note 31, at 16,676 (quoting 16 U.S.C. § 824d(a)); *see* Federal Power Act, ch. 687, sec. 213, § 201(b), 49 Stat. 838, 847 (1935) (codified as amended at 16 U.S.C. § 824(b)(1)) ("The provisions of this Part shall apply to . . . the sale of electric energy at wholesale in interstate commerce.").

[97] *See* Elec. Power Supply Ass'n v. FERC, 753 F.3d 216, 218 (D.C. Cir. 2014), *rev'd and remanded*, 136 S. Ct. 760, 784 (2016).

[98] That list is illustrative, not comprehensive. *See* DELOITTE, ENERGY STORAGE: TRACKING THE TECHNOLOGIES THAT WILL TRANSFORM THE POWER SECTOR 5 fig.1 (2015), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/energy-resources/us-er-energy-storage-tracking-technologies-transform-power-sector.pdf [https://perma.cc/E5JG-7G3U].

[99] *See* FERC Order No. 841, *supra* note 6, at 9,599.

[100] *See* Nat'l Ass'n of Regul. Util. Comm'rs v. FERC (*NARUC*), 964 F.3d 1177, 1187–88 (D.C. Cir. 2020) (discussing state authority to regulate storage); *cf.* Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators, Order No. 841-A, 84 Fed. Reg. 23,902, 23,909–10 (May 23, 2019) (codified at 18 C.F.R. pt. 35) [hereinafter FERC Order No. 841-A] (explaining that the Order did "not specify[] any terms of sale at retail," *id.* at 23,909, but a state may not "broadly prohibit[] all retail customers from participating in RTO/ISO markets," *id.* at 23,910).

In addition, batteries are often deployed in much smaller "sizes" than are traditional generators.[101] Whereas the generating capacity of conventional power plants is often at least several hundred megawatts, batteries' capacity is more commonly just a few megawatts, or even a few hundred kilowatts.[102] Partly as a result, batteries may interconnect through the state-regulated distribution system rather than the FERC-regulated transmission system, even if they intend to participate in FERC-regulated wholesale markets.[103] Accordingly, one consequence of batteries' unique suite of attributes is that they may be subject to a hodgepodge of federal and state regulations, with much greater overlap than conventional generators are subject to.

As with demand response, FERC has tried to break down barriers to storage resources' participation in wholesale markets. In Order No. 841, FERC required RTOs to "remove barriers to the participation of electric storage resources" and allow the resources "to provide all capacity, energy, and ancillary services that [they are] technically capable of providing in the RTO/ISO markets."[104] The Order also required RTOs and ISOs to develop a "participation model" that accommodated storage resources by ensuring that market rules account for their unique operational attributes, such as the complications associated with managing

---

[101] *See* Stephen Comello & Stefan Reichelstein, *The Emergence of Cost Effective Battery Storage*, NATURE COMMC'NS, May 2019, at 1, 2; U.S. ENERGY INFO. ADMIN., BATTERY STORAGE IN THE UNITED STATES: AN UPDATE ON MARKET TRENDS 17 (2020), https://www.eia.gov/analysis/studies/electricity/batterystorage/pdf/battery_storage.pdf [https://perma.cc/C7FR-KMW5] (showing average power capacity for battery storage to range from 6.0 to 11.7 megawatts and average energy capacity to range from 4.2 to 23.5 megawatt-hours); *Power Blocks in Natural Gas-Fired Combined-Cycle Plants Are Getting Bigger*, U.S. ENERGY INFO. ADMIN. (Feb. 12, 2019), https://www.eia.gov/todayinenergy/detail.php?id=38312 [https://perma.cc/KDB3-T376].

[102] *See 2019*, linked within *Form EIA-860 Detailed Data with Previous Form Data (EIA-860A/860B)*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/electricity/data/eia860 [https://perma.cc/HPT2-LVFD] (compiling data on capacity of storage projects); *2020 ATB Spreadsheet*, linked within *Electricity Annual Technology Baseline (ATB) Data Download*, NAT'L RENEWABLE ENERGY LAB'Y, https://atb.nrel.gov/electricity/2020/data.php [https://perma.cc/6MP6-ATBR] (showing capacity of all resources); *Global Energy Storage Database Projects (10-27-2020)*, linked within *DOE OE Global Energy Storage Database*, U.S. DEP'T OF ENERGY: ENERGY STORAGE SYSTEMS PROGRAM, https://www.sandia.gov/ess-ssl/global-energy-storage-database-home [https://perma.cc/35SA-KG4D] (compiling over 1,600 grid-level storage projects associated with renewables).

[103] *Cf.* THOMAS BOWEN, ILYA CHERNYAKHOVSKIY & PAUL DENHOLM, NAT'L RENEWABLE ENERGY LAB'Y, GRID-SCALE BATTERY STORAGE 6 (2019), https://www.nrel.gov/docs/fy19osti/74426.pdf [https://perma.cc/G87Q-KKKQ] ("The variety of different services storage can provide often cuts across multiple markets and compensation sources.").

[104] FERC Order No. 841, *supra* note 6, at 9,582. Order No. 841 is expected to generate enormous financial benefits. Massachusetts estimated that the Order could help the state realize $3.4 billion in health and environmental benefits over a ten-year period. *See* Brief of Massachusetts et al. as Amici Curiae in Support of Respondent at 6, *NARUC*, 964 F.3d 1177 (Nos. 19-1142 & 19-1147); Matthew Bandyk, *FERC's Order 841 "Essential" for Energy Storage to Cut Emissions, Attorneys General Argue*, UTIL. DIVE (Feb. 11, 2020), https://www.utilitydive.com/news/fercs-order-841-essential-for-energy-storage-to-cut-emissions-attorneys/572050 [https://perma.cc/D2D7-RBPA].

their charging levels.[105] Recognizing the frequent intersection between federal and state jurisdiction over battery storage resources, Order No. 841 precluded states from issuing blanket prohibitions on wholesale market participation, even for resources that interconnect through the distribution system.[106]

As with FERC's demand response rule, many groups challenged Order No. 841 on jurisdictional grounds, arguing that FERC's decision not to permit states to block storage resources that interconnect through the distribution system from participating in wholesale markets caused the rule to exceed FERC's jurisdiction. In the summer of 2020, after this Article was originally drafted, the D.C. Circuit upheld Order No. 841 in what we believe may be the most important case involving the FPA's bright line since the Court's energy law trio.[107] That litigation is discussed in section III.A.

3. Distributed Energy Resources. — Distributed energy resources interconnect through the distribution system and can either inject electricity into the grid or modulate their consumption in response to the needs of the grid.[108] They can include everything from residential solar installations, to customer-owned batteries, to smart appliances, to electric vehicles and the associated charging apparatuses.[109] Distributed energy resources tend to be colocated with end-use consumers and, thus, have the potential to turn retail customers into "resources" themselves that not only purchase electricity from the grid, but also sell excess electricity onto the grid.[110] The widespread adoption of distributed technologies can help to manage grid congestion, forestall upgrades to the transmission and distribution system, and facilitate the integration of renewable resources, all while significantly decreasing electricity prices.[111]

---

[105] *See* FERC Order No. 841, *supra* note 6, at 9,587.

[106] *See* FERC Order No. 841-A, *supra* note 100, at 23,908–10 (summarizing rehearing requests raising jurisdictional concerns).

[107] *See NARUC*, 964 F.3d at 1181.

[108] *See* Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators, 81 Fed. Reg. 86,522, 86,522 n.2 (proposed Nov. 30, 2016) (codified at 18 C.F.R. pt. 35) (defining "distributed energy resources").

[109] *See* Reed Karaim, *10 Key Technologies: Essential Tools and Devices for Enabling the Distributed Energy Grid*, RURAL ELEC. MAG. (Nov. 30, 2019), https://www.cooperative.com/remagazine/articles/pages/2019-essential-tools-technologies-distributed-energy-grid.aspx [https://perma.cc/MS86-VMKE]; Herman K. Trabish, *How Leading Utilities Are Planning for Distributed Energy Resources*, UTIL. DIVE (Feb. 6, 2018), https://www.utilitydive.com/news/how-leading-utilities-are-planning-for-distributed-energy-resources/516260 [https://perma.cc/NS9L-S5N8].

[110] *See* GRIDWORKS & GRIDLAB, THE ROLE OF DISTRIBUTED ENERGY RESOURCES IN TODAY'S GRID TRANSITION 3–6 (2018), http://gridlab.org/wp-content/uploads/2019/04/GridLab_RoleOfDER_online-1.pdf [https://perma.cc/8P5K-ATJA].

[111] *See* Alex Eller, Opinion, *Energy Storage Will Disrupt Transmission and Distribution Investments*, UTIL. DIVE (Oct. 17, 2017), https://www.utilitydive.com/news/energy-storage-will-disrupt-transmission-and-distribution-investments/506945 [https://perma.cc/7SRP-QEXW]; Darrell

That versatility is also what makes distributed energy resources complicated for the purposes of the FPA's jurisdictional divide. Resources on the distribution system that both consume and produce electricity almost by definition do not fit neatly within the FPA's jurisdictional framework. Those complications will only become more significant as the number of distributed energy resources on the grid undergoes what many experts expect to be near-exponential growth over the next several years.[112] FERC recently issued a final rule to facilitate the wholesale market participation of distributed energy resource aggregators, which can coordinate multiple distributed energy resources acting as a single entity.[113]

II. THE FPA'S BRIGHT LINE IN THE MODERN ELECTRICITY SECTOR

As a result of the changes discussed in the previous sections, federal courts have seen an unprecedented number of jurisdictional challenges under the FPA. Although some observers have interpreted the growing number of challenges as evidence that the bright line theory of jurisdiction is anachronistic, this Part shows that three recent Supreme Court energy law cases provided a coherent framework for using the bright line to resolve disputes in modern electricity markets.

A. The Problem

In recent years, almost every major federal and state energy regulation has elicited a jurisdictional challenge under the FPA.[114] In addition to the litigation involving demand response[115] and energy storage,[116]

Proctor, *Distributed Energy Resources Bring Benefits, Challenges and New Opportunities*, POWER MAG. (Feb. 1, 2018), https://www.powermag.com/distributed-energy-resources-bring-benefits-challenges-and-new-opportunities [https://perma.cc/YUF5-VFDG].

[112] *See, e.g.*, Trabish, *supra* note 109 (presenting estimates that solar installations will increase from approximately 2 million to 3.8 million between 2018 and 2022, behind-the-meter battery storage will increase from 200 megawatts to 1,400 megawatts between 2018 and 2022, and electric vehicles will increase from 1% of new car sales to over 50% between 2018 and 2035).

[113] *See* Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators, Order No. 2222, 85 Fed. Reg. 67,094, 67,095–96 (Oct. 21, 2020) (to be codified at 18 C.F.R. pt. 35).

[114] For a comprehensive overview of federal cases invalidating state energy policies on preemption grounds through 2016, see Ferrey, *supra* note 19, at 344–61. For analysis of and materials related to the individual cases, see STATE POWER PROJECT, www.statepowerproject.org [https://perma.cc/RW83-K8JG].

[115] *See supra* p. 1378.

[116] *See supra* p. 1380.

groups have also challenged state clean energy procurements,[117] subsidies for nuclear power,[118] subsidies for biomass facilities,[119] subsidies for rooftop solar,[120] and efforts to prohibit utilities from purchasing electricity from coal-fired power plants.[121] In every one of those challenges, the central question was how to construe the trio of Supreme Court cases that applied the FPA's jurisdictional divide to modern energy market disputes.[122]

To date, academics have generally interpreted the Supreme Court's energy law trio as discarding the FPA's bright line. Professor Jim Rossi, for example, has argued that, "while dual sovereignty has had a long reign, recent Supreme Court decisions abandon it as the primary federalism principle under energy statutes."[123] As Rossi sees it, the trio of Supreme Court cases "call[s] into question whether a bright-line approach to jurisdiction can resolve the federalism disputes confronting modern energy markets."[124] Professor Joel Eisen has said that "[a] bright line jurisdictional test is impractical"[125] and claimed that the three Supreme Court cases "mark the end of 'dual federalism' in electricity law that treated federal and state regulators as operating within separate and distinct spheres of authority."[126] And Professor Shelley Welton has underscored the stakes of these decisions, noting that the uncertain jurisdictional framework "creates legal risk around any state decision to cede decarbonization goals to the markets."[127]

Scholarship on the Court's energy law trio generally falls into three groups, though there is considerable overlap among them. First, many scholars have defended individual state energy programs as being consistent with the FPA's federalist vision or offered suggestions about how

---

[117] Allco Fin. Ltd. v. Klee, 861 F.3d 82, 86 (2d Cir. 2017).

[118] Coal. for Competitive Elec. v. Zibelman, 906 F.3d 41, 45–46 (2d Cir. 2018); Elec. Power Supply Ass'n v. Star, 904 F.3d 518, 521–22 (7th Cir. 2018).

[119] New Eng. Ratepayers Ass'n, 168 FERC ¶ 61,169, paras. 2, 4 (Sept. 19, 2019).

[120] New Eng. Ratepayers Ass'n, 172 FERC ¶ 61,042, paras. 2–3, 8 (July 16, 2020).

[121] North Dakota v. Heydinger, 825 F.3d 912, 913 (8th Cir. 2016).

[122] Note that one of the cases in the trio, *Oneok*, involved the NGA, not the FPA. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594 (2015). But because the NGA and the FPA distribute jurisdiction between FERC and states in exactly the same way, courts have always found that NGA cases are binding precedent in FPA cases and vice versa. *See* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1298 n.10 (2016); *see also* Rossi, *supra* note 26, at 412 ("Courts have read the FPA and NGA *in pari materia* . . . .").

[123] Rossi, *supra* note 26, at 405; *see also id.* at 406 ("Cases such as *ONEOK* and *EPSA* reveal the folly of field-preemption approaches for modern energy markets and the need to fundamentally rethink preemption analysis.").

[124] *Id.* at 427.

[125] Eisen, *supra* note 27, at 5.

[126] *Id.* at 3 (footnote omitted).

[127] Welton, *supra* note 49, at 1073.

to harmonize state programs with the FPA.[128] Second, others have read the FPA cases as effecting a doctrinal transformation and abandoning the bright line approach altogether.[129] According to these scholars, the Court has replaced the bright line with a version of concurrent jurisdiction. Third, a few prominent commentators have suggested that the Supreme Court's FPA jurisprudence may be unable to accommodate state clean energy policies.[130] They have therefore urged Congress to amend the FPA to accommodate the modern electricity sector.

