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FEDERAL PREEMPTION AND CLEAN ENERGY FLOORS*

JIM ROSSI** & THOMAS HUTTON***

Federal policies regarding renewable and clean energy often lack clear definition, are incomplete, and are scattered across multiple statutes and agencies. Yet at the same time, recent decisions of both federal agencies and courts have attributed a preemptive effect to federal statutes that threatens to hobble innovation in renewable and clean energy policy by subnational regulators. This approach channels the most impactful policies promoting clean and renewable energy toward subsidies from the federal fisc, rather than diverse policies undertaken independently by state and local governments or regional customers and suppliers.

This Article argues that, contrary to many agency and judicial decisions, the text, structure, history, and purpose of key federal energy statutes do not require a singular approach to federalism in clean energy policy. Borrowing from environmental law, we plant a flag for a preemption approach that we call a “clean energy floor.” We show that clean energy floors are consistent with the structure, history, and purpose of federal energy legislation, including both New Deal and more modern statutes. As a normative matter, we also argue that a reading of federal energy statutes to incorporate regulatory floors is a good idea, to the extent that it allows federal and subnational energy regulators an opportunity to work together to overcome problems of fragmentation, stagnation and stalemate. This approach is especially well-suited for addressing important issues related to climate change and new technologies such as renewable energy and natural gas fracking, even absent new congressional action or completely defined federal policy. Our approach to what we

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call “energy federalism”—and as applied to subnational clean energy regulation, what we call “clean energy federalism”—also has some important implications for how courts should interpret other statutes in the regulatory contexts where federal and state authority are often perceived as substitutes for one another, such as healthcare.

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INTRODUCTION

When there is no clear national direction for energy initiatives, regulators are more likely to work at cross-purposes, as is reflected by the fragmented subnational approaches to natural gas fracking regulation.¹ In areas where federal law preempts any state or local regulation, the scope of innovation by subnational units of government² is limited, contributing to policy stagnation and, in some instances, overreliance on technology subsidies by the federal government.³ In addition, where regulatory jurisdiction is highly uncertain, federalism can contribute to policy inaction—a stalemate in which neither subnational nor national decision makers perceive that they have the prerogative to act to solve complex regulatory problems.⁴ For example, U.S. climate change policy for the energy sector suffers from a simultaneous lack of clear national direction and inconsistent state and local attention to the issue.⁵ This Article identifies what we call a “clean energy floor” as a way of addressing these problems with fragmentation, stagnation, and stalemates in energy law, and generalizes its lessons for assessing the effects of preemption in the context of other multi-purpose statutes.

1. See generally Jody Freeman, Op-Ed., *The Wise Way to Regulate Gas Drilling*, N.Y. TIMES, July 6, 2012, at A23 (proposing that Congress lift regulatory exemptions for hydraulic fracturing to allow EPA to set minimum requirements for drilling which states would then implement through federally approved programs).

2. As used in this Article, “subnational” regulators include state and local authorities. They also include, in appropriate contexts, Regional Transmission Organizations (RTOs), which are multi-state, non-governmental organizations that control transmission lines and ensure nondiscriminatory access to those lines. As described in greater detail *infra* notes 180–90 and accompanying text, RTOs exercise certain regulation-like influence over electricity market participants in certain contexts.

3. See STEPHAN DOLEZALEK & JOSHUA FREED, AN AMERICAN KODAK MOMENT: WHAT THE U.S. GOVERNMENT CAN LEARN FROM THE PRIVATE SECTOR IN RESPONDING TO DISRUPTIVE NEW ENERGY TECHNOLOGIES 4 (Apr. 2012), http://content.thirdway.org/publications/514/Third_Way_Report__An_American_Kodak_Moment.pdf; JESSE JENKINS ET AL., BEYOND BOOM & BUST: PUTTING CLEAN TECH ON A PATH TO SUBSIDY INDEPENDENCE 7 (2012), http://www.brookings.edu/~media/research/files/papers/2012/4/18%20clean%20investments%20mur%20o/0418_clean_investments_final%20paper.pdf.

4. See generally Jim Rossi, *The Electric Deregulation Fiasco: Looking to Regulatory Federalism to Promote a Balance Between Markets and the Provision of Public Goods*, 107 MICH. L. REV. 1768 (2002) (“[T]he legal resolution of jurisdictional boundaries plays a significant role in the development of sound deregulatory policies.”).

5. See Ann E. Carlson, *Energy Efficiency and Federalism*, 107 MICH. L. REV. FIRST IMPRESSIONS 63, 65–66 (2008), <http://www.michiganlawreview.org/assets/fi/107/carlson.pdf>.

Like many traditional areas of regulation, energy law has long embraced jurisdictional clarity as its main approach to resolving federal preemption problems. Conventional agency and judicial interpretations of electric power and natural gas statutes define distinct and independent jurisdictional spheres for states, on the one hand, and national regulators, on the other. To take one example, no one questions that under existing statutes states retain broad regulatory authority over most aspects of natural gas fracking activities, despite the fact that Congress has adopted legislation to regulate the interstate natural gas industry and many types of pollution associated with natural gas extraction.⁶

For another example of distinct subnational and national regulation, consider the division of regulatory authority in the electric power sector. Congress adopted legislation to regulate electricity in the 1930s, expanding the reach of federal jurisdiction with the enactment of every subsequent major energy statute.⁷ As the Supreme Court noted in *Federal Energy Regulatory Commission v. Mississippi*,⁸ “[I]t is difficult to conceive of a more basic element of interstate commerce than electric energy”⁹ The entire field of electric power regulation of public utilities is certainly considered to be within Congress’s power to preempt, if it so chooses, as a result of its Commerce Clause authority.¹⁰ Yet Congress has also consistently protected the role of states in regulating electric power, and state and local governments retain considerable control over the activities of electric power firms. Specifically, states enjoy almost complete authority over issues related to the retail pricing of electric power sold by utilities, and states also decide key issues related to the mix of energy firms’ power generation portfolios, including what percentage of energy comes from renewable sources.¹¹

6. See David B. Spence, *Federalism, Regulatory Lags, and the Political Economy of Energy Production* 3, 12 (Uiv. Tex. Law, Law and Economics Research Paper No. 222, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017280.

7. See Jeffrey S. Dennis, *Twenty-Five Years of Electricity Law, Policy, and Regulation: A Look Back*, NAT. RESOURCES & ENV’T, Summer 2010, at 33–35.

8. 456 U.S. 742 (1982).

9. *Id.* at 757.

10. *Id.*

11. Section 201(b) of the Federal Power Act (“FPA”) expressly states that the statute’s reach, and thus the jurisdiction of federal energy regulators, does not extend to power distribution or to facilities used for the generation of electric energy. 16 U.S.C. § 824(b) (2006). For discussion of the dual jurisdictional approach outlined in the FPA and statutory limits on the authority of the Federal Energy Regulatory Commission (“FERC”), see *New York v. FERC*, 535 U.S. 1, 20 (2002) (stating that FERC’s jurisdiction over the sale of power is “specifically confined to the wholesale market”).

This well-entrenched approach to federal preemption in energy statutes—clearly defining lines of authority to mediate federal and state conflicts—is premised on assumptions that state autonomy matters (whether for the purpose of protecting subnational sovereignty¹² or some other objective), that federal and state governments can serve as substitutes for each other, and that courts will delineate the boundaries of authority between them where Congress itself has failed to do so. On this view, the expansion of federal authority by Congress typically entails an equal and opposite contraction of state power, in particular through the adoption of “ceiling” preemption, which produces consistent “unitary” national standards. Conversely, state and local authority over energy expands in response to a lack of federal attention to the relevant issues, including where the national government has failed to adopt a clear policy, for example, in the area of climate change regulation.

In this Article we argue that the interpretive approach to preemption in U.S. energy statutes by courts and agencies should parallel the approach to environmental statutes: absent clear evidence of a congressional purpose to adopt unitary standards or an obvious conflict or obstacle to a clearly defined regulatory program, courts and agencies should generally favor what is known as floor preemption over ceiling preemption in the context of energy statutes. U.S. energy statutes do not require a conventional approach to federalism, in which matters are either governed by a unitary federal standard that excludes state and local regulation through preemption (especially when the federal standard serves as a ceiling) or, conversely, left entirely to states. This unitary preemption approach is likely to be incongruous to the extent it is applied to efforts to protect and advance environmental values in the energy industry—a cluster of policies we call “clean energy” regulation. Some subnational governments have the policy preference to undertake the potential cost and risk of clean energy regulation in exchange for the perceived benefits of new environmental or regulatory requirements. If the subnational government’s clean energy policy touches the pervasive federal energy regulatory regime, applying the traditional unitary approach to preemption in energy law may preclude the subnational governments from implementing their desired policies.

12. We use the term sovereignty sparingly in this context, out of recognition that not all federalism debates are about interference with “sovereignty,” per se. Of equal concern to such debates are functional goals that can be served by altering the balance of power between national and subnational governments.

Our analysis of floor preemption as well-suited to federal energy statutes hinges on the oft-overlooked distinction between the substantive supremacy of federal law (which is unassailable), and the regulatory *effects* of preemption. In the intellectually kindred area of environmental regulation, what is known as “floor preemption”¹³ determines the effects of federal supremacy for a number of statutes. Floor preemption treats federal law as providing only a minimum that precludes more lax state standards, leaving states the authority to adopt more restrictive requirements for certain pollutants.¹⁴ Such a preemption tool can reconcile the supremacy of federal law with the benefits of subnational regulatory innovation. Unlike the conventional approach to federalism in energy statutes, floor preemption does not view federal and state laws as mutually exclusive substitutes for each other. Rather, federal law sets basic goals and provides direction, but state and local regulators are allowed to innovate by adopting regulations not inconsistent with, or advancing, these goals. Under floor preemption, and its accompanying “cooperative federalism” model, federal and state jurisdiction are not independent or mere substitutes, but are interdependent and complementary.¹⁵

Drawing from this environmental law analogy, we set out to undertake the first comprehensive effort to articulate an alternative approach to federalism in energy law that is attentive to preemption tools such as floor standards. The prevailing judicial approach to preemption is far from resolved across the multiple federal statutes that address energy, but to date, many signs from federal courts are not encouraging for clean energy. Courts have always understood Congress to have preempted areas such as interstate natural gas sales¹⁶ and nuclear safety.¹⁷ Federal regulators also have clear authority to regulate the price of electricity sold for resale (i.e.,

13. See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1548 (2007).

14. See *id.* at 1551. For extended discussion see *infra* Part II.

15. As a preemption tool, floor standards are consistent with a theory that has come to be known as cooperative federalism, which contrasts with more traditional notions of state sovereignty or process federalism. For discussion of these three distinct approaches to federalism, see generally Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012) (suggesting that a wide range of federalism theories can be seen in the U.S. system).

16. See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300–01 (1988).

17. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983); *N. States Power Co. v. Minnesota*, 447 F.2d 1143, 1154 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).