Although impressive in their own right, these theories ultimately raise as many questions as they provide answers. As a threshold matter, if the Supreme Court has abandoned the bright line approach, it is not clear what has replaced it.[131] Nor is it clear what should guide the type of case-by-case analysis other scholars favor.[132] After all, urging the Court to abandon nearly one hundred years of precedent and embrace

---

[128] *See* Christiansen, *supra* note 25, at 102; Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 VAND. L. REV. 1801, 1859 (2012) (proposing an alternative, hybrid approach to federal preemption of state siting authority); Lyons, *supra* note 27, at 927–28; Felix Mormann, *Constitutional Challenges and Regulatory Opportunities for State Climate Policy Innovation*, 41 HARV. ENV'T L. REV. 189, 237 (2017) (suggesting a multipronged approach, in which states rely on both feed-in tariffs and renewable energy credits, for states to insulate themselves from preemption challenges); Peskoe, *supra* note 23, at 19; Hannah J. Wiseman, *Disaggregating Preemption in Energy Law*, 40 HARV. ENV'T L. REV. 293, 297–98 (2016); Jennifer Ko, Comment, *The Nuclear Option: What Can States Do to Encourage Clean Energy After* Hughes *and* EPSA*?*, 166 U. PA. L. REV. 1267, 1279–80 (2018) (providing recommendations on how a state can avoid preemption challenges).

[129] *See* Eisen, *supra* note 27, at 22; Matt Flaherty, *Evolving Energy Federalism: Zero Emissions Credits and Opportunities in State Energy Policy*, 10 SAN DIEGO J. CLIMATE & ENERGY L. 1, 3 (2019) (arguing that the Supreme Court has transitioned to a system of cooperative federalism); Rossi, *supra* note 26, at 403; Amy L. Stein, *Regulating Reliability*, 54 HOUS. L. REV. 1191, 1196–97 (2017) ("[I]n all three cases, the Court cast aside its historical constraints and adopted a more functional analysis of the allocation of energy authority."); Ashwini Bharatkumar, Comment, *Formalism, Functionalism, and Federalism: The Practical Import of* Electric Power Supply Association v. STAR *and* Coalition for Competitive Electricity v. Zibelman *for State Clean Energy Support Policies*, 43 HARV. ENV'T L. REV. 547, 547–48 (2019) (arguing that the legality of state proceedings will be limited by the scope of federal interventions).

[130] *See* Eisen, *supra* note 28, at 153 ("[C]onflict preemption [is] the most appropriate lens through which to resolve these cases. This is implied preemption that occurs either when it is impossible for someone to comply with both state and federal laws, or when state law thwarts the purposes and objectives of federal law."); Ferrey, *supra* note 19, at 376–77; Steven Ferrey, *The Supreme Court's Constitutional "Bright Line": Preempting Authority of 47 of 50 States*, 10 NE. U. L. REV. 143, 146–47 (2018) ("This article analyzes in extensive detail every aspect of [the *Hughes*] decision and concludes that this decision upheld the former, 'field preemption,' to permanently crimp and curtail state authority in 47 of the 50 states over a critical U.S. technology."); Nordhaus, *supra* note 19, at 211, 213; Welton, *supra* note 49, at 1118–20.

[131] *Cf.* Rossi, *supra* note 26, at 457–58 (taking the view that the Court has "move[d] away from dual sovereignty," *id.* at 458, and arguing that, as a result, "field preemption is little more than a fiction," *id.* at 457, and "preemption analysis in modern energy markets should attempt a case-by-case analysis of foundational facts and of regulatory conflict, and should not be decided based on field preemption alone," *id.* at 457–58).

[132] *See id.*

conflict preemption as the primary means for resolving jurisdictional disputes in modern energy markets does not offer any guidance regarding the factors courts should consider when engaging in such case-by-case analyses. What is more, conflict between state and federal energy regulators is built into the FPA, making it difficult, if not impossible, to articulate a coherent framework for distinguishing between permissible and impermissible conflicts. As a result, a theory of conflict preemption could augment judicial discretion about whether energy regulations are permissible, putting the generalist federal courts in charge of resolving complex and often arcane issues of energy policy — the very issues FERC was created to resolve.[133]

Moreover, the FPA's jurisdictional divide is as much about the limits on federal authority as the limits on state authority. Because "the Supremacy Clause creates uneven playing fields,"[134] a theory grounded in conflict preemption would cabin state authority while giving federal regulators license to run roughshod over matters that the FPA explicitly reserves to the states. Any doctrinal approach that allows that result would be deeply inconsistent with the purposes of the FPA itself, which "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way."[135]

Finally, abandoning the bright line framework would ignore express language in recent energy cases announcing that jurisdiction continues to be delineated into exclusive spheres.[136] Thus, commentators who have argued that the Supreme Court has embraced conflict preemption have ignored explicit admonitions from the Court that it is construing — not abandoning — prior precedents.[137]

---

[133] For a critique of this result, see Matthew R. Christiansen, *The FPA and the Private Right to Preempt*, 84 GEO. WASH. L. REV. ARGUENDO 129, 130 (2016).

[134] Nat'l Ass'n of Regul. Util. Comm'rs v. FERC (*NARUC*), 964 F.3d 1177, 1187 (D.C. Cir. 2020).

[135] Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599 (2015) (quoting Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n, 332 U.S. 507, 517–18 (1947)); *see also* Nw. Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 511 (1989).

[136] *See* FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 767 (2016) ("[The FPA] maintains a zone of exclusive state jurisdiction."); *Oneok*, 135 S. Ct. at 1595 ("Since the parties have argued this case almost exclusively in terms of field pre-emption, we consider only the field pre-emption question."); *NARUC*, 964 F.3d at 1187 ("FERC has the exclusive authority to determine who may participate in the wholesale markets . . . .").

[137] Perhaps the reason that scholars have urged the Court to reject the bright line and embrace conflict preemption is because courts have so frequently upheld federal and state regulations that oversee a resource that is subject to both federal and state oversight. But recognizing that some matters implicate the regulatory responsibilities of state and federal regulators simultaneously does not mean that jurisdiction is concurrent. Consider the case of demand response. As discussed below, when FERC regulated demand response, it did so because demand response affects wholesale rates. *See infra* pp. 1389–90. States, too, can regulate demand response, but only if they regulate matters within their own exclusive sphere. Thus, the bright line does not mean that state and federal regulators cannot both supervise the same resource or practice. It simply means that, when doing so, they must tether the regulation to a matter subject to that regulator's jurisdictional sphere.

The framework developed in the following sections addresses each of those questions and, as a result, differs from existing views in at least three respects. First, we do not think that the Supreme Court has abandoned the bright line. Instead, it has simply explained how the bright line applies to the modern electricity sector. Second, our interpretation rejects concurrent jurisdiction and leaves almost no role for conflict preemption. It may be doctrinally correct to observe that states and federal regulators occasionally share jurisdiction over the same *resource*, and that the instances in which they do are becoming more common as the electricity sector evolves. But that does not mean that they share jurisdiction over the same *issues*. Instead, federal and state regulators retain separate spheres of exclusive jurisdiction. And while significant cross-jurisdictional effects are the inevitable result of that allocation of jurisdiction, that does not mean that federal and state regulators share concurrent jurisdiction under the FPA. That observation leaves only a vanishingly small role for the doctrine of conflict preemption. Accordingly, as we understand the Supreme Court's cases, the bright line resolves virtually every jurisdictional dispute and virtually no state policies are conflict preempted.[138] Third, we do not think that there is any need for additional clarification from either Congress or the courts. Instead, we believe that the Court's bright line framework continues to provide ample room for both federal and state regulators to carry out their responsibilities under the FPA.

B. Toward a Unified Theory of FPA Jurisdiction

The Court's energy law trio may not have articulated a fully formed theory of the FPA's jurisdictional divide. Nevertheless, it provides the building blocks needed to put one together. In particular, all three cases relied on two basic observations that form the foundation of our theory of the FPA's jurisdictional divide.

First, they recognized the enduring presence of separate spheres of exclusive federal and state jurisdiction.[139] Those spheres are divided by the bright line that, as discussed above, has characterized courts' discussion of the FPA since the law was passed. Any coherent theory of the FPA's jurisdictional divide must start from that foundation.

Second, they recognized that one sovereign's actions will inevitably affect matters within the other's sphere of exclusive jurisdiction.[140] Rec-

---

[138] We use the phrase bright line instead of field preemption because the FPA delineates exclusive spheres of both state and federal jurisdiction. State actions that interfere with FERC's exclusive authority are therefore field preempted, whereas FERC actions that interfere with states' exclusive domain exceed the Commission's delegated authority. In the latter case, preemption analysis has no role whatsoever. *See supra* note 36.

[139] Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1292 (2016); *EPSA*, 136 S. Ct. at 775; *Oneok*, 135 S. Ct. at 1596.

[140] *Hughes*, 136 S. Ct. at 1298; *EPSA*, 136 S. Ct. at 776; *Oneok*, 135 S. Ct. at 1601.

ognizing that fact, the Court concluded that, if cross-jurisdictional effects alone could invalidate a federal or state law, then the FPA's jurisdictional line would prevent both federal and state regulators from overseeing parts of the electricity sector that fall within their exclusive jurisdiction.

Those two observations — the enduring importance of the bright line and the inevitability of cross-jurisdictional effects — are the foundation of our approach to applying the FPA's jurisdictional divide to the modern electricity sector. But before explaining that theory, we need to start with each leg of the Court's energy law trio.

1. The Supreme Court's Energy Law Trio. —

(a) Oneok. — The first case in the Court's energy law trio, *Oneok, Inc. v. Learjet, Inc.*, involved an antitrust dispute between natural gas pipelines and their customers. Though *Oneok* considered the Natural Gas Act[141] (NGA), not the FPA, the two statutes divide jurisdiction between FERC and the states in virtually identical ways.[142] For that reason, courts have always regarded cases involving NGA jurisdiction as binding precedent in FPA disputes and vice versa.[143]

The customers contended that the rates charged by the pipelines were inflated by market manipulation and therefore violated various states' antitrust statutes.[144] The pipelines responded by arguing that the customers' lawsuits contravened the bright line that divides federal and state authority under the NGA.[145] They claimed that the state antitrust claims were field preempted because they addressed "anticompetitive activities that affected wholesale (as well as retail) rates."[146] In addition, they noted that FERC also had sought to address the market manipulation underlying those claims and that state antitrust cases potentially could "reach conclusions about that conduct that differ from those that FERC might reach or has already reached."[147] In short, the pipelines' preemption argument boiled down to the theory that the state law claims overstepped the bright line because of their potential to affect matters on FERC's side and interfere with its ability to regulate those matters.

141 15 U.S.C. §§ 717–717z.

142 *See* Lyons, *supra* note 27, at 931 ("[T]he Court explained that the Natural Gas Act's jurisdictional line, which parallels that of the Federal Power Act, was 'clear and complete' and 'cut sharply and cleanly' between federal and state authority in a way that preserved state regulatory authority that existed 'before the Act was passed.'" (quoting Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n, 332 U.S. 507, 517 (1947))).

143 *See supra* note 122.

144 *See Oneok*, 135 S. Ct. at 1598.

145 *See id.* at 1599.

146 *Id.*

147 *Id.*

The Court disagreed. Recognizing that the NGA "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way,"[148] the Court observed that it "must proceed cautiously" when considering a NGA preemption claim, lest it overturn the carefully balanced jurisdictional scheme that Congress put in place.[149] It then explained that the Supreme Court's energy law precedents have long emphasized "the *target* at which the state law *aims* in determining whether that law is pre-empted."[150] Where the aim of a state law was a "matter firmly on the States' side of [the jurisdictional] dividing line,"[151] that law was not field preempted, "even though [it] might have affected the costs of and the prices of interstate wholesale sales."[152] By contrast, a state law that was "unmistakably and unambiguously *directed at*" matters within FERC's jurisdiction was field preempted because it sought to regulate matters on FERC's side of the bright line.[153]

Turning to the specifics of the customers' claims, the Court explained that state antitrust laws do not aim at wholesale sales of natural gas or natural gas companies.[154] They seek to prevent market power abuses across all industries and, therefore, their application to retail sales of natural gas did not indicate an effort to regulate the wholesale natural gas sector, even though they might *affect* such sales.[155] As a result, the Court concluded that the laws were not field preempted, regardless of their potential effects on wholesale rates.[156]

Justice Scalia dissented. He argued that the states' application of antitrust law to retail sales would amount to a regulation of wholesale conduct insofar as that is where the alleged manipulation occurred.[157] In other words, he took the position that addressing manipulative conduct through regulation of retail sales would, in that case, inevitably

---

[148] *Id.* (quoting Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n, 332 U.S. 507, 517–18 (1947)).
[149] *Id.*
[150] *Id.*
[151] *Id.* at 1600 (quoting Nw. Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 514 (1989)).
[152] *Id.*; *see id.* (stating that *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), the primary authority relied upon by the pipelines and Justice Scalia in dissent, was consistent with that interpretation because "the Court there thought that the State's . . . regulation was aimed directly at interstate pipelines"); *see also Nw. Cent. Pipeline Corp.*, 489 U.S. at 514 ("To find field pre-emption of [a state] regulation merely because purchasers' costs and hence rates might be affected would be largely to nullify . . . § 1(b) [of the NGA — the analog to section 201(b) of the FPA].").
[153] *Oneok*, 135 S. Ct. at 1600 (quoting *Nw. Cent. Pipeline Corp.*, 489 U.S. at 513 (emphasis added)).
[154] *Id.* at 1601.
[155] *See id.*
[156] *Id.*
[157] *See id.* at 1604–05 (Scalia, J., dissenting).

affect FERC's regulation of manipulative conduct in the wholesale market, which he deemed sufficient to preempt the application of those state laws.[158]

In dismissing those arguments, the Court relied on an extensive history of the natural gas sector's evolution,[159] explaining that, largely as a result of that evolution, the "Platonic ideal" of a "clear division between areas of state and federal authority" no longer exists.[160] Whatever the state does — or does not do — to address the effects of manipulation on the retail rate would inevitably affect the wholesale rate in the manner that, according to Justice Scalia, indicated that the law was preempted. The Court explained that if those inevitable effects were sufficient to preempt a state law, it would prevent states from exercising their exclusive jurisdiction and undo "the careful balance between federal and state regulation that Congress struck when it passed the Natural Gas Act."[161]

(b) EPSA. — The Court returned to energy law jurisdiction the following Term when it considered the legality of FERC's Order No. 745, the demand response regulation discussed above.[162] Recall that demand response programs provide consumers with a payment to reduce their electricity consumption when doing so is more efficient than increasing electricity generation.[163] A group of generators challenged Order No. 745, arguing that creating a payment for reducing electricity consumption — even through the wholesale market — "effectively" regulated the retail rate because it changed the opportunity cost of a retail transaction.[164]

Although the D.C. Circuit agreed with the generators,[165] the Supreme Court emphatically did not. In upholding Order No. 745, the Court established a two-pronged test for evaluating the limits on FERC's "affecting" jurisdiction under the FPA.[166] First, recognizing that, "[t]aken for all it is worth," jurisdiction over anything affecting wholesale rates "could extend FERC's power to some surprising places,"

---

158 *See id.* at 1605–06.