“wholesale” electricity), which is presumed to be roughly coextensive with electricity sold in interstate commerce.¹⁸ Yet several recent agency and judicial decisions have interpreted this authority as having a unitary preemptive effect on the state pricing of electricity,¹⁹ effectively imposing a ceiling on important state pricing mechanisms designed to encourage clean energy, such as feed-in tariffs for renewable energy.²⁰ Contrary to the predominant judicial interpretations behind these decisions, we maintain that the most important federal energy statutes are consistent with a range of different approaches to preemption, including regulatory floors. Consequently, in areas where federal statutory goals for complex regulatory issues can be identified, courts should not necessarily presume that federal statutes are designed to adopt a unitary national policy, leaving little or no authority to subnational regulators. Contrary to what conventional federalism in energy law may suggest, courts also should not necessarily view a substantive preemption choice under an energy statute as limiting state regulators’ autonomy. We show how key energy statutes can be interpreted to allow a floor preemption paradigm with respect to clean energy policies and other energy regulation innovations by subnational regulators.

Part I of this Article describes several prominent examples of preemption tools in environmental law to provide a background for a discussion of clean energy policies. Environmental law scholars extol floor preemption,²¹ an approach that Congress has adopted in many federal environmental statutes where it has chosen to preempt state law.²² As we highlight, absent a clear indication of an explicit congressional purpose to adopt a unitary standard approach, the judicial approach to interpreting most standards in environmental statutes strongly favors the tool of floor preemption—at least when federal law has a substantive supremacy effect at all. The federal floor in many federal environmental standards addresses fragmentation,

18. See Federal Power Act § 201(c)–(d), 16 U.S.C. § 824(c)–(d) (2006).

19. See Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591, 1594 (2003).

20. These decisions are discussed *infra* at Part II.B.

21. See, e.g., William L. Andreen, *Federal Climate Change Legislation and Preemption*, 3 ENVTL. & ENERGY L. & POL’Y J. 261, 269 (2008); Buzbee, *supra* note 13, at 1592; Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 66–67 (2011).

22. The fundamental question these examples raise, and which this Article addresses, relates to preemption tools—how the form of preemption has supremacy effects on subnational regulation. A related question is whether there is any substantive preemption at all, but in most scenarios where preemption tools are at issue, some initial substantive preemption determination already has been made.

primarily by avoiding the problem of a “race to the bottom” with respect to environmental standards among states and localities competing to host industry.²³ Simultaneously, floor preemption can overcome stagnation and overreliance on federal subsidies by leaving space for subnational regulatory innovation, an opportunity that we maintain states and localities often put to good use.²⁴ Moreover, the multiplicity of regulators in areas subject to floor preemption means that the regulated area benefits simply from increased regulatory attention, which helps to overcome stalemates.²⁵

Part II considers the allocation of authority between federal and subnational governments in the context of the energy statutes. The area of clean energy regulation has become a battleground of doctrinal heritage between environmental law, for which floor preemption is the norm, and conventional federalism in energy law, for which unitary federal choice preemption is favored by agency and judicial decisions.²⁶ Questions relating to the effects of preemption in federal energy statutes are likely to proliferate as new technologies such as fracking emerge, and as subnational policymakers develop new mechanisms to encourage clean energy.

Unitary preemption has the virtue of providing for clear allocations of authority between federal and subnational law. Under such an approach, which we maintain describes the predominant

23. See Buzbee, *supra* note 13, at 1551–52 (describing the theory that “without federal regulation, states would enact suboptimally lax environmental standards in an effort to attract and retain industry”). Of course, the idea of a “race to the bottom” problem is not universally accepted. See, e.g., Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1211–12 (1992) (arguing that “contrary to prevailing assumptions, competition among states for industry should not be expected to lead to a race that decreases social welfare,” and that “federal regulation aimed at dealing with the asserted race to the bottom, far from correcting evils of interstate competition, is likely to produce results that are undesirable”). But see Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom”?*, 48 HASTINGS L.J. 271, 274–75 (1997) (critiquing the race-to-the-bottom concept in the wake of the Revesz article, *supra*).

24. See *infra* notes 224–27 and accompanying text.

25. Andreen, *supra* note 21, at 302 (“[T]he institutional diversity preserved by floor preemption would offer the nation a multiplicity of venues in which policy choices could be explored as well as some protection against the risk of regulatory failure.”); see also Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811, 812 (2008) (“[P]reemption eliminates the institutional diversity and attendant benefits of plurality, dialogue, and redundancy that federalism offers.”).

26. While ceiling preemption is familiar in energy law, in other significant ways energy law has reflected a respect for state prerogatives. Most important is the authority states have retained to regulate retail electricity rates, although the federal government enjoys exclusive authority over wholesale rates. See Federal Power Act § 201(b)(1), 16 U.S.C. § 824(b)(1) (2006).

judicial interpretation of statutes in the electric power context, industry enjoys a national standard and need not tailor its activities to suit numerous regulators across smaller or more regional markets. But this uniformity benefit comes at the expense of hobbling the most nimble and inventive policymakers.²⁷ Another foregone benefit inherent in unitary federal preemption relates to the multi-purpose character of federal energy statutes: by precluding states and localities from pursuing more aggressive clean energy policies, courts may inhibit the achievement of goals embodied in the very same federal law being construed to preempt subnational regulation. For instance, a federal statutory goal of consumer protection may coexist with goals of environmental protection, energy efficiency, energy diversity, and energy security.²⁸ But decisions that treat consumer protection as a unitary ceiling value may hobble subnational efforts to pursue coexisting goals, or result in an extra-statutory, judicially imposed prioritization of goals. In any event, while some judicial interpretations in energy law favor broad preemption and others favor state and local decisions, courts addressing preemption in energy statutes are rarely attentive to the variety of preemption tools at their disposal. As an alternative to the conventional unitary preemption approach in energy statutes, we advance floor preemption as consistent with the history and structure of both the 1978 Public Utilities Regulatory Policies Act (“PURPA”),²⁹ and the 1935 Federal Power Act (“FPA”),³⁰ and as a good idea for energy policy, especially in addressing clean energy issues.

In Part III, we consider the challenges and limitations of a judicial presumption in favor of floor preemption in energy law, and draw lessons for federalism issues arising from other complex regulatory problems with multi-purpose statutes. One challenge relates to the fact that the standards in many federal energy statutes embrace multiple goals and are not as easily reduced to quantitative standards as some environmental law standards are. Another challenge arises from the prospect of parochial state or local decision-making in energy, which can lead to protectionist regulatory

27. See Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 184 (2006) (“[F]ederal preemption cuts short the lawmaking process and products of an entire level of democratic government.”).

28. Schapiro, *supra* note 25, at 837–38 (“Eliminating complementary state regulatory schemes might contradict the congressional purpose to advance health and safety aims.”).

29. Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified as amended in scattered sections of 7, 15, 16, 42, and 43 U.S.C.).

30. Public Utility Act of 1935, ch. 687, 49 Stat. 847 (codified as amended in scattered sections of 16 U.S.C.).

programs or undermine uniformity interests. While worthy of recognition, we maintain that neither challenge renders floor preemption inappropriate for clean energy and many other regulatory problems.

Ultimately, we suggest courts and regulators need to pay careful attention to the distinction between preemption's substance and its implementation tools. At some level, assessment of preemption tools is related to regulatory design, but their legal status often depends on an analysis independent of the determinations related to the substantive supremacy of statutes. We maintain that the statutory interpretation inquiry for preemption tools such as regulatory floors must consist of an implied preemption analysis that is attentive to the statute or regulation's purposes. Particularly when Congress is silent or ambiguous on the tools of preemption—as we maintain it has been in many energy statutes—there will be room for a range of different federalism approaches. With this in mind, we advance a workable implied preemption framework for courts to determine, in the absence of express congressional guidance, whether a preemption floor fits certain regulatory problems without judicially imposing substantive values on statutes.

The floor preemption approach we advance for clean energy has lessons for federalism disputes in other contexts. As Heather Gerken has recently observed, federal statutes deploy more—and more nuanced—models of federalism than is often appreciated, and the same statute may sometimes invoke multiple approaches to federalism.³¹ We think this complementariness is especially true in the energy context, where broad-based federal statutes amended over seventy-five or more years are designed to serve multiple—and sometimes conflicting—values. Such dovetailing likely applies to other contexts, such as healthcare, as Abbe Gluck has identified.³² Equally important, however, our approach does not define every federal statute or regulatory program as endorsing a floor or as suited

31. See Gerken, *supra* note 15, at 1550–51.

32. See Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 539 (2012). Gluck observes that state authorities have a long history of “enacting state laws and regulations, creating new state and local bureaucracies, and participating directly in the federal regulatory process—all as part of their duties to implement federal statutes.” *Id.* at 538. She urges the need for legal doctrine addressing “how to allocate implementation authority when Congress unquestionably has the power to regulate but gives both state and federal implementers concurrent jurisdiction over the same federal statutory terrain.” *Id.* at 541.

to a cooperative federalism approach.³³ Often, we submit, subnational regulation can serve some of the same values underlying the federal statute—an approach that is reinforced by the history of energy statutes and their overall structure and logic in addressing clean energy issues. But where Congress makes a unitary supremacy choice regarding a particular issue, it is incumbent on courts to respect it. Only where Congress has failed to do so will a floor preemption tool be appropriate. We offer some considerations to assist courts in determining when Congress has made a unitary supremacy choice in energy and other statutes.

I. PREEMPTION FLOORS IN ENVIRONMENTAL LAW

We begin this Part by supplying some context for what we call “preemption tools” in environmental law. As we argue in this Part, preemption analysis in the environmental law context distinguishes the substantive supremacy of federal statutes from the judicially-determined effects of supremacy. Indeed, although most environmental statutes are clear in their purpose to advance some basic goal, such as reducing pollution, protecting natural resources, or minimizing environmental risks, this clarity has never meant that the singular effect of preemption is national uniformity in environmental standards and enforcement. Instead, many environmental statutes establish a floor with respect to environmental standards or their enforcement, allowing state and local governments to retain the flexibility to pursue overlapping regulatory programs that reinforce the same goals embodied in the federal law.

This Part provides several illustrations from the environmental law setting that best exemplify floor preemption, explains why Congress and courts have endorsed this preemption tool, and describes when, in some limited instances, Congress has deviated from it and adopted unitary standards. As discussed in this Part, the judicial and agency approach to preemption in environmental law has only favored unitary standards in instances where Congress makes an explicit choice to preempt subnational regulation or where courts invoking implied preemption doctrine have found that allowing

33. Similarly, Heather Gerken notes that multiple approaches to federalism are reflected in current regulatory statutes, and that different approaches may even be appropriate within the context of the same regulatory program. *See Gerken, supra* note 15, at 1550 (observing that “[s]ubstantial variegation can be found within the same statutory scheme”).

subnational regulation to continue would impose a clear conflict with, or present an obstacle to, meeting a federal statutory goal.