159 *Id.* at 1595–98 (majority opinion) (summarizing the evolution of the natural gas sector). As the Court explained, and largely at FERC's behest, the natural gas sector had evolved to rely on market competition in a manner similar to the deregulation of the electricity sector described above. *See id.*

160 *Id.* at 1601.

161 *Id.*

162 *See* FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 777 (2016).

163 *See supra* p. 1377.

164 *EPSA*, 136 S. Ct. at 777 (alteration in original) (quoting Brief for the Respondents at 10, *EPSA*, 136 S. Ct. 760 (2016) (Nos. 14-840, 14-841)).

165 *See supra* p. 1378.

166 As noted in section I.C.1, the FPA vests FERC with jurisdiction over not only wholesale rates, but also rates and practices "affecting" those rates. *See* 16 U.S.C. § 824d(a)–(b).

the Court adopted the "common-sense"[167] limitation that FERC's affecting jurisdiction extended only to matters that "directly affect" wholesale rates.[168] The Court explained that Order No. 745 easily satisfied that standard. It observed that the rule required payments to demand response resources *only* when those payments would *actually* reduce wholesale rates, which, by definition, directly affected wholesale rates.[169]

But that was only the first step. The Court also explained that FERC cannot enact a regulation that transgresses section 201(b)'s limitations on federal authority "no matter how direct, or dramatic, its impact on wholesale rates."[170] The Court observed that setting a retail rate or requiring retail customers to purchase a particular amount of electricity would affect wholesale rates, perhaps substantially.[171] Nevertheless, notwithstanding those "ineluctable consequence[s]," the Court held that a hypothetical regulation along those lines would violate the FPA because it regulates within the states' exclusive jurisdiction.[172]

At the same time, the Court also recognized that a FERC regulation does not transgress the FPA's jurisdictional line "just because it affects — even substantially" — matters under state jurisdiction.[173] Relying on *Oneok*, the Court explained that in the modern electricity sector, the federal and state spheres of jurisdiction "are not hermetically sealed from each other," and that "transactions that occur on the wholesale market have natural consequences at the retail level."[174] Those effects are "of no legal consequence" as long as FERC's regulation aimed at or targeted the wholesale market.[175] In such circumstances, any consequences the FERC regulation has on retail rates are acceptable byproducts of the federal effort to ensure just and reasonable wholesale rates.[176] Taken together, those observations recognize that, while FERC cannot regulate within a state's exclusive jurisdiction, it may enact a regulation that has substantial effects on matters within the state's exclusive jurisdiction, provided that those effects are not the reason for doing so.

Applying that standard, and again relying on *Oneok*, the Court reviewed FERC's goals and the mechanism by which it sought to further them in Order No. 745. It concluded that both were "all about, and

167 *EPSA*, 136 S. Ct. at 774.
168 *Id.* (emphasis omitted) (quoting Cal. Indep. Sys. Operator Corp. v. FERC, 372 F.3d 395, 403 (D.C. Cir. 2004)).
169 *Id.* at 774–75.
170 *Id.* at 775.
171 *Id.*
172 *Id.*
173 *Id.* at 776.
174 *Id.*
175 *Id.*
176 *See id.*

only about, improving the wholesale market."[177] In particular, the Court reviewed FERC's justifications for the rule, noting that the Commission had "focused wholly on the benefits that demand response participation (in the wholesale market) could bring to the wholesale market."[178] It also reviewed the Commission's approach to implementing the rule, observing that "every aspect of the regulatory plan happens exclusively on the wholesale market and governs exclusively that market's rules."[179] Accordingly, in the parlance of *Oneok*, the Court concluded that Order No. 745 did not "aim at" or "target" matters reserved for state jurisdiction.

Having reached that conclusion, it turned to address the generators' argument that Order No. 745 "effectively" regulated retail sales.[180] The Court observed that its precedents regarding exclusive state jurisdiction over retail rates "speak about rates, for electricity and all else, in only their most prosaic, garden-variety sense."[181] What mattered for the purposes of the FPA was that FERC had not regulated the actual retail rate (whether directly or by aiming to do the same).[182] The Court further explained that an interpretation that gave states exclusive jurisdiction over "'*effective*' rates"[183] — that is, an interpretation that invalidated FERC rules based on their effects on retail rates — was not only unsupported by the Court's precedents, but would also "flout the FPA's core objects"[184] by preventing FERC from regulating the wholesale market, pardon the pun, *effectively*.[185]

Justice Scalia again dissented, reiterating his support in *Oneok* for a jurisdictional line based on the effects of the regulation in question.[186] He argued that FERC's rule effectively regulated retail customers and retail rates by changing a customer's calculus in deciding whether to consume electricity.[187] In particular, he contended that Order No. 745 "effectively increase[s] the retail price of electric energy for participating customers because they must now account for the opportunity cost of using, as opposed to abstaining from using, more energy."[188]

---

[177] *Id.* (citing Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599 (2015)); *see id.* at 776–77.

[178] *Id.* at 777.

[179] *Id.* at 776.

[180] *Id.* at 777 (alteration in original) (quoting Brief for the Respondents, *supra* note 164, at 10).

[181] *Id.* at 778; *see also id.* (quoting the Solicitor General's observation at oral argument that "[t]he rate is what it is," Transcript of Oral Argument at 7, *EPSA*, 136 S. Ct. 760 (2016) (Nos. 14-840, 14-841), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-840_50k6.pdf [https://perma.cc/RQS9-59RL]).

[182] *See id.* at 777–78.

[183] *Id.* at 778 n.8 (emphasis added).

[184] *Id.* at 781.

[185] *See id.* at 780–82.

[186] *See id.* at 786 (Scalia, J., dissenting).

[187] *Id.* at 786–87.

[188] *Id.* at 786.

In rejecting that argument, the Court relied on the traditional bright line approach to the FPA. But it clarified that the bright line demarcated what was subject to federal and state regulation; it did not wall off two broader, almost metaphysical spheres of federal and state interest.[189] In so doing, it gave FERC considerable leeway to regulate within its sphere of jurisdiction in much the same way as *Oneok* did for state regulation of the natural gas subject to its jurisdiction.[190] As discussed further below, we believe that the combined result of those two cases — and the rejection of Justice Scalia's effects-based jurisdictional line — balances federal and state interests in a way that gives meaning to the bright line in the context of the modern electricity sector.

(c) Hughes. — The Court returned to the FPA's bright line a few months later in *Hughes v. Talen Energy Marketing, LLC*. As in *Oneok*, *Hughes* considered whether a state energy law was preempted, this time holding that it was. The details of the law in question are particularly important here. Maryland was concerned that wholesale markets were "provid[ing an] insufficient incentive for new electricity generation in the State."[191] To address that problem, it solicited proposals from prospective generators to enter a so-called "contract for differences."[192] The contract required the generator to bid its energy and capacity into the wholesale market.[193] If that capacity cleared the market and the clearing price exceeded the contract price, the generator would rebate the difference to consumers in Maryland.[194] If, by contrast, the capacity cleared the market but the clearing price was below the contract price, Maryland consumers would cover that difference through a surcharge on their retail rates.[195] The bottom line was that, to receive any payment, the generator was required to participate in the FERC-regulated wholesale market and secure a particular result (that is, clear in that market), but then was guaranteed to receive a different price set by Maryland regulators, not the wholesale rate established through the wholesale market.

A group of incumbent generators sued the state, arguing that the contract was preempted under the FPA.[196] The Court agreed, explaining that the Maryland regulation "contraven[ed] the FPA's division of

---

[189] *See id.* at 775–76 (majority opinion).

[190] *See* Christiansen, *supra* note 25, at 106 (discussing how the Court's "literal" reading of the text was actually a functionalist interpretation of the FPA).

[191] Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1292 (2016); *see id.* at 1294 (noting that "[b]ecause Maryland sits in a particularly congested part of the . . . grid, importing electricity from other parts of the grid into the State is often difficult").

[192] *Id.* at 1294–95.

[193] *Id.* at 1295.

[194] *Id.*

[195] *Id.*

[196] *See id.* at 1296.

authority between state and federal regulators" because it required CPV, the generator receiving the contract for differences, to participate in the wholesale market while guaranteeing it "a rate distinct from the clearing price."[197] According to the Court, the "fatal defect" in Maryland's regulation was that the subsidy rendered the generator indifferent to the capacity price but nevertheless conditioned the payments made under the contract for differences on the generator's participation in the wholesale market. That meant that Maryland had tethered the contract, and the resulting payments, to an action within FERC's exclusive jurisdiction.[198] By conditioning payments in this fashion, the Court explained, the state had "intrude[d] on FERC's authority over interstate wholesale rates."[199]

The Court rejected the state's argument that the contract was not preempted because it nominally regulated generation facilities.[200] Relying on *Oneok*, the Court explained that the FPA preempts state efforts that aim at or target FERC's exclusive jurisdiction, even if those regulations could be construed as an exercise of the states' reserved authority.[201] The Court observed that "the contract for differences operates within the [wholesale] auction; it mandates that [distribution utilities] and [the generator] exchange money based on the cost of [the generator's wholesale] sales . . . ."[202] In that sense, the regulation was tethered to the wholesale market.[203] In short, the Court held that the fact that the state was nominally regulating something within its jurisdiction (that is, generation facilities) did not save the regulation from preemption where the regulation itself showed that it aimed at a matter within FERC's exclusive jurisdiction.

Hughes is a terse decision, which quickly dispatched Maryland's regulation for crossing the FPA's bright line. Unlike *Oneok*, it did not explicitly situate its holding within the Court's preemption taxonomy.[204] And, unlike *EPSA*, it did not endeavor to articulate a comprehensive

---

[197] *Id.* at 1297.

[198] *See id.* at 1299.

[199] *Id.* at 1298.

[200] *See id.*

[201] *Id.* (citing Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599 (2015)).

[202] *Id.* at 1299.

[203] *See id.* ("Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures 'untethered to a generator's wholesale market participation.' So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable." (quoting Brief for Respondents at 40, *Hughes*, 136 S. Ct. 1288 (Nos. 14-614, 14-623))).

[204] The decision did, however, use the language of field preemption and expressly declined to address the respondents' conflict preemption arguments. *See id.* at 1299 n.13; *see also* Coal. for Competitive Elec. v. Zibelman, 906 F.3d 41, 50 (2d Cir. 2018) ("An FPA field preemption claim was recently considered by the Supreme Court in *Hughes v. Talen Energy Marketing, LLC*.").

test for the limits on the relevant regulator's authority. Instead it noted only that "[b]y adjusting an interstate wholesale rate, Maryland's program [had] invade[d] FERC's regulatory turf,"[205] with the bid and clear requirement being the "fatal defect" that rendered Maryland's regulation preempted.[206] Perhaps for these reasons, *Hughes*'s meaning has proven to be at least somewhat in the eye of the beholder and understanding its contribution to the Court's energy law jurisprudence requires some additional work.[207]

Hughes's meaning can be discerned by reading it in light of its two predecessor cases. When viewed as the third piece of the Court's energy law trio, *Hughes* appears to be a straightforward application of *Oneok* and consistent with the bright line as it was applied in both *Oneok* and *EPSA*. As the Court explained, Maryland's bid-and-clear requirement meant that the generator would receive a state subsidy only if it cleared a wholesale auction that was subject to FERC's exclusive control. The problem with the Maryland regulation was not that it simply *affected* a wholesale rate, but that it functionally *regulated* a generator's wholesale market conduct. By mandating that the generator not only participate in PJM's (the organization overseeing the electricity grid on the mid-Atlantic)[208] capacity market, but also achieve a particular outcome within that market in order to receive a payment, Maryland was regulating the generator's participation in the wholesale auction. In doing so, it upended the incentive structure that FERC's auction rules were designed to create and that were integral to the conclusion that the wholesale auction would produce just and reasonable rates.[209] Regulating a generator's participation in the wholesale market made clear that the "*target* at which [Maryland] *aim[ed]*"[210] was the wholesale rate, the very matter over which FERC has exclusive jurisdiction. That is *Oneok* 101.[211]

[205] *Hughes*, 136 S. Ct. at 1297.

[206] *See id.* at 1299.

[207] As Professor Emily Hammond has explained, the case "doesn't really tell us which state initiatives will survive future Supremacy Clause challenges and which will fail." Emily Hammond, Hughes v. Talen Energy Marketing, LLC*: Energy Law's Jurisdictional Boundaries — Take Three*, GEO. WASH. L. REV. DOCKET (Apr. 22, 2016), http://www.gwlr.org/hughes-v-talen-energy-marketing-llc-energy-laws-jurisdictional-boundaries-take-three [https://perma.cc/R97X-2X8T].

[208] *Hughes*, 136 S. Ct. at 1293.

[209] *See id.* at 1297.

[210] *Id.* at 1298 (quoting Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599 (2015)).

[211] To be fair, ours is not the only plausible reading of *Hughes*. Parts of the Court's opinion could be read to suggest that the problem was that Maryland directly regulated a wholesale rate. *See, e.g.*, *Hughes*, 136 S. Ct. at 1297 ("By adjusting an interstate wholesale rate, Maryland's program invades FERC's regulatory turf."). After all, Maryland came about as close as possible to directly regulating a wholesale rate without actually doing so. The generator knew in advance what its ultimate compensation would be for any capacity sales through the wholesale auction. But even so, *Hughes* is better understood as a case about aiming at the wholesale rate. While Maryland may have effectively regulated a wholesale rate by guaranteeing the generator a particular return on its

The importance of that analysis becomes clear when the contract for differences in *Hughes* is compared to other ways in which states routinely regulate generation facilities. For example, a bid-and-clear requirement coupled with a contract for differences is very different from, say, a bid requirement, which obligates a resource to participate in a wholesale auction as a condition of payment, but does not regulate or control that participation, leaving that task entirely to FERC.[212] Similarly, a bid-and-clear requirement is also distinct from an output-linked requirement, which compensates a resource for providing capacity or producing electricity, but again does not regulate or control how the resource participates in the FERC-regulated auction.[213] That is because both types of payments are independent of a resource's market outcomes or its terms of participation in the market. As a result, those payments may *affect* the resource's behavior in the auction, for example, by providing additional incentives to sell electricity or capacity, but they do

sales of capacity, to steal another of Justice Kagan's memorable phrases in *EPSA*: "The modifier 'effective' is doing quite a lot of work in that argument." FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 777 (2016). In reality, the generator received the wholesale rate established in the wholesale auction, but then engaged in a separate transaction using Maryland's jurisdiction over retail rates that was nominally an exercise in regulating generation facilities. *See Hughes*, 136 S. Ct. at 1295. Thus, while the Maryland program made the generator completely indifferent to the capacity market price, it did not actually set a capacity rate. It instead calibrated its payment to the capacity payment such that the Maryland generator was wholly unaffected by the capacity auction. Given that fact, along with the Court's multiple references to *Oneok*'s recitation of the "aiming at" standard, we think *Hughes* is best understood as an application of *Oneok* and not as a case involving direct regulation of wholesale rates. *See infra* pp. 1398–99 (discussing the distinction between the two parts of the field preemption inquiry under the FPA).