A. Congressional Choices to Adopt Regulatory Floors

Congress often expressly supersedes state regulatory authority under its Supremacy Clause authority³⁴ and has done so in a variety of contexts including both energy and environmental regulation. Expressly preemptive legislation is presumed to reflect Congress's carefully deliberated view of state and federal roles, including the specific regulatory manner in which ultimate decisions will be made. For example, in the Clean Water Act ("CWA"), Congress explicitly provided that federal standards would supersede state standards that fell below a certain level.³⁵ But importantly, this substantive *supremacy* decision alone does not determine the effects of *preemption*. Congress sometimes envisions the states taking on an active role if they so choose. Thus, while setting minimum standards, the CWA did not explicitly impose a unitary standard but instead authorized states to set effluent limitations that are more stringent than federal minimum standards and that pursue the same pollution reduction goal.³⁶ Under this scheme, widely considered a leading

34. Article VI of the Constitution provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

U.S. CONST. art. IV, cl. 2.

35. 33 U.S.C. § 1370 (2006).

36. See Clean Water Act §§ 301(b)(1)(C), 510, 33 U.S.C. §§ 1311, 1370 (2006). Section 1370 of 33 U.S.C. provides:

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

example of cooperative federalism, states may enact regulations compliant with the Clean Water Act and request authority for issuing permits and enforcing their terms.³⁷ In the event a state fails or declines to enforce federal or stricter-than-federal standards, the Environmental Protection Agency (“EPA”) is required to enforce the federal standards.³⁸

Another paradigm example of floor preemption in environmental law is the Clean Air Act (“CAA”). Under the CAA’s cooperative federalism regime, states may adopt state implementation plans to reach the “national ambient air quality standards” set by the EPA with respect to six “criteria pollutants.”³⁹ Section 116 of the CAA expressly permits states and their subdivisions to set emissions standards or otherwise require air pollution abatement, provided that the standards adopted are not less stringent than federal standards.⁴⁰ As with the Clean Water Act, states retain the primary responsibility for permitting and for enforcing their standards.⁴¹ In addition, states are expressly allowed to adopt air emissions standards that are stricter than the minimum national standards promulgated by the EPA.⁴² Congress adopted a

Id. § 510, 33 U.S.C. § 1370.

37. See *U.S. Steel Corp. v. Train*, 556 F.2d 822, 829–30 (7th Cir. 1977); Alexandra B. Klass, *Climate Change and Reassessing the “Right” Level of Government: A Response to Bronin*, 93 MINN. L. REV. HEADNOTES 15, 25 (2009), http://www.minnesotalawreview.org/wp-content/uploads/2012/05/Klass_ClimateChange.pdf.

38. See Clean Water Act § 402(c)(3), 33 U.S.C. § 1342(c)(3) (2006). This is an uncommon outcome, as the great majority of states prefer to regulate their own environmental quality. See CLAUDIA COPELAND, CONG. RESEARCH SERV., RL 30030, CLEAN WATER ACT: A SUMMARY OF THE LAW 4 (2010) (stating that the federal government retains responsibility for Clean Water Act permitting only in Idaho, Massachusetts, New Hampshire, New Mexico, and the District of Columbia).

39. § 109–110, 42 U.S.C. §§ 7409–7410 (2006).

40. *Id.* § 116, § 7416 (addressing retention of state authority).

41. *Id.* § 101, 42 U.S.C. § 7401(a)(3) (finding that air pollution control is within the “primary responsibility” of the states); *id.* § 110, 42 U.S.C. § 7410 (requiring states to submit state implementation plans outlining standards and enforcement mechanisms for primary air quality standards).

42. See *id.* § 116, 42 U.S.C. § 7416 (Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section); *Ind. & Mich. Elec. Co. v. EPA*, 509 F.2d 839, 844 &

similar approach in section 3009 of the Resource Conservation and Recovery Act (“RCRA”), which provides that “no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations.”⁴³

Yet another example of floor preemption in the context of environmental regulation is the underground injection control regime of the Safe Drinking Water Act (“SDWA”).⁴⁴ After the 1997 Eleventh Circuit case *Legal Environmental Assistance Foundation v. EPA*,⁴⁵ the SDWA governs the increasingly widespread practice of hydraulic fracturing, whereby water and chemicals are injected into the ground at high pressure to fracture shale rock and release natural gas.⁴⁶ As with several other federal environmental protection schemes, the SDWA expressly envisions a leading role for the states—in particular, the task of developing underground injection control programs with standards at least as stringent as certain minimum standards promulgated by the EPA.⁴⁷

When Congress adopts floor preemption, it establishes a national minimum standard in order to achieve a clearly identified environmental protection goal. At the same time, Congress also allows states substantial flexibility in their approaches to implementation, and, sometimes, in their approaches to enforcement. Experimentation at the subnational level can especially be helpful in developing regulatory approaches for nascent technologies, such as fracking. In contrast to floor preemption, Congress has on occasion expressly favored a unitary federal approach rather than a floor in adopting environmental statutes.

For example, the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”)⁴⁸ contains a unitary standard for labeling or packaging of pesticides: “[a] State shall not impose or continue in

n.2 (7th Cir. 1975) (“A state plan *must* meet the [federal] minimum criteria, but *may* exceed them.”).

43. 42 U.S.C. § 6929 (2006).

44. 42 U.S.C. §§ 300f to 300j-26 (Supp. V 2011).

45. 118 F.3d 1467 (11th Cir. 1997).

46. *See id.* at 1478 (holding that hydraulic fracturing is a form of underground injection subject to EPA regulation under the Safe Drinking Water Act).

47. *See* 42 U.S.C. § 300h; *Legal Envtl. Assistance Found.*, 118 F.3d at 1469–70 (“A state must submit to EPA a proposed [underground injection control] program that meets these minimum requirements, and receive EPA approval, in order to obtain primary regulatory and enforcement responsibility for underground injection activities within that state.”).