Perhaps most importantly, our analysis would not change even if Maryland had set a wholesale rate. That would create an independent ground for invalidating the law and mean that *Hughes* fits neatly within our framework as an example of an instance in which a state regulation that directly sets the wholesale rate is preempted. *See* Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*."); United States v. Brice, 748 F.3d 1288, 1292 (D.C. Cir. 2014) (Williams, J., concurring in the judgment) (acknowledging that an opinion may be considered to rest on multiple grounds, even when one of those grounds "was quite unnecessary" to the outcome). Thus, regardless of whether one thinks that the Maryland program set a rate, the Court's frequent statements that the state aimed at a wholesale rate indicate that *Oneok*'s "aiming at" standard is an important part of the FPA's bright line.

212 In these examples, we are contemplating contracts that establish such requirements. Both FERC and the courts have recognized that states may impose conditions through contractual relationships — such as retail rate program participation agreements or distribution interconnection agreements — established pursuant to their reserved authority even though, on their own, such requirements might raise preemption concerns. *See* Nat'l Ass'n of Regul. Util. Comm'rs v. FERC (*NARUC*), 964 F.3d 1177, 1187–89 (D.C. Cir. 2020) (noting that states could force electric storage resources to choose between participating in the wholesale market or retail market, even though they could not outright prohibit wholesale market participation); FERC Order No. 841-A, *supra* note 100, at 23,910.

213 As discussed below, both the Second and Seventh Circuits have considered such output requirements and held that they were not preempted by the FPA. *See infra* pp. 1419–20.

not regulate the wholesale market by linking the payment to what the resource does in the wholesale market.

In contrast, the bid-and-clear requirement in *Hughes* compensated a resource for the actions it took in the wholesale market. This is clear evidence that the state was aiming at wholesale participation. As *Hughes* explained, the impermissible tethering occurred because the state "condition[ed] payment of funds on capacity clearing the auction," which changed the generator's incentives within the auction and, therefore, as the Court put it, "operate[d]" within the wholesale auction.[214] The Court's now-famous "tethering" standard is shorthand for tying compensation to what a resource does in the market.[215] So long as a state regulation avoids that type of objective intrusion or operation within the wholesale market, it is "untethered" to that market and does not run afoul of *Hughes*.[216]

2. The Bright Line Is Alive and Well. — Time to put the pieces together. In the following sections, we explain how the Court's energy law trio creates a coherent theory for applying the FPA's jurisdictional divide to the modern electricity sector.[217] The foundation of our framework is a pair of observations shared by all three of the Court's cases.

First, the Court recognized the enduring presence of separate spheres of exclusive federal and state jurisdiction.[218] In each case, the Court explained that those separate spheres are rooted in the FPA's statutory text. As a result, absent congressional action, the FPA's current distribution of authority will remain the foundation for resolving any dispute over the FPA's jurisdictional divide.

Second, the Court also recognized that each sovereign's actions will inevitably affect matters within the other's sphere of exclusive jurisdiction.[219] In every instance, the Court explained that such cross-jurisdictional effects cannot, by themselves, be the basis for concluding that a federal or state regulation violates the FPA's jurisdictional divide. Were it otherwise, many aspects of the electricity sector would not be amenable to effective regulation, whether state or federal, creating exactly the sort of regulatory gaps that the FPA was enacted to close.[220]

From those two observations, we draw a simple, but fundamental conclusion: the theoretical construct of a bright line between federal and

[214] *Hughes*, 136 S. Ct. at 1299.

[215] In the numerous preemption cases that have followed *Hughes*, the courts have focused on the tethering as the touchstone for applying that decision. *See* Coal. for Competitive Elec. v. Zibelman, 906 F.3d 41, 46 (2d Cir. 2018); Elec. Power Supply Ass'n v. Star, 904 F.3d 518, 523 (7th Cir. 2018); Allco Fin. Ltd. v. Klee, 861 F.3d 82, 102 (2d Cir. 2017).

[216] *Hughes*, 136 S. Ct. at 1299.

[217] We say the FPA because that has been the focus of this Article, although this theory could also apply equally to aspects of the similar jurisdictional divide under the NGA.

[218] *See Hughes*, 136 S. Ct. at 1292; FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 775 (2016); Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1596 (2015).

[219] *See Hughes*, 136 S. Ct. at 1298; *EPSA*, 136 S. Ct. at 776; *Oneok*, 135 S. Ct. at 1601.

[220] *See EPSA*, 136 S. Ct. at 780; *supra* pp. 1371–72.

state jurisdiction remains alive and well and continues to provide the organizing principle for resolving jurisdictional disputes under the FPA. That bright line demarcates *what* FERC and the states can regulate, whether directly or indirectly. But it is not an impermeable barrier that prevents any cross-jurisdictional effects. As such, it does not force courts to engage in the Sisyphean task of stamping out the cross-jurisdictional effects that are the unavoidable consequence of a system in which regulatory authority over a single industry is divided between federal and state government.

The evolution of the modern electricity sector makes that point more important than ever. As competition and technological change continue to refashion the industry, the most important questions will increasingly lie at what FERC has called the "confluence of State and Federal jurisdiction,"[221] meaning that any regulation, federal or state, will inevitably have significant effects on matters within the other sovereign's exclusive jurisdiction. Although those effects may demand closer coordination between federal and state regulators, they do not present problems for the FPA's bright line.

The bright line does two things. Most obviously, it prohibits FERC and the states from directly regulating matters subject to the other's exclusive jurisdiction. The phrase "directly regulating" has a precise meaning here. It refers to situations in which a regulator is expressly doing that which the FPA reserves to the other regulator, such as a state setting a wholesale rate. In other words, the bright line ensures that only FERC can set the actual rates for the wholesale sale and transmission of electricity, while only states may regulate the actual rates for retail sales of electricity as well as generation and distribution facilities.[222] Because those areas of jurisdiction are exclusive, any federal regulation in the state sphere — and vice versa — is per se invalid.

Less obvious, but just as important, is that the bright line also prohibits FERC and the states from exercising their authority in a way that aims at or targets matters left for the other to decide. All three cases emphasize this point. *Oneok* explained that this test was integral to the Court's field preemption inquiry under the NGA and FPA.[223] *EPSA* upheld FERC's regulation of demand response because it was "all about, and only about, improving the wholesale market."[224] In other words, the Court upheld FERC's demand response rule because it targeted matters over which FERC had authority and not matters the FPA reserved to states' exclusive jurisdiction. *Hughes*, by contrast, concluded that Maryland had overstepped its jurisdictional bounds. By

---

[221] FERC Order No. 745, *supra* note 31, at 16,676.
[222] *See* 16 U.S.C. § 824(b)(1).
[223] *Oneok*, 135 S. Ct. at 1599–600.
[224] *EPSA*, 136 S. Ct. at 776 (citing *Oneok*, 135 S. Ct. at 1599).

establishing a contract for differences, the state guaranteed a generator a certain amount of revenue while conditioning the payments on the generator bidding into and clearing the wholesale market. Though ostensibly acting within its own sphere of jurisdiction, the state regulated the terms of generators' wholesale market participation, which provided evidence that the state aimed its regulation at the wholesale rate.[225] Collectively, these cases make clear that when one sovereign exercises its authority in a manner that aims to regulate that which is reserved to the other sovereign's exclusive authority, it oversteps its jurisdictional bounds just as if it had directly set a rate subject to the other's control.

The importance of considering the aim or target of a regulation comes from the structure of the FPA. Because the law bifurcates jurisdiction over a single industry, it creates myriad opportunities for one regulator to use its authority to fix what it views as problems with the other regulator's exercise of its authority. Consider *Hughes* again. Because the surcharge/rebate mechanism on which Maryland relied was imposed through its authority over retail rates, the contract for differences nominally regulated generation facilities.[226] But, for the reasons explained above, the Maryland program objectively regulated wholesale market conduct, notwithstanding the trappings of state jurisdiction.[227] By preventing regulators from exploiting the FPA's cooperative-federalist model to perform an end run around its jurisdictional limitations, the "aiming at" standard plays an essential role in maintaining the FPA's allocation of jurisdiction.

It should, therefore, be no surprise that the "aiming at" standard has deep roots in FPA jurisprudence. For example, in *Northern Natural Gas Co. v. State Corp. Commission*,[228] a case involving the analogous provisions of the NGA, the Court recognized that a state regulation that nominally addressed production of natural gas in fact set the terms for wholesale sales, indicating that the purported "conservation measures aimed directly at interstate purchasers and wholesales for resale."[229] In addition, in *Northwest Central Pipeline Corp. v. State Corp. Commission*,[230] the Court similarly observed that "[t]he congressionally designed interplay between state and federal regulation under the NGA does not, however, permit States to attempt to regulate pipelines' purchasing decisions in the mere guise of regulating production."[231]

It is certainly true that, largely as a result of the electricity sector's economic and technological evolution, there may be more opportunities today than in the past for FERC actions to affect the state sphere of

---

[225] *See* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1298–99 (2016).
[226] *See id.* at 1295.
[227] *Id.* at 1298.
[228] 372 U.S. 84 (1963).
[229] *Id.* at 94; *see id.* at 85–86.
[230] 489 U.S. 493 (1989).
[231] *Id.* at 518.

jurisdiction and for state actions to affect the federal sphere. As a result, we may see more disputes about whether federal or state regulators have sought to harness those effects in an effort to aim at or target matters within the other's sphere of jurisdiction. If that turns out to be the case, it is the result of an evolving industry, not a new standard for applying the FPA's jurisdictional bounds.

The increasing importance of the "aiming at" inquiry is also why the Court's decision in *Hughes* is so important. As discussed above, it took an objective approach to evaluating whether a state action aims at or targets FERC's authority to regulate wholesale rates and in that way crosses the bright line.[232] In particular, the *Hughes* Court examined how the state regulation functioned in practice, concluding that it was preempted because it operated within the wholesale market by conditioning a payment on a generator participating and achieving a particular result in that market while leaving that generator indifferent to the rate that market would otherwise produce.[233]

In so doing, *Hughes* confirmed that the FPA's bright line standard is consistent with the Supreme Court's broader field preemption jurisprudence. For example, last year, in *Virginia Uranium, Inc. v. Warren*,[234] a jurisdictional dispute between state and federal mining regulators,[235] the plurality observed that the Court "has generally treated field preemption inquiries like this one as depending on *what* the State did, not *why* it did it."[236] That opinion cited to a variety of areas in which the Court has insisted on such an objective inquiry into field preemption, pointing to *Hughes* as one such example in the area of energy.[237] It also enumerated "the costs to cooperative federalism" that would come from courts "inquiring into state legislative purpose too precipitately," including endless litigation and the possibility that functionally identical laws would meet different fates based on courts' subjective assessments of their purposes.[238]

---

232 *See supra* section II.B.1.c, pp. 1391–95.

233 *See* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1299 (2016).

234 139 S. Ct. 1894 (2019).

235 *Id.* at 1900–01 (plurality opinion).

236 *Id.* at 1905.

237 *Id.*

238 *Id.* at 1906. As explained further below, *see infra* pp. 1410–11, this does not mean that the rationale for an action is irrelevant to the preemption inquiry. That rationale, whether in the form of an explanation provided in a regulatory action (such as a FERC rulemaking) or in a statement of basis and purpose in a state statute, will often shed light on how the action is intended to function and what it is aimed at regulating. Considering this evidence is an important aspect of a judicial inquiry and does not implicate the concerns that the Court outlined in *Virginia Uranium*. In practice, this will often mean that the rationale will be more fulsome — and, thus, more important — when it comes to evaluating a FERC regulation, which must comply with the Administrative Procedure Act's reasoned decisionmaking requirements, as opposed to a state law, which need not

Hughes is consistent with *Virginia Uranium*. By establishing an objective test that considers what the state *did*, not what it *intended*, *Hughes* fits with the characterization of the Court's jurisprudence as being about the substance of state regulations, not the subjective motivations of the regulators who enacted them. By illustrating how to conduct the "aiming at" inquiry in the context of modern electricity markets, *Hughes* put *Oneok* into practice in a way that is consistent with the Court's broader field preemption jurisprudence.[239]

Finally, it bears repeating that our interpretation of the FPA's bright line — including both its directly regulating and "aiming at" components — recognizes that valid state and federal actions will often significantly affect matters within the other sovereign's jurisdiction. That is the inevitable result of the jurisdictional scheme that Congress put in place and not a basis for invalidating either federal or state regulation. A finding to the contrary would, for all intents and purposes, resuscitate the effects-based theory of jurisdiction that Justice Scalia espoused in dissent in both *Oneok* and *EPSA*. In both cases, Justice Scalia contended that the relevant regulation was invalid because it effectively regulated matters that the FPA left to the other sovereign's control.[240] But the Court emphatically rejected that argument both times, reasoning that such a standard would handcuff federal and state regulators by circumscribing the jurisdiction expressly conveyed (or, in the case of the state, preserved) under the FPA and NGA.[241] Such an interpretation would, moreover, create precisely the type of regulatory gap that, according to the Court, the FPA was designed to close.[242] The only question then is what, if anything, the FPA says about how to mediate cross-jurisdictional effects, the topic we turn to next.

3. Conflict Preemption. — The FPA's bright line is not the only limit on state authority.[243] A state law that does not regulate matters within

contain a statement of basis and purpose or any legislative findings. State regulations enacted by public utility commissions will often end up somewhere in the middle.

239 As noted, Justice Gorsuch's opinion in *Virginia Uranium* represented only a plurality of the Court. Justice Ginsburg separately concurred in the judgment, accompanied by two other Justices, explaining her view that the plurality's "discussion of the perils of inquiring into legislative motive sweeps well beyond the confines of this case." *Va. Uranium*, 139 S. Ct. at 1909 (Ginsburg, J., concurring in the judgment) (citation omitted). In any case, the analysis in her opinion, which focused on the text of the relevant statutes and the "context and history" of the potentially preempting federal statute, *id.* at 1913; *see id.* at 1912–13, is consistent with the objective inquiry in *Hughes* and of the type we argue for below. *See infra* Part III, pp. 1407–12.

240 *See supra* pp. 1387–88, 1390.

241 *See* FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 780 (2016); Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1601 (2015).

242 *See infra* pp. 1405–06.

243 We discuss only state authority here because the Court has made clear that the effects of a FERC regulation that does not directly regulate or aim at state exclusive jurisdiction are "of no legal consequence." *EPSA*, 136 S. Ct. at 776 ("When FERC regulates what takes place on the

FERC's exclusive jurisdiction may nevertheless be invalidated under the doctrine of conflict preemption.[244] "[C]onflict pre-emption . . . occurs 'when compliance with both state and federal law is impossible, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objective[s] of Congress."'"[245] The Supreme Court has explained that, when it comes to the FPA and the NGA, "conflict-pre-emption analysis must be applied sensitively . . . , so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role."[246]

This section discusses the two potential bases for conflict preemption and explains how they apply under the FPA. While none of the Court's recent trio of energy law cases turned on conflict preemption, the Court has frequently considered how conflict preemption complements the exclusive jurisdiction framework outlined above.

For decades, courts have consistently recognized that state energy laws are conflict preempted only when they make it impossible for regulated entities to comply with both federal and state requirements simultaneously.[247] Under the FPA, this version of "impossibility preemption" generally arises when a state exercises its reserved authority over retail rates to effectively overrule a prior FERC determination that a rate or practice is just and reasonable. For example, in *Nantahala Power & Light Co. v. Thornburg*,[248] the Court explained that, notwithstanding states' plenary and exclusive authority over retail rates, a state may not exercise that authority to preclude a utility from recovering a

---

wholesale market, as part of carrying out its charge to improve how that market runs, then no matter the effect on retail rates, [FPA section 201(b)] imposes no bar.").

[244] *Oneok*, 135 S. Ct. at 1602 ("Conflict pre-emption may, of course, invalidate a state law even though field pre-emption does not."); *see also Va. Uranium*, 139 S. Ct. at 1901 (plurality opinion) ("This Court has sometimes used different labels to describe the different ways in which federal statutes may displace state laws — speaking, for example, of express, field, and conflict preemption. But these categories 'are not rigidly distinct.'" (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 n.6 (2000) (internal quotation marks omitted))).

[245] United States v. Locke, 529 U.S. 89, 109 (2000) (quoting California v. ARC Am. Corp., 490 U.S. 93, 100–01 (1989) (citation omitted)).

[246] Nw. Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 515 (1989). This case involved the analogous sections of the NGA but, as noted, courts have a well-established practice of treating a holding under one act as binding on the analogous sections of the other. *See supra* p. 1386.

[247] The Supreme Court has recognized this type of conflict preemption in other areas of the law, as well. *See, e.g.*, *Crosby*, 530 U.S. at 372 ("We will find preemption where it is impossible for a private party to comply with both state and federal law . . . ."); *ARC Am. Corp.*, 490 U.S. at 100 ("[E]ven if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible . . . ."); Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce.").

[248] 476 U.S. 953 (1986).

wholesale rate that FERC has already found to be just and reasonable.[249] The Court reiterated this principle a few years later in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*,[250] relying on *Nantahala* to explain that "[o]nce FERC sets [a wholesale] rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates . . . ."[251] That is a straightforward application of the Supremacy Clause: a state cannot regulate in a way that overrules federal regulation, even if the state regulation is an otherwise valid exercise of its authority.[252]

That type of impossibility preemption is necessary to prevent an end run around the FPA's bright line. All electricity sector revenue ultimately comes from the retail customer and is, at one point or another, collected through retail rates. Without impossibility preemption, states could use their retail ratemaking authority to effectively second guess FERC determinations regarding wholesale rates by preventing utilities from ultimately recovering their FERC-approved wholesale rates. That would put states in the position of, for all intents and purposes, reviewing wholesale rates — something that Congress expressly reserved for exclusive FERC jurisdiction.

But impossibility preemption requires actual impossibility, not just inconvenience. The state law must actually prevent a private actor from complying with both federal and state obligations.[253] Although states cannot use their retail rate authority to undo FERC's regulation of wholesale rates, they can adopt policies that create tensions with wholesale regulations. That is because the inevitable — and sometimes significant — effects that state actions have on the wholesale sector do not implicate impossibility preemption, even where they may force FERC to take what it views as a second-best action. If they did, impossibility

[249] *See id.* at 966.
[250] 487 U.S. 354 (1988).
[251] *Id.* at 373 (quoting *Nantahala*, 476 U.S. at 966).
[252] *See* U.S. CONST. art. VI, cl. 2.
[253] *See, e.g.*, Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1595 (2015) ("[C]onflict pre-emption exists where 'compliance with both state and federal law is impossible . . . .'" (quoting California v. ARC Am. Corp., 490 U.S. 93, 100 (1989))); Mut. Pharm. Co. v. Bartlett, 570 U.S. 472, 480 (2013) ("[T]he Court has found state law to be impliedly pre-empted where it is 'impossible for a private party to comply with both state and federal requirements.'" (quoting English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990))); Hillman v. Maretta, 569 U.S. 483, 490 (2013) ("[A] conflict occurs when compliance with both federal and state regulations is impossible . . . ." (citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963))); PLIVA, Inc. v. Mensing, 564 U.S. 604, 618 (2011) ("We have held that state and federal law conflict where it is 'impossible for a private party to comply with both state and federal requirements.'" (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995))).

preemption could undo the dual-federalist scheme that is the foundation of the FPA.

The FPA's leading impossibility preemption cases, *Mississippi Power & Light Co.* and *Nantahala*, embrace that narrow view of impossibility preemption. In both cases, the state's action effectively disallowed the FERC-approved wholesale rate by precluding its collection through retail rates.[254] By forcing the utility to recover a rate that would not allow the utility to cover the costs it incurs in wholesale markets, the state action created an unavoidable and irreconcilable conflict with FERC's plenary authority over wholesale rates. That is the type of conflict that impossibility preemption under the FPA must require if it is to respect Congress's allocation of jurisdiction between federal and state regulators.

The Court's other species of conflict preemption — the "obstacle" theory of conflict preemption — is more nebulous and has not been applied in FPA disputes. It provides that a state law is preempted when the state hampers Congress's goals in enacting the relevant federal statute.[255] Unlike impossibility preemption, obstacle preemption is inherently a subjective determination: "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects."[256] Thus, in evaluating a claim of obstacle preemption, a court must ascertain first what Congress sought to achieve when enacting the law in question and then whether the state action interferes with the mechanism that Congress set up to achieve that purpose.[257]

---

[254] *See Miss. Power & Light Co.*, 487 U.S. at 373; *Nantahala*, 476 U.S. at 966. The filed rate doctrine is one reason that FERC-approved rates preempt state laws that render it impossible for regulated entities to recover the costs they incur from wholesale markets. The filed rate doctrine treats rates that have been filed with FERC as federal regulations and prohibits utilities from deviating from that rate. *See* Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39, 47 (2003) ("The filed rate doctrine requires 'that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates.'" (quoting *Nantahala*, 476 U.S. at 962)). The FERC-approved rate is the only wholesale rate that may be legally collected. *Id.* For a persuasive critique of the filed rate doctrine, see Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591, 1598–605 (2003). In our view, though, FERC-approved rates would conflict preempt state laws even without the filed rate doctrine because a state law that rendered it impossible for utilities to recover a rate that FERC deemed just and reasonable would make it impossible to comply with federal law.

[255] *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (stating that courts have recognized preemption "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (quoting, inter alia, Hines v. Davidowitz, 312 U.S. 52, 67 (1941))).

[256] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000).

[257] *See, e.g.*, Arizona v. United States, 567 U.S. 387, 406 (2012) ("The correct instruction to draw from the text, structure, and history of [the law in question] is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose."); Hayfield N.R.R. Co. v. Chi. & N.W. Transp. Co., 467 U.S. 622, 636 (1984) (noting that while the state law may seem "unfair," that does not mean that it "frustrate[s] the purpose of the

The FPA should never preempt a state's exercise of its reserved authority over generation, distribution, and retail under an obstacle theory of preemption.[258] As discussed above, the FPA's jurisdictional scheme was a direct response to *Attleboro*.[259] Congress sought to fill the "*Attleboro* gap"[260] — and then some[261] — while expressly preserving areas of state authority that were not affected by *Attleboro*.[262] Put differently, the congressional intent behind the FPA's jurisdictional scheme was to provide for comprehensive regulation of the electricity sector while preserving that state authority that was not implicated in *Attleboro*.

Congress implemented that goal by granting the Federal Power Commission, now FERC, a broad grant of jurisdiction over wholesale transactions while expressly reserving to states exclusive jurisdiction over retail sales and over generation and distribution facilities. It should go without saying that Congress anticipated that states would exercise the full extent of that authority. Otherwise, the FPA would have created

---

federal . . . scheme"); *see also* Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1901, 1907 (2019) (plurality opinion) (explaining that an obstacle preemption inquiry must look to the purpose as evidenced by the statute itself, not "some brooding federal interest," *id.* at 1901, or "abstract and unenacted legislative desires," *id.* at 1907).

258 That is not to suggest that obstacle preemption will never arise in other areas of energy law. At least one Supreme Court case, *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), found a state law preempted based on an obstacle preemption theory. In that case, which involved regulations establishing natural gas curtailment protocols for interstate shipments of natural gas during periods when gas was scarce, *see id.* at 628, the Court explained that under Congress's scheme, "the desirability of uniform federal regulation [was] abundantly clear," *id.* at 634–35, and that Congress did, in fact, vest the Federal Power Commission with the authority to promulgate such a uniform national scheme, *see id.* at 634–41. Accordingly, the Court concluded that individual state laws establishing curtailment protocols stood as an obstacle to such a uniform federal scheme. *Id.* at 633–35; *see* Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1602 (2015) (noting that *Louisiana Power & Light Co.* was a conflict preemption case based on the Court's belief that state regulation interfered with the need for a uniform federal scheme). But, as explained above, section 201(b), along with sections 205 and 206, present the exact opposite case, since they expressly contemplate that states will continue to regulate retail rates, distribution facilities, and generation facilities, *see supra* p. 1372 — that is, the statutory scheme makes clear that Congress did not intend to establish comprehensive federal regulation.

259 *See supra* pp. 1371–72.

260 *See* FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 767 (2016) ("Federal regulation of electricity owes its beginnings to one of this Court's decisions." (citing Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 89–90 (1927))); New York v. FERC, 535 U.S. 1, 21 (2002) (explaining that Congress enacted the relevant portions of the FPA in response to *Attleboro*).

261 *New York*, 535 U.S. at 21 ("[T]he original FPA did a good deal more than close the gap in state power identified in *Attleboro*. The FPA authorized federal regulation not only of wholesale sales that had been beyond the reach of state power, but also the regulation of wholesale sales that had been *previously subject* to state regulation.").

262 *EPSA*, 136 S. Ct. at 767 ("Alongside [the FPA's broad] grants of power, however, the Act also limits FERC's regulatory reach, and thereby maintains a zone of exclusive state jurisdiction."); *see also* Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1601 (2015) (observing that the analogous provisions of the NGA, which were based on the FPA, were "drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way" (quoting Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n, 332 U.S. 507, 517–18 (1947))).

precisely the type of regulatory gaps — limbo areas unregulated by federal or state authorities — that *EPSA* held to be inconsistent with congressional intent.[263] That means that a state's exercise of its reserved authority, almost by definition, is not an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[264] To the contrary, a state's exercise of that authority *is* itself one of the purposes and objectives underlying the FPA's jurisdictional scheme.[265] And that is true where the state action significantly affects, and even complicates, FERC's comprehensive regulation of the wholesale market.[266]

As with impossibility preemption, the evolution of the electricity sector has made a strict approach to obstacle preemption more important than ever. As technological change and competition have progressed, more and more entities within the electricity sector will, at one point or another, be regulated by both FERC and one or more states, albeit in different respects. In addition to the earlier example of demand response, consider FERC's rule on energy storage, which permits resources that interconnect through the distribution grid to participate in wholesale markets.[267] As a result of that determination, a potentially large number of resources will make FERC-jurisdictional wholesale sales while injecting energy through state-jurisdictional interconnections to the grid. A conflict preemption theory that treated state regulation — even aggressive state regulation — of those interconnections as an obstacle to the FPA's objectives would dislodge states from their areas of exclusive jurisdiction. Such a result would seem to directly contradict Congress's decision to delegate to the states authority over retail transactions.

This understanding of conflict preemption is consistent with the Supreme Court's description of conflict preemption in recent FPA cases. In *Hughes*, for example, the Court qualified its holding by stating that conflict preemption prohibits states from using their authority to regu-

[263] *See EPSA*, 136 S. Ct. at 780.

[264] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[265] *Cf.* N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 421 (1973) (observing that when "coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one").

[266] *See* Coal. for Competitive Elec. v. Zibelman, 906 F.3d 41, 53 (2d Cir. 2018) ("[I]t would be 'strange indeed' to hold that Congress intended to allow the states to regulate production, but only if doing so did not affect interstate rates." (quoting Nw. Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 512 (1989))).

[267] As discussed in section I.C.2, pp. 1378–80, the Commission not only permitted such participation, but also precluded states from directly prohibiting distribution-connected storage resources from participating in wholesale markets, although it did not otherwise limit state authority over the distribution grid.

late retail rates to "second-guess the reasonableness of interstate wholesale rates."[268] At the same time, the Court emphasized that "[n]othing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures 'untethered to a generator's wholesale market participation.'"[269] An aggressive approach to conflict preemption would prevent states from promoting new or clean energy sources by using such "untethered" measures. By definition, every state subsidy affects wholesale markets by giving certain types of generators additional revenue. To hold that all such effects are conflict preempted would therefore prevent states from exercising their authority under section 201 of the FPA to control generation facilities and, in that way, flout *Hughes*'s last sentence.