48. 7 U.S.C.A. §§ 136–136y (West 2010 & Pamphlet 2 Feb. 2013).

effect any requirements for labeling or packaging in addition to or different from those required under this Act.”⁴⁹ Likewise, the 1987 amendments to the Energy Policy and Conservation Act,⁵⁰ known as the National Appliance Efficiency and Conservation Act (“NAECA”),⁵¹ empowered the Department of Energy to set unitary efficiency standards as to twelve common household appliances.⁵² The current statute expressly provides that these standards preempt any state regulation of the efficiency of the federally-regulated appliances.⁵³ Moreover, NAECA was enacted only after several states had adopted appliance efficiency regulations; it thus eliminated those preexisting state regulatory schemes.⁵⁴

Under the Clean Air Act, federal regulators set uniform national vehicle emission standards.⁵⁵ However, in this unitary preemption context, Congress envisioned some residual flexibility for the states: California, and only California, is permitted to set its own heightened standards, though other states may elect to adopt California’s standards.⁵⁶ Thus, with vehicle emissions standards, the federal floor also acts as a federal ceiling, with the single exception that states have the right to opt-in to California’s higher standards. The unitary “ceiling” component of this scheme avoids the complex and expensive scenario in which vehicle manufacturers are compelled to design vehicles to comply with up to fifty separate vehicle emissions regimes. The “floor” component provides a limited opportunity for those states whose constituents are so inclined to undertake the increased costs of cleaner vehicles, in exchange for the perceived environmental benefits.⁵⁷ This scheme is widely considered a

49. *Id.* § 136v(b).

50. Pub. L. No. 94-163, 89 Stat. 871 (1975) (codified as amended at 42 U.S.C. §§ 6201–6422).

51. Pub. L. No. 100-12, 101 Stat. 103 (1987) (codified as amended at 42 U.S.C. §§ 6201–6422 and in scattered sections of 15 U.S.C.).

52. *Id.* § 3, 101 Stat. at 105 (codified as amended at 42 U.S.C. § 6292 (2006)).

53. 42 U.S.C. § 6297 (2006) (“[E]ffective on the effective date of an energy conservation standard established in or prescribed under section 6295 of this title for any covered product, no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product . . .”).

54. *See, e.g.*, Carlson, *supra* note 5, at 66.

55. *See* Clean Air Act § 202, 42 U.S.C. § 7521 (2006).

56. *See id.* §§ 177, 209(b)(1), 42 U.S.C. §§ 7507, 7543(e)(2)(B) (2006) (allowing California to set its own vehicle emissions standards); Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. COLLOQUY 1, 9–10 (2007), <http://www.law.northwestern.edu/lawreview/v102/n2/1029/LR102n2Watts&Wildermuth.pdf>.

57. This has been described as a “lead alternative state” system. *See* David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 545–46 (2008).

successful reconciliation of the need for uniformity with the desire for regulatory innovation.⁵⁸

In sum, express floor preemption involves an explicit congressional choice that state and local standards are allowed so long as they are more protective of environmental goals than federal standards, presumably because this advances the environmental protection goals of the statute. At least in theory, express floor preemption allows a minimum level of regulation sufficient to protect the environmental quality of neighboring jurisdictions and provides an option for states and localities so inclined to undertake the additional cost of still better environmental quality. In instances where Congress has favored uniformity over subnational flexibility, it has expressly limited the array of subnational regulatory options, as with FIFRA and NAECA, or has found ways to strike a balance between state autonomy and industry compliance costs, as with vehicle emissions standards.

B. Implied Preemption's Threat to Environmental Floors

Federal law is often construed by judicial or executive branch officials to disempower the subnational regulators by implication, despite the federal statute's silence on the issue. Within this so-called "implied preemption," there is a basic taxonomy of preemption theories, each defined by the specific rationale for preempting state law. The Supreme Court has explained as follows:

Preemption occurs . . . when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.⁵⁹

Thus, implied preemption is said to consist of "conflict preemption," "field preemption," and "obstacle preemption." At the extreme, some commentators question whether forms of implied

58. See, e.g., David E. Adelman & Kristen H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1839–40 (2008) (noting that the EPA has occasionally adopted California's standards as national standards).

59. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368–69 (1986) (citations omitted).

preemption are consistent with the Constitution at all,⁶⁰ and others have observed that these implied preemption decisions reflect the political leanings of jurists more than congressional intent.⁶¹ Yet the Supreme Court has long recognized the necessity of implied preemption,⁶² including the ability of agencies to preempt state and local authority.⁶³ Commentators disagree over how readily implied preemption should be triggered or how expansive it should be.⁶⁴ As a doctrinal matter, courts uniformly maintain that congressional intent is the “touchstone” of every preemption inquiry,⁶⁵ but as in other statutory interpretation contexts they routinely draw from the traditional allocation of authority between levels of government and pragmatic considerations to aid in their decisions.⁶⁶ The means of answering the question whether a federal statute should displace state law has surprising indeterminacy given its importance and the frequency with which it arises.

Several judicial decisions have interpreted environmental statutes to include unitary national standards not based on an explicit choice by Congress, as express preemption doctrine would require, but based on implied preemption doctrine. For example, in 1992 the Supreme Court rejected an Illinois law regulating the training of hazardous waste site workers as conflicting with the federal Occupational Safety and Health Act,⁶⁷ using implied preemption analysis to find unitary preemption.⁶⁸ Lower courts have applied a similar line of implied preemption reasoning to find unitary

60. See, e.g., Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 304 (2000).

61. See, e.g., David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CALIF. L. REV. 1125, 1159 (1999).

62. One voice of dissent on the Court in this regard is Justice Thomas. See *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring) (“I cannot join the majority’s implicit endorsement of far-reaching implied pre-emption doctrines.”).