That does not mean that a state can overcome preemption concerns simply by labeling its action an exercise of the authority reserved to the states. If a state uses that authority in a way that targets or aims at matters reserved for FERC, it will overstep the bright line, as discussed in the previous section.[270] But that is field preemption, not conflict preemption.[271] So long as a state action does not transgress the bright line or make compliance with federal regulation impossible, it should not be preempted.

4. Avoiding Regulatory Gaps. — Our interpretation of the FPA is not only the best reading of the cases, it is also the only rational way to apply the FPA's jurisdictional divide to the modern electricity sector. Recall that section 201(b) gives FERC authority to regulate wholesale rates but reserves to the states exclusive authority to regulate all other sales of electricity as well as generation and distribution facilities.[272] At the same time, sections 205 and 206 of the FPA instruct FERC to ensure that wholesale rates and practices affecting those rates are just and reasonable and not unduly discriminatory or preferential.[273] If state and federal energy policies could not affect matters that the FPA reserves to

---

[268] Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1298 (2016).

[269] *Id.* at 1299 (quoting Brief for Respondents, *supra* note 203, at 40).

[270] *See* Nat'l Ass'n of Regul. Util. Comm'rs v. FERC (*NARUC*), 964 F.3d 1177, 1187–88 (D.C. Cir. 2020) ("Any State effort that aims directly at destroying FERC's jurisdiction by 'necessarily deal[ing] with matters which directly affect the ability of the [Commission] to regulate comprehensively and effectively' over that which it has exclusive jurisdiction 'invalidly invade[s] the federal agency's exclusive domain.'" (alterations in original) (quoting N. Nat. Gas Co. v. State Corp. Comm'n, 372 U.S. 84, 91–92 (1963))).

[271] After all, this describes the state regulation in *Hughes*, which, as noted, is best read as a field preemption case. In that case, the state purported to regulate generation facilities — a matter clearly within its authority — but did so in a manner that aimed at the wholesale rate. *Hughes*, 136 S. Ct. at 1292, 1298.

[272] 16 U.S.C. § 824(b).

[273] *Id.* §§ 824d–e.

the other sovereign, it would be impossible for either regulator to fully carry out its responsibilities under the FPA. For example, as the Court explained in *EPSA*, adopting an effects-based standard for applying the FPA's bright line would have completely "extinguished" demand response in the wholesale market, notwithstanding its direct and salutary effects on both wholesale rates and reliability.[274] By the same token, if states cannot regulate generation facilities because doing so affects — through the basic law of supply and demand[275] — the wholesale sales under FERC's jurisdiction, then state authority over those facilities would be dramatically curtailed, precisely the opposite of what section 201(b) would suggest.[276]

Those regulatory gaps would undermine the core objective of the FPA, which was to address the regulatory gap that the Supreme Court created when it held that states could not regulate interstate wholesale sales.[277] As the Court explained in *EPSA*: "If neither FERC nor the States can regulate wholesale demand response, then by definition no one can. But under the Act, no electricity transaction can proceed unless it is regulable by someone. . . . Congress passed the FPA precisely to eliminate vacuums of authority over the electricity markets."[278] As noted above, interpreting the bright line to act as an impermeable barrier would handicap both state and federal regulators' authority rather than protect it.

By contrast, our interpretation of the bright line fully empowers state and federal regulators to carry out their responsibilities in the modern electricity sector. By dividing the electricity sector into spheres of exclusive federal and state jurisdiction, our interpretation ensures that federal regulators are able to fulfill their statutory responsibilities without contradictory regulation by state regulators and vice versa. At the same time, our interpretation recognizes that there will inevitably be cross-jurisdictional effects from carrying out those responsibilities. In concluding that those effects do not support a determination that the regulator has overstepped its authority, our interpretation ensures that

---

[274] *See* FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 781 (2016) (explaining that "the upshot of [the generators'] view would be to extinguish the wholesale demand response program in its entirety," but that "that outcome would flout the FPA's core objects").

[275] *See* Coal. for Competitive Elec. v. Zibelman, 906 F.3d 41, 57 (2d Cir. 2018) (explaining how a state's regulation of generation facilities can have an "incidental effect" on the wholesale rate through the basic principles of supply and demand).

[276] *See* 16 U.S.C. § 824(b) (reserving for the states exclusive jurisdiction "over facilities used for the generation of electric energy").

[277] *See EPSA*, 136 S. Ct. at 767 (citing Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 89–90 (1927)); Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1845 (2016) ("If FERC could not oversee mechanisms that form the core of the wholesale markets, it would create the kind of regulatory gap that Congress sought to correct when it adopted the FPA in 1935.").

[278] 136 S. Ct. at 780.

federal and state regulators are not left hamstrung and unable to fulfill their statutory responsibilities.

Note, though, that while the FPA creates spheres of exclusive jurisdiction, that does not mean that state and federal regulators cannot both regulate the same entity simultaneously. The FPA simply requires that when a regulator does exercise its authority, it must remain in its jurisdictional sphere. Consider again the example of demand response. FERC unquestionably has authority to regulate demand response so long as, in doing so, it is regulating the wholesale electricity market. States, too, have authority to regulate retail demand response programs and retail customers more generally. This type of jurisdictional overlap does not mean that state and federal jurisdiction is concurrent. Rather, it means that a single resource can implicate multiple jurisdictional spheres simultaneously.[279]

As we have explained, that interpretation is consistent with longstanding Supreme Court precedent and has always been important to effective functioning of the FPA. But the economic and technological revolution currently underway in the electricity sector makes that interpretation more important today than ever before. As more and more of the important issues exist at what FERC has described as "the confluence of State and Federal jurisdiction,"[280] both federal and state regulators must be able to carry out their responsibilities effectively if they are to oversee an orderly transition to the electricity grid of the future.

III. RESOLVING JURISDICTIONAL DISPUTES UNDER THE FPA

In this Part, we explain how to apply the bright line jurisdictional framework outlined above and then do so for a pair of contemporary disputes under the FPA.

As discussed in Part II, our framework relies on a critical distinction that the Court has drawn in its trio of energy law cases between actions that *regulate* matters reserved to the other regulator's jurisdiction and actions that merely *affect* matters reserved to the other's jurisdiction. The bright line is about the former, not the latter. That is, the FPA does not invalidate a federal or state regulation based on the extent to which the regulation affects matters within the other sovereign's exclusive jurisdiction. It does, however, invalidate actions that regulate — whether

[279] This formulation is unremarkable. Government agencies often have authority to regulate the same thing without interfering with another regulator's exclusive sphere of jurisdiction. For example, the Federal Drug Administration (FDA) ensures that vaccines are safe, the Securities and Exchange Commission (SEC) ensures that disclosures are not misleading, and the Occupational Safety and Health Administration ensures that workers who manufacture vaccines are not exposed to unacceptable risks. The fact that the SEC oversees the adequacy of disclosures does not mean that the Commission interferes with the FDA's exclusive jurisdiction over vaccine safety.

[280] FERC Order No. 745, *supra* note 31, at 16,676.

directly or by aiming at — matters reserved to the other's jurisdiction. Disputes about the FPA's bright line will therefore turn on what the regulator is regulating, not the effects of that regulation. In practice, resolving that inquiry requires us to ask at least two and at most three questions (FERC actions withstand judicial scrutiny if they survive the first two questions; states face a third hurdle).

First, we must determine whether the challenged law or regulation directly regulates a matter over which the sovereign has jurisdiction.[281] If so, we proceed to the second question. If not — that is, if the action directly regulates a matter left to the other sovereign to decide — then it is categorically invalid and that is the end of the road.

Second, even where a law or regulation does not directly regulate a matter within the other sovereign's exclusive jurisdiction, we must nevertheless ascertain whether it "aims" at or "target[s]" such a matter.[282] If so, it violates the FPA just as if it had regulated that matter directly. If a FERC regulation survives these first two questions, it is consistent with the FPA's allocation of jurisdiction.[283]

Third, state laws must also survive the doctrine of conflict preemption. Because the Supremacy Clause provides that conflicts between federal and state law are resolved by invalidating the state law, we must also determine whether a state law or regulation conflicts with federal law. If so, it is invalid. The following subsections discuss each of those questions in turn.

A. *The Direct Regulation Test*

The first step is to ask whether the statute or regulation in question directly regulates a matter within the other sovereign's exclusive jurisdiction. That is an inquiry into whether the regulator is explicitly addressing a matter that Congress gave the other sovereign exclusive jurisdiction to resolve. For example, a FERC regulation that actually sets the terms of a retail transaction would constitute direct regulation as would a state regulation that sets a wholesale rate.

---

[281] *See EPSA*, 136 S. Ct. at 773–75.

[282] Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599 (2015) (emphases omitted); *see id.* at 1599–600 (first citing N. Nat. Gas Co. v. State Corp. Comm'n, 372 U.S. 84, 94 (1963); and then citing Nw. Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 513–14 (1989)).

[283] *See EPSA*, 136 S. Ct. at 773–80. *EPSA* established what has become the standard framework for evaluating whether FERC exceeded its jurisdiction: asking whether the relevant action fell within FERC's authority, including whether it directly affects wholesale rates, and then, if so, whether the action nevertheless regulates a matter left for the states to resolve. *See id.* at 773–75; Nat'l Ass'n of Regul. Util. Comm'rs v. FERC (*NARUC*), 964 F.3d 1177, 1186 (D.C. Cir. 2020). Although we phrase our standard at a slightly higher level of generality, so that it applies to challenges to both FERC and state actions, there is no conflict between the two. Asking whether FERC is directly regulating and aiming at matters subject to its jurisdiction, as opposed to matters subject to state jurisdiction, is, for all intents and purposes, the FERC-specific inquiry outlined in *EPSA*.

EPSA confronted this very point in explaining why the rule at issue in that case did not regulate retail rates. The Court observed that FERC cannot take an action that actually sets the rate or terms of retail sales "no matter how direct, or dramatic, its impact on wholesale rates."[284] To make the point, the Court provided a "far-fetched example" in which FERC "issued a regulation compelling every consumer to buy a certain amount of electricity on the retail market," which would affect the wholesale rate because it "would necessarily determine the load purchased on the wholesale market too, and thus would alter wholesale prices."[285] Nevertheless, the Court explained, "the regulation would exceed FERC's authority . . . because it specifies terms of sale at retail — which is a job for the States alone."[286] That is the type of FERC regulation that would fail the direct regulation test because it actually regulates matters reserved to the states.[287]

Similarly, a state regulation that actually sets a wholesale rate is also invalid under the FPA. FERC addressed one such fact pattern in 2019, when it issued a declaratory order finding that a New Hampshire regulation intended to promote biomass facilities within the state was preempted because it "establishe[d] a rate for wholesale sales of electric energy in interstate commerce."[288] That regulation specified a particular rate — eighty percent of the retail rate — that utilities had to pay when making wholesale purchases from qualifying biomass facilities.[289] In finding that state law preempted, FERC recognized that by actually setting a rate for a wholesale sale of electricity, the New Hampshire law "d[id] explicitly what the Maryland program in *Hughes* did implicitly."[290] It is that type of "explicit" action that constitutes a state's direct regulation of wholesale rates in violation of the FPA's bright line.

Because "direct regulation" of a matter that the FPA reserves to the other sovereign will, as in these examples, often be readily apparent, violations of that sort should be relatively infrequent. Indeed, in our view, the most difficult recent court cases involving the FPA's bright line have turned not on questions of direct regulation, but on whether a state or federal regulation that is nominally within the regulator's proper sphere is in fact aimed at something within the other's sphere of exclusive jurisdiction — the topic to which we turn next.

---

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

285 *Id.*

286 *Id.*

287 For that reason, a FERC regulation that in no way benefited wholesale markets but had a sweeping effect on state authority would likely lie outside of federal jurisdiction.

288 New Eng. Ratepayers Ass'n, 168 FERC ¶ 61,169, para. 41 (Sept. 19, 2019); *see id.* para. 2.

289 *Id.* para. 2.

290 *Id.* para. 44.

B. The "Aiming at" Test

If a law or regulation does not directly regulate a matter reserved to the other sovereign, the next question is whether it achieves the same result by aiming at or targeting a matter reserved to the other sovereign. As the Court explained in *Hughes*, this inquiry asks whether a regulation that nominally operates within one regulator's sphere of jurisdiction in fact regulates a matter within the other regulator's exclusive jurisdiction.[291] The phrase "aiming at" might at first conjure up a subjective inquiry that considers the regulator's motivations, stated or unstated. But, as discussed in section III.B, that is not what the FPA's "aiming at" standard does. Instead, as explained in *Virginia Uranium*, the "aiming at" standard is an example of the Court's long-held preference for field preemption inquiries that turn on "*what* the State did, not *why* it did it."[292]

Hughes, for example, explained that the Maryland regulation guaranteed a generator a certain amount of revenue but conditioned the payment of that revenue on the generator's wholesale market participation.[293] That is an inquiry into what the law did; it is not an inquiry into the "real" motivation behind the Maryland regulators' actions.[294] Similarly, *Oneok* explained that the antitrust laws at issue in that case were applied only to conduct associated with retail sales of electricity, which made clear that they operated only to regulate antitrust violations associated with state-jurisdictional sales.[295] That represents an objective assessment of how the state laws were applied and what they were applied to, not the subjective intent behind that application.

An objective approach does not, however, mean that any reasons given for a state or federal regulation are irrelevant to the "aiming at" inquiry.[296] To the extent the reasons for a FERC or state public utility commission order or a description of how it operates are provided to

---

[291] *See supra* p. 1392.

[292] Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1905 (2019) (plurality opinion).

[293] *See* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1299 (2016).

[294] *See* Farmer, *supra* note 34, at 27–28 (distinguishing between "an evidentiary inquiry into the State's motive," *id.* at 27, and an examination of "the manner in which the law functions and the effects it has," *id.* at 28).

[295] Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599–600 (2015).

[296] As noted, Justice Gorsuch's opinion in *Virginia Uranium* was for only a plurality of the Court. Justice Ginsburg wrote separately for herself and two other Justices, expressing concern about Justice Gorsuch's criticism of the "perils of inquiring into legislative motive," which she believed "swe[pt] well beyond the confines of th[at] case." 139 S. Ct. at 1909 (Ginsburg, J., concurring in the judgment). Nevertheless, her resolution of that case turned on the text of the relevant statutes, *see id.* at 1912–13, and the "context and history" of the potentially preempting federal statute, *id.* at 1913, which is precisely the type of objective inquiry for which we advocate in this Article. Accordingly, while the Justices may disagree about the outer bounds of the preemption inquiry, a solid majority of the Court appears to sanction this type of approach as the proper method for resolving preemption disputes under cooperative federalist statutes such as the FPA.

meet reasoned decisionmaking requirements, that information will often shed light on how the regulation operates and the subject at which it aims. Again, *EPSA* shows the way. The Court upheld FERC's Order No. 745 by concluding that it directly affected wholesale rates and did not regulate retail rates.[297] In reaching the latter conclusion, the Court recognized the significant effects that Order No. 745 could have on retail sales, but concluded that the rule was consistent with the FPA because it operated within the wholesale market, and because FERC had justified the rule entirely based on the benefits it would provide to wholesale markets.[298] As the Court put it, citing *Oneok*, "the Commission's justifications for regulating demand response are all about, and only about, improving the wholesale market."[299] That discussion is best read as an inquiry into whether FERC aimed at a matter reserved for state regulation — that is, the retail rate.