63. See *infra* Part II.B.1.

64. See, e.g., Adelman & Engel, *supra* note 58, at 1834 (arguing for a curtailed application of preemption that would require either an express statement or a direct conflict between state and federal law); Steven Gardbaum, *Congress’s Power to Preempt the States*, 33 PEPP. L. REV. 39, 53–54 (2005) (arguing that courts should only recognize express preemption, and should abandon theories of implied preemption); Robert L. Glicksman, *Nothing Is Real: Protecting the Regulatory Void Through Federal Preemption by Inaction*, 26 VA. ENVTL. L.J. 5, 21 (2008) (arguing in favor of implied preemption approach).

65. See, e.g., *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987).

66. See Glicksman, *supra* note 64, at 35–36 (citing cases).

67. Occupational Health and Safety Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678, 42 U.S.C. § 3142 (2006))

68. See *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 108–09 (1992).

preemption of state and local laws in the nuclear waste transport and hazardous waste contexts.⁶⁹ Such decisions presumably settle on unitary preemption on the theory that a floor preemption approach would present a conflict with a congressional goal in the relevant area. Yet at the same time, these limited instances of implied unitary preemption have involved clear federal goals related to managing risks in nationwide economic activities, along with challenges to state or local initiatives that conflict with or interfere with their implementation.

By favoring unitary preemption instead of floor preemption, the above decisions run against the grain of environmental law—and there are strong precedential and pragmatic reasons that implied unitary preemption has been limited to the most clear-cut instances of conflict or obstacle with respect to federal programs. In environmental contexts where Congress has adopted a clear environmental protection goal but has been silent or ambiguous regarding the form of preemption, the Supreme Court has occasionally recognized unitary preemption on an implied preemption analysis, but has been wary of extending that unitary preemption expansively. For example, in *Bates v. Dow Agrosciences, Inc.*,⁷⁰ the Supreme Court reversed a lower court decision and held that FIFRA's labeling requirements for herbicides, which had been interpreted elsewhere to impose a ceiling for labeling activities,⁷¹ preempted state tort law claims.⁷² Observing that in FIFRA Congress was silent regarding the status of state tort law, the Court confirmed that FIFRA did preempt competing state labeling standards as well as “any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations.”⁷³ Tort theories not requiring a company to change its labeling, however, were held not to be preempted.⁷⁴

69. See *Ensko, Inc. v. Dumas*, 807 F.2d 743, 745 (8th Cir. 1986) (invalidating county ordinance prohibiting storage, processing, and transport of acute hazardous waste because it presented a conflict with the Resource Conservation and Recovery Act's minimum standards); *Jersey Cent. Power & Light Co. v. Twp. of Lacey*, 772 F.2d 1103, 1112–13 (3d Cir. 1985) (finding township ordinance prohibiting the transport of nuclear waste preempted by Atomic Energy Act, under field preemption, and Hazardous Materials Transportation Act, under obstacle preemption).

70. 544 U.S. 431 (2005).

71. See *supra* text accompanying notes 48–49 (mentioning that this is an example of express ceiling preemption).

72. *Bates*, 544 U.S. at 452, 454.

73. *Id.* at 452.

74. *Id.* at 431.

The judiciary's reluctance to embrace implied preemption to set unitary standards in interpreting environmental statutes reinforces federalism values. Arguments in favor of floor preemption in environmental regulation, even where Congress has not made an explicit floor preemption choice itself, reflect a concern with self-determination, particularly in areas traditionally regulated by the states (so-called "historic police powers" of the states).⁷⁵ This rationale can be traced to *Rice v. Santa Fe Elevator Corp.*,⁷⁶ in which the Court recognized a presumption against preemption, stating, "Congress legislated here in a field which the States have traditionally occupied . . . [s]o we start with the assumption that the historic police powers of the States were not to be superseded . . ."⁷⁷ This line of reasoning underlies the notion that states should enjoy primacy in regulating for matters like land use and health,⁷⁸ although it may extend to other areas where states can provide innovation.

In addition to arguments rooted in state sovereignty, as David Adelman and Kirsten Engel,⁷⁹ Ann Carlson,⁸⁰ Bill Buzbee,⁸¹ and Alex Klass⁸² have highlighted, there are practical arguments for generally favoring floors over unitary ceilings in the context of environmental statutes. That is, providing a minimal federal standard without eliminating all state regulatory authority over standards and enforcement can simply produce better regulation. In areas where a diversity of approaches among states leaves inconsistent approaches and results, such an approach ensures that all states overcome fragmentation and move in a similar direction with respect to basic policy goals. Floor preemption's multiplicity of regulators limits the impact of the risks endemic to regulation, which include "regulatory

75. Schapiro, *supra* note 25, at 836–37.

76. 331 U.S. 218 (1947).

77. *Id.* at 230.

78. See Buzbee, *supra* note 13, at 1560 & n.31, 1561 n.33 (collecting cases evidencing "[j]udicial concerns with federal assertions of power impinging on . . . state and local domains . . . especially in the setting of federal environmental regulation"); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'") (quoting *Slaughter-House Cases*, 83 U.S. 36, 62 (1872)) (citation and internal quotation marks omitted).