But there is an important difference between examining the text of a statute and considering the justifications offered in a regulatory document, and conjecturing about the true intention of a legislature or an administrative agency. Ascertaining the aim or target of a regulation is not a license to look behind the regulator's stated rationale as part of an effort to divine its "true" purpose.[300] Instead, it is a straightforward inquiry into what the regulation does, the problem it is supposed to remedy, and the link between them. Courts can look at the rule, just as they look at statutory text or consider whether an agency rule is "arbitrary and capricious."[301] Consistent with general principles of judicial review of agency action, courts should — within reason — evaluate agencies' stated understanding of the problem a regulation is supposed to solve and how it will go about doing so. Again, that is exactly what the Court did in *EPSA*.[302] Accordingly, if FERC or a state energy regulator explains how a regulation promotes a goal over which that regulator has jurisdiction, and if that reason withstands scrutiny, then the regulation

[297] FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 777 (2016).

[298] *Id.* at 776–77 ("FERC, that is, focused wholly on the benefits that demand response participation (in the wholesale market) could bring to the wholesale market. The retail market figures no more in the Rule's goals than in the mechanism through which the Rule operates." *Id.* at 777.).

[299] *Id.* at 776 (citing *Oneok*, 135 S. Ct. at 1599).

[300] *Va. Uranium*, 139 S. Ct. at 1905–06 (plurality opinion); *cf.* Dep't of Com. v. New York, 139 S. Ct. 2551, 2573–74 (2019) (explaining that a court reviewing agency action under the Administrative Procedure Act will not conduct an extra-record "judicial inquiry into 'executive motivation,'" *id.* at 2573 (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977)), absent a "strong showing of bad faith or improper behavior," *id.* at 2574 (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971))).

[301] *See generally* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[302] *See EPSA*, 136 S. Ct. at 775–77.

aims at a matter that is subject to that regulator's authority under the FPA.[303]

If a FERC regulation survives these first two questions — that is, it neither directly regulates nor aims at a matter within state jurisdiction — it is consistent with the FPA's allocation of jurisdiction and that is the end of the inquiry. A state law, however, must surmount one additional hurdle, discussed in the following section.

C. The Conflict Preemption Test

The Supremacy Clause provides that conflicts between federal and state law are resolved by invalidating the state law.[304] That means that any preemption inquiry under the FPA must also consider whether a state regulation conflicts with federal law. As explained above, the only way to apply conflict preemption without upending the FPA's dual federalist structure is to conclude that state laws are preempted only when they make it actually impossible to comply with federal law.[305] Accordingly, the last step in determining whether a state law violates the FPA is to ask whether a regulated entity can simultaneously comply with both federal and state law. If so, the state law is consistent with the FPA's allocation of jurisdiction.

Actual impossibility is the key. In the context of the FPA, state actions will inevitably affect FERC's sphere of jurisdiction and vice versa. That type of interference is the necessary result of Congress dividing jurisdiction over a single industry between federal and state regulators. It is, in other words, hardwired into the jurisdictional scheme. As such, an otherwise valid state regulation that merely inconveniences the federal scheme is no "obstacle" to the fulfillment of the congressional purpose underlying the FPA.[306]

IV. APPLYING THE BRIGHT LINE TO CURRENT JURISDICTIONAL DISPUTES

A pair of recent examples illustrate the ease with which this framework can be applied to mediate disputes over the FPA's jurisdictional

---

[303] In practice, state legislative action will often lack similar objective evidence of how it works. Courts considering whether a state law aims at a matter within FERC jurisdiction will therefore typically be limited to assessing whether the legislation promotes a goal over which states retain authority, without the benefit of any additional explanation for how the law works. That is precisely what the Court did in *Oneok*. It recognized that state antitrust laws exist to prevent market manipulation and market power abuses and that those laws had been applied only to retail sales. *See Oneok*, 135 S. Ct. at 1600–01. That was sufficient for the Court to uphold those laws. *Id.* at 1601.

[304] U.S. CONST. art. VI, cl. 2.

[305] *See supra* pp. 1400–03.

[306] *See supra* p. 1404.

divide. The first example involves FERC's Order No. 841, which sought to break down barriers to the participation of energy storage resources in wholesale markets. The second example involves the recent spate of litigation over state laws aimed at reducing the electricity sector's contribution to climate change. We discuss these examples in turn.

A. Energy Storage

As noted, FERC's Order No. 841 sought to break down barriers to the participation of energy storage resources in wholesale markets.[307] That order drew swift legal challenges before the D.C. Circuit, where the principal question was whether FERC was legally required to allow states to "opt-out" of the rule's requirements by prohibiting storage resources that interconnect through the distribution system from participating in wholesale markets.[308] Before the Commission, several groups argued that an opt-out was necessary for FERC to avoid regulating distribution facilities.[309] In particular, they contended that, without an opt-out, FERC would effectively be regulating the distribution system by making it illegal for states to preclude distribution-connected resources from participating in wholesale markets.[310]

Despite those objections, Order No. 841 did not provide an opt-out.[311] FERC relied heavily on *EPSA*, explaining that the justifications for Order No. 841 were about only the wholesale market, as was true of Order No. 745 — the demand response rule discussed in section I.C[312] — and that storage resources' participation in wholesale markets fell squarely within FERC's jurisdiction over wholesale energy sales.[313] FERC explained that the rule addressed only storage resources' wholesale market participation, even if that participation affected matters on the distribution system.[314] FERC contended that, like the effects of demand response in *EPSA*, those effects were the inevitable result of Congress's decision to divide jurisdiction over the electricity sector, not a basis for finding that FERC exceeded its authority under the FPA.[315]

---

[307] FERC Order No. 841, *supra* note 6, at 9,582.

[308] *See* Nat'l Ass'n of Regul. Util. Comm'rs v. FERC (*NARUC*), 964 F.3d 1177, 1184 (D.C. Cir. 2020).

[309] *See* FERC Order No. 841-A, *supra* note 100, at 23,904–06 (summarizing rehearing requests raising jurisdictional concerns).

[310] *See, e.g.*, *id.* at 23,905 (noting that parties contended that "Order No. 841 directly affects retail sales because it allows distribution-connected and behind-the-meter electric storage resources to make wholesale sales and purchases" (emphases omitted)).

[311] *Id.* at 23,907–08.

[312] *See supra* section I.C.1, pp. 1377–78.

[313] *See* FERC Order No. 841-A, *supra* note 100, at 23,908–11.

[314] *See id.* at 23,910.

[315] *See id.* at 23,909 ("We acknowledge that the Commission's actions in Order No. 841 to improve wholesale markets will have impacts beyond those markets. However, as the Supreme Court stated in *EPSA*, '[w]hen FERC regulates what takes place on the wholesale market, as part of

In particular, the Commission explained that the only effect of not providing an opt-out was that states could not categorically prevent a storage resource's participation in wholesale markets, not that they had to somehow facilitate that participation.[316] Accordingly, it concluded that, even without an opt-out, Order No. 841 did not regulate distribution facilities.[317]

In *National Ass'n of Regulatory Utility Commissioners v. FERC*[318] (*NARUC*), the D.C. Circuit agreed.[319] In its opinion, the court provided the clearest example to date of how our framework works in practice and, also, why it is so critically important to articulate a coherent theory of the FPA's jurisdictional divide. It was the court's understanding of the limits on *both* federal and state authority that allowed the court to so clearly conclude that the rules established in Order No. 841 fell on FERC's side of the FPA's bright line.

The court began by "swiftly conclud[ing]" that the rules governing storage resources' participation in wholesale markets are a practice directly affecting wholesale rates.[320] Relying on *EPSA* (and invoking the language of *Oneok*), the court explained that "Order No. 841 solely targets the manner in which [storage resources] may participate in wholesale markets" and is "designed to increase wholesale competition, thereby reducing wholesale rates."[321]

It then turned to the heart of the petitioners' case: whether Order No. 841 had regulated a matter reserved to state jurisdiction by not creating an opt-out that gave states the ability to categorically prohibit resources' participation in wholesale markets.[322] The court observed that while Order No. 841 might "lure" storage resources into the wholesale market, that effect was simply a consequence of FERC's regulation of the wholesale market and did not amount to regulation of the distribution system or any other matter reserved for state jurisdiction.[323] In short, just as in *Oneok* and *EPSA*, *NARUC* concluded that so long as the regulator in question addressed only the matters on its side of the

---

carrying out its charge to improve how that market runs, then no matter the effect on retail rates, § 824(b) imposes no bar.'" (alteration in original) (quoting FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 776 (2016))).

[316] *See id.* at 23,910–11 ("Consistent with the FPA's cooperative federalist foundation, where electric storage resources interconnected with the distribution system are participating in RTO/ISO markets, it will be under circumstances that are consistent with states' authority to regulate the distribution system." *Id.* at 23,911.).

[317] *See id.* at 23,911.

[318] 964 F.3d 1177 (D.C. Cir. 2020).

[319] *See id.* at 1181.

[320] *Id.* at 1186.

[321] *Id.*

[322] *Id.*

[323] *Id.* at 1187.

FPA's dividing line, the inevitable effects on matters within the other sovereign's jurisdiction were irrelevant.[324]

The court then turned to the specific question of whether an opt-out was necessary to retain the federal-state balance under the FPA.[325] The court began its analysis with a discussion of preemption, noting that "[w]hile the FPA creates two separate zones of jurisdiction, the Supremacy Clause creates uneven playing fields."[326] The court examined the "aiming at" cases — *Oneok*, *Northern Natural*, and *Northwest Central Pipeline Corp. v. State Corp. Commission* — to explain again that the FPA prohibits a state from exercising its reserved authority to "aim[]" at or "target" a matter left under FERC's exclusive jurisdiction.[327] That, the court explained, provided the coup de grâce for the argument that FERC had overstepped its bounds. Because FERC has exclusive jurisdiction to address the rules governing participation in wholesale markets, any state effort to do the same by blocking wholesale market participation would necessarily aim at the matters over which FERC has exclusive jurisdiction.[328] The court observed that, even after Order No. 841, states retained their full authority over the distribution system.[329] States could therefore regulate that system in a manner that might *effectively* limit wholesale market participation — for example, through the rules governing how storage resources interconnect to that system — so long as those actions do not aim at or target FERC's jurisdiction.[330]

NARUC reached the correct outcome and also provides perhaps the best example yet of how our jurisdictional framework works in practice. Although the court described the steps of its jurisdictional inquiry in slightly different terms — framing it as a three-part inquiry into whether Order No. 841 regulated a practice directly affecting wholesale rates, whether it had nevertheless regulated a matter reserved for state jurisdiction, and, finally, whether it had still somehow contravened the core purposes of the FPA[331] — that inquiry is entirely consistent with the approach laid out in the previous section of this Article.[332] Indeed, the court's formulation can be understood to apply our general framework

[324] *Id.* (explaining that changes in storage resources' use of the distribution system as a result of their participation in the wholesale market "[are] the type of permissible effect of direct regulation of federal wholesale sales that the FPA allows").
[325] *See id.*
[326] *Id.*
[327] *Id.* (emphases omitted) (quoting Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599 (2015)); *see id.* at 1187–88.
[328] *See id.* at 1187–88.
[329] *See id.* at 1188.
[330] *See id.*
[331] *Id.* at 1186.
[332] *See supra* Part III, pp. 1407–12.

to the specific question of the limits on FERC's "affecting" jurisdiction.[333] The first two questions of the court's inquiry simply address whether Order No. 841 regulated a matter within FERC's jurisdiction, an inquiry that includes both the question of whether FERC directly regulated a matter under its authority *and* the question of whether it aimed at or targeted a matter under state jurisdiction. In holding that FERC had regulated a practice that directly affects wholesale rates and had not regulated a matter under state jurisdiction, the court concluded that Order No. 841 survived the first two hurdles of our framework, which was enough to resolve the jurisdictional challenge.[334]

In addition, the court based its holding on the recognition that the FPA provides for separate spheres of exclusive jurisdiction.[335] Under that framing, FERC and the states will never have concurrent jurisdiction over an issue. But, as *NARUC* recognized, that does not mean that FERC and the states will not simultaneously regulate the same entities. Instead, the evolution of the electricity sector will increasingly produce situations in which FERC regulates certain aspects of a particular entity, while a state regulates others. As the court explained, FERC has exclusive jurisdiction to regulate distribution-connected storage resources' participation in wholesale markets, meaning that any state attempt to do the same would be preempted under the FPA.[336] At the same time,

---

[333] As noted, *see supra* p. 1372, in addition to its "core" jurisdiction over wholesale rates, FERC also has jurisdiction over, among other things, practices affecting those rates. *See* 16 U.S.C. § 824d.

[334] The court's third step — whether Order No. 841 "contravened" the core purposes of the FPA — appears to be, for jurisdictional purposes at least, just another way of stating the first two questions. After all, for a jurisdictional inquiry at least, the "core purpose" of the act is simply the preservation of the spheres of exclusive jurisdiction, a purpose that is fulfilled by ensuring that each sovereign regulates only within its respective sphere. The court itself seemed to recognize this point, answering its third question by noting that Order No. 841 did not "perpetuate[] federal policy goals to the detriment of the statutory authority granted to the States," making it "consistent with the FPA's purpose of maintaining the respective zones of jurisdiction while ensuring that FERC can carry out its duty of ensuring just and reasonable federal wholesale rates." *NARUC*, 964 F.3d at 1189. We suggest that this condition will always be met where a FERC action survives steps 1 and 2 of our framework — that is, where it directly regulates a matter subject to FERC's jurisdiction and does not aim at a matter subject to state jurisdiction — and where a state survives those steps and also is not conflict preempted. *See supra* Part III, pp. 1407–12. An action within FERC's jurisdiction may still be arbitrary and capricious and, in that way, may contravene the FPA's "'core purposes' of 'curb[ing] prices and enhanc[ing] reliability in the wholesale electricity market,'" *NARUC*, 964 F.3d at 1186 (alterations in original) (quoting FERC v. Elec. Power Supply Ass'n (*EPSA*), 136 S. Ct. 760, 773 (2016)), but, as *EPSA* indicates, the question of whether a regulation is substantively arbitrary and capricious is separate and apart from whether it is jurisdictionally infirm, *see EPSA*, 136 S. Ct. at 780, 782 (concluding that FERC's demand response rule did not violate the FPA's jurisdictional divide before turning to the "second, narrower question," *id.* at 782, of whether the rule was arbitrary and capricious).

[335] *See NARUC*, 964 F.3d at 1188.

[336] *Id.* at 1187–88 ("Any State effort that aims directly at destroying FERC's jurisdiction by 'necessarily deal[ing] with matters which directly affect the ability of the [Commission] to regulate comprehensively and effectively' over that which it has exclusive jurisdiction 'invalidly invade[s]

however, states retain jurisdiction over those resources in a number of important respects, including their interconnection to the distribution system, any effects they may have on the safety and reliability of that system, and their retail sales and participation in retail programs, such as state-administered demand response.[337]

That recognition also underscores the importance of the unified theory of the FPA's jurisdictional divide. As noted, the court explained why Order No. 841 did not exceed FERC's authority by pointing to the limits on *state* authority, explaining that the petitioners were contending that the FPA's jurisdictional scheme required FERC to give them an authority that they would not otherwise possess under the FPA — that is, the ability to prohibit wholesale market participation. That insight, that the FPA's bright line can be simultaneously ascertained and applied from both the "top down," by looking at the limits on federal authority, and the "bottom up," by looking at the limits on state authority, produces an understanding of the FPA's jurisdictional divide that is at once more stable and more predictable than an approach that relies on independent inquiries into the limits on federal and state authority. And that understanding is exactly what both federal and state regulators will need as they attempt to tackle the transition to the electricity grid of the future.

B. State Climate Change Policies

As noted at the outset, states are taking the lead in addressing climate change, with most states making the electricity sector the focus of their decarbonization efforts. Many of those state efforts have prompted FPA preemption challenges, several of which have made it to the courts of appeals over the last few years. Some courts have reached the right result, while others have, in our estimation, reached the wrong one. At no point, however, has any of those courts articulated an interpretation of the FPA's jurisdictional line that adheres fully to the Supreme Court's cases on the matter. Accordingly, a coherent theory of the FPA's jurisdictional divide will help ensure that states know how to enact policies that stay on the right side of that divide and that those policies do not become mired in endless litigation.

Unfortunately, the decisions to date leave something to be desired. Consider, for example, *North Dakota v. Heydinger*,[338] an Eighth Circuit case addressing Minnesota's Next Generation Energy Act.[339] In a vivid illustration of the enduring confusion about the precise contours of the FPA's jurisdictional divide, the decision drew separate opinions from all

the federal agency's exclusive domain.'" (alterations in original) (quoting N. Nat. Gas Co. v. State Corp. Comm'n, 372 U.S. 84, 91–92 (1963))).

[337] *Id.* at 1188.

[338] 825 F.3d 912 (8th Cir. 2016).

[339] MINN. STAT. §§ 216H.01–.13 (2020); *see Heydinger*, 825 F.3d at 915–16.

three judges. Two of the judges believed that the Minnesota statute was preempted (at least in part) by the FPA, although one advanced a field preemption theory[340] and the other a conflict preemption theory.[341] The third judge concluded that the statute violated the dormant commerce clause, without addressing whether it was preempted under the FPA.[342]

Putting aside the dormant commerce clause question, which is outside the scope of this Article, our framework shows that the Minnesota statute should not have been preempted by the FPA. Among other things, the Minnesota law prohibited load-serving entities within the state from importing electricity that would increase the amount of carbon dioxide emitted when serving customers within the state.[343] That prohibition passes our three-part test for state regulations.

First, the statute did not directly regulate within FERC's exclusive jurisdiction. It merely instructed companies that sell electricity to Minnesota consumers that their electricity purchases must not include electricity that increases the states' carbon dioxide emissions. It did not set a rate or establish a term, condition, or anything else under FERC's authority.

Second, the program did not aim at FERC's exclusive jurisdiction over wholesale rates. Unlike the Maryland regulation in *Hughes*, it did not operate within the wholesale market or have the effect of adjusting any rate set by FERC for the sale of electricity. Instead, "*what* the [s]tate did"[344] was address the environmental attributes of electricity used to serve load within the state — a matter squarely within state authority for the purposes of the FPA. In addition, and also unlike the regulation at issue in *Hughes*, the Minnesota statute did not operate to limit FERC's just and reasonable review of payments received in connection with a wholesale sale, which, in our view, is further evidence that it did not aim at FERC's exclusive jurisdiction.[345]

Third, the Minnesota statute was not conflict preempted. None of the three opinions identified how the law made it impossible to comply with any FERC regulation. Similarly, nothing in those opinions explained how the state's regulation of generation facilities stood as an

---

[340] *See Heydinger*, 825 F.3d at 928 (Colloton, J., concurring in the judgment) (stating that "[i]nsofar as the Minnesota statute bans wholesale sales of electric energy," it intrudes on FERC's "exclusive jurisdiction over the interstate wholesale market for electricity").

[341] *Id.* at 927 (Murphy, J., concurring in part and concurring in the judgment) ("Minnesota's [statute] . . . directly conflicts with FERC's jurisdiction.").

[342] *Id.* at 919–22 (Loken, J.).

[343] *See id.* at 915–16.

[344] Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1905 (2019).

[345] *Cf.* New Eng. Ratepayers Ass'n, 168 FERC ¶ 61,169, para. 43 (Sept. 19, 2019) (finding a state law preempted partly because it did not provide for FERC review of the rate for a wholesale sale of electricity).

obstacle to the federal scheme, which, as discussed above, expressly contemplates that states would regulate those facilities. Accordingly, the opinions do not support any of the various theories of FPA preemption that the Supreme Court has previously advanced.

In contrast, consider a pair of recent circuit court cases that addressed Illinois and New York programs to promote emissions-free nuclear generation by establishing "zero-emissions credits" (ZECs), which compensate eligible facilities for the emissions-free attributes of nuclear generation.[346] Under both states' programs, ZECs reflect some measure of the harm caused by greenhouse gas emissions and are available to any eligible unit that generates electricity — regardless of how or where the unit sells its electricity.[347] Both programs elicited prompt preemption challenges.

This time we agree with the results the courts reached. First, the state regulations do not directly regulate within FERC's jurisdiction. Like the statute in *Heydinger*, neither program sets a rate or establishes a term, condition, or anything else under FERC's authority. Second, the ZEC programs also do not aim at anything within FERC's jurisdiction.[348] Unlike the Maryland regulation in *Hughes*, the two ZEC programs provide a separate payment to generators that is independent of their performance in the wholesale market.[349] In addition, that payment is linked to a matter within states' exclusive jurisdiction to regulate — that is, the environmental attributes of the generation mix used to serve load within the states.[350] Consistent with *Virginia Uranium*, we look to what the state actually did,[351] which, in this case, was directly compensate a resource for an attribute that falls squarely within the state's regulatory ambit. Accordingly, there is no basis to conclude that the laws dictate — as opposed to merely affect — wholesale market outcomes.

Third, the ZEC programs also are not conflict preempted. They do not make it impossible for companies to comply with any FERC regulations. And while they affect the wholesale market, those cross-jurisdictional effects are, as both courts recognized, the result of state regulation of generation facilities, which, through the law of supply and demand, will inevitably affect wholesale rates.[352] Accordingly, the zero-emissions programs comply with the Supreme Court's precedents on FPA conflict preemption, which, as discussed in Part II, hold that state

[346] Coal. for Competitive Elec. v. Zibelman, 906 F.3d 41, 45, 52 (2d Cir. 2018) (noting that ZECs account for the "environmental attributes of energy generation," *id.* at 52); Elec. Power Supply Ass'n v. Star, 904 F.3d 518, 521 (7th Cir. 2018).

[347] *Coal. for Competitive Elec.*, 906 F.3d at 54–55; *Elec. Power Supply Ass'n*, 904 F.3d at 523.

[348] *See Coal. for Competitive Elec.*, 906 F.3d at 57; *Elec. Power Supply Ass'n*, 904 F.3d at 524.

[349] *Coal. for Competitive Elec.*, 906 F.3d at 54; *Elec. Power Supply Ass'n*, 904 F.3d at 523–24.

[350] *See Coal. for Competitive Elec.*, 906 F.3d at 54–55; *Elec. Power Supply Ass'n*, 904 F.3d at 524.

[351] *See* Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1905 (2019).

[352] *See Coal. for Competitive Elec.*, 906 F.3d at 57; *Elec. Power Supply Ass'n*, 904 F.3d at 524.

energy laws are conflict preempted only when they render it impossible for regulated entities to comply with regulations governing wholesale markets.

All four courts to consider the matter — the two district courts and the Second and Seventh Circuits — held that the FPA did not preempt the Illinois and New York laws.[353] Nevertheless, their theories of the case varied considerably, and no court articulated a completely satisfactory understanding of the FPA. In particular, the Second Circuit stated a theory of preemption that is slightly too broad while the Seventh Circuit stated one that is slightly too narrow.

Although the vast majority of the Second Circuit's analysis is consistent with our framework, its application of *Hughes*'s tethering standard erred in a respect that was immaterial for that case but could prove important in subsequent preemption disputes. In explaining why New York's pricing mechanism for ZECs was not preempted, the court suggested that "the tether in *Hughes* is tied to 'wholesale market *participation*.'"[354] That could be read to suggest that conditioning payment on any participation in the wholesale market is preempted.

But that is not what *Hughes* held. The impermissible tether in *Hughes* was the fact that the subsidy "operate[d] within the auction" by changing the resources' terms of wholesale market participation.[355] Indeed, the very next line in *Hughes* underscores the point that requiring wholesale market participation was not the problem: "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."[356]

As discussed above, there is a significant difference between a subsidy that is conditioned on *bidding* into a wholesale auction and a subsidy that is conditioned on *clearing* a wholesale auction.[357] A bid-*and-clear* requirement compensates a resource for what it does in the wholesale auction, which regulates the resource's behavior in a FERC-jurisdictional market. By contrast, a bid requirement by itself leaves FERC with plenary authority to regulate the resource's wholesale market participation, exactly as Congress intended. In this way, simple participation requirements recognize the importance of the wholesale market but do not prevent FERC from taking actions to make sure that wholesale auctions continue to yield just and reasonable rates. While the ZEC program did not have a participation requirement, making the court's statement unnecessary to decide the case, other state programs

---

353 *Coal. for Competitive Elec.*, 906 F.3d at 45–46; *Elec. Power Supply Ass'n*, 904 F.3d at 522.

354 *Coal. for Competitive Elec.*, 906 F.3d at 51 (quoting Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1299 (2016) (emphasis added)).

355 *Hughes*, 136 S. Ct. at 1299.

356 *Id.* (emphasis added).

357 *See supra* notes 212–216 and accompanying text.

may well require a resource to offer into the wholesale market as a condition of receiving payment. But such programs would merely affect wholesale markets. They do not dictate the terms of participation or render resources indifferent to what happens therein, and thus do not intrude on FERC's authority or raise preemption concerns. For that reason, drawing the bright line to preempt a subsidy that conditions payment on compliance with the rules that dictate the terms and conditions of wholesale market participation as opposed to a subsidy that merely requires market participation is more consistent with *Hughes* and the Court's "aiming at" jurisprudence.

The Seventh Circuit's decision, by contrast, interpreted the FPA's distribution of jurisdiction too narrowly by ignoring the role of conflict preemption. The Seventh Circuit, like the Second Circuit, recognized that Maryland's bid-and-clear requirement was the program's "fatal defect."[358] The Seventh Circuit was also correct that, while "the exercise of powers reserved to the states under § 824(b)(1) affects interstate sales[,] [t]hose effects do not lead to preemption; they are instead an inevitable consequence of a system in which power is shared between state and national governments."[359]

But, unlike the Second Circuit, the Seventh Circuit did not acknowledge that conflict preemption remains relevant to FPA disputes. Though conflict preemption is rare,[360] the Second Circuit was correct to recognize that policies that address matters within state jurisdiction can nevertheless be preempted if they prevent regulated parties from complying with wholesale regulations.[361] The Seventh Circuit, by contrast, suggested that *any* state law that affects but does not regulate wholesale transactions should survive a preemption challenge.[362] That interpretation confuses a necessary condition with a sufficient condition. To survive a field preemption challenge, it is necessary for a state law to aim at a matter over which the state has jurisdiction. But to be sufficient to survive a conflict preemption challenge as well, a state program cannot make it impossible for a private party to comply with the relevant federal regulations. In failing to consider the Court's statement on conflict preemption, the Seventh Circuit's decision paints an incomplete picture of what a state must do to avoid having its regulations tripped up in federal court.

---

[358] *Elec. Power Supply Ass'n*, 904 F.3d at 524; *see id.* at 523 ("This feature — that the subsidy depended on selling power in the interstate auction — is what led the Justices to conclude that Maryland had transgressed a domain reserved to the FERC.").

[359] *Id.* at 524.

[360] *See supra* pp. 1403–05.

[361] *See* Coal. for Competitive Elec. v. Zibelman, 906 F.3d 41, 55–56 (2d Cir. 2018).

[362] *See Elec. Power Supply Ass'n*, 904 F.3d at 524 ("But because states retain authority over power generation, a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law.").

CONCLUSION

The electricity sector has undergone a profound transformation in the past decade. A market that was once controlled by a small number of utilities that produced power from large, central station power plants has evolved into "the most complex machine ever made."[363] And that transformation is set to continue. Before long, it may be commonplace for consumers to instruct their electric vehicles to sell energy into the grid when prices increase, for smart meters to automatically schedule energy-change-intensive tasks for periods when electricity is cheap, and for groups of residential solar installations to aggregate their production, participate in wholesale markets, and act like a traditional public utility. The FPA's jurisdictional divide represents perhaps the most important legal consideration for regulators to get there. If it is weaponized to limit both federal and state regulations, it will bog down the transition to the grid of the future in a mire of litigation and second-best regulations.

The theory articulated in this Article avoids that outcome. The FPA was not intended to hamstring state or federal regulators, but rather to ensure that all aspects of the electricity sector were subject to regulatory oversight. Our interpretation preserves spheres of exclusive jurisdiction for both federal and state regulators while at the same time ensuring that those regulators are able to carry out their responsibilities effectively — just as Congress intended when it enacted the Public Utility Act in 1935.

---

[363] SCHEWE, *supra* note 16, at 1.