79. See Adelman & Engel, *supra* note 58, at 1807–08.

80. See Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 318 (2003).

81. See William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145, 147–48 (2007).

82. See Alexandra B. Klass, *State Innovation and Preemption: Lessons from State Climate Change Efforts*, 41 LOY. L.A. L. REV. 1653, 1677–78 (2008).

inertia, capture, poor initial choice or error, outdated choices, and inadequate funding of administrative agencies.”⁸³

In contrast, relying on a single federal regulator can amplify the impact of those problems when they occur.⁸⁴ Relying on a single federal agency might produce stagnation, especially where federal regulators have limited resources and it is left unclear what jurisdiction or tasks remain for subnational regulators. In such instances, floor preemption can provide alternative regulatory forums, help to curb agency capture,⁸⁵ and create inter-jurisdictional competition for better regulation.⁸⁶ Ann Carlson has observed that an “iterative federalism” approach can also promote innovation by generating a wide array of regulatory models for the regulators in any one subnational government to consider adopting.⁸⁷ Finally, in contrast to approaches that would leave jurisdiction uncertain, a floor preemption model may help to overcome stalemates where neither federal nor subnational regulators are inclined to act.

The argument that judges and agencies should favor floor preemption over unitary approaches where Congress is silent or ambiguous with respect to the form of preemption is bolstered by the reality that Congress can always impose unitary national standards through express preemptive language—and when Congress does so, a court can dutifully respect this express preemption choice. A unitary approach to preemption, consistent with ceiling preemption, can promote uniformity and a one-size-fits-all solution, and Congress may recognize this as important in contexts such as national product markets. But in other environmental protection contexts, where Congress has declined to expressly favor unitary standards, courts

83. Buzbee, *supra* note 81, at 155–56. This can be particularly important in instances where regulation is addressing complex issues, and where subnational regulation provides a context for overcoming difficult coordination problems. See Jody Freeman & Dan Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 809–10 (2005) (noting how institutional limitations on jurisdiction lead to barriers to solutions for environmental problems).

84. See Buzbee, *supra* note 13, at 1556 (“[B]ecause floor preemption retains multiple institutions and the different modalities and incentives of common law litigation, one need not rely on hyper-involved citizens and selfless bureaucrats to prompt regulatory reexamination and adjustment.”).

85. See Alexandra B. Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes and Appliance Efficiency Standards*, 34 HARV. ENVTL. L. REV. 335, 357 (2010).

86. See Howard A. Learner, *Restraining Federal Preemption When There Is an “Emerging Consensus” of State Environmental Laws and Policies*, 102 NW. U. L. REV. 649, 656 (2008).

87. See Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1102–03 (2009).

have rightly favored floor preemption as an approach consistent with the design of federal environmental law statutes, and that gives states flexibility to advance federal goals in their own regulatory decisions.

II. IDENTIFYING REGULATORY FLOORS IN FEDERAL ENERGY STATUTES

Unlike environmental law, most judicial and academic discussions of energy statutes conflate discussions of the substantive supremacy of federal law with the selection of a particular preemption tool such as a unitary standard. In this Part, we highlight this defect and the impoverished notion of federalism it endorses for energy law. We maintain that the interpretive approach to preemption in energy statutes by courts and agencies should parallel the approach to environmental statutes: absent clear evidence of a congressional purpose to adopt unitary standards or an obvious conflict or obstacle to a clearly defined regulatory program, courts and agencies should generally favor floor preemption over ceiling preemption in the context of energy statutes.

At the outset, it bears noting that, as with some environmental standards, on occasion Congress has made explicit choices to adopt unitary preemption in the energy context. For example, due to an express choice of Congress, beginning with the first instance of federal regulation of the natural gas industry in 1938, federal regulators have enjoyed preemptive federal authority to issue certificates of public convenience and necessity, authorizing the construction of natural gas pipeline projects.⁸⁸ Such a certificate makes federal eminent domain powers available to the applicant, through a framework that prevails over conflicting state and local law.⁸⁹ As a more recent natural gas-related example, the Energy Policy Act of 2005 provided the Federal Energy Regulatory Commission (“FERC”) with exclusive federal authority to site liquefied natural gas terminals.⁹⁰ In such contexts, Congress has

88. See Natural Gas Act, ch. 556, § 7, 52 Stat. 821, 825 (1938) (codified as amended at 15 U.S.C. § 717f (2006)); see, e.g., *Tenn. Gas Pipeline Co. v. Mass. Bay Transp. Auth.*, 2 F. Supp. 2d 106, 108–09 (D. Mass. 1998); see also Richard J. Pierce, Jr., *The State of the Transition to Competitive Markets in Natural Gas and Electricity*, 15 ENERGY L.J. 323, 333 (1994) (“FERC’s plenary and preemptive power to authorize construction or expansion of gas pipelines was critical to the success of the gas transition.”).

89. See 15 U.S.C. § 717f(h) (2006).

90. See Energy Policy Act of 2005, Pub. L. No. 109-58, § 311(c)(2), 119 Stat. 594, 685–86 (codified at 15 U.S.C. § 717b(e)(1) (2006)) (granting FERC “the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an

avored a national regulator to avoid subnational regulatory solutions that conflict with a federal goal.

While unitary preemption has an undeniable place in energy law, in this Part we argue that many agency and judicial interpretations of energy statutes seem to assume—mistakenly—that it is the only available preemption tool for energy regulation. By contrast, we maintain that the best interpretations of energy statutes such as PURPA and the FPA are as providing for a floor with respect to many issues, not imposing a unitary national ceiling—especially in contexts where Congress has been unclear or ambiguous about preemption tools. Where Congress has not made such an explicit choice, major energy statutes such as PURPA and the FPA are often more consistent with the floor preemption approach of environmental law. The best understanding of these statutes is that they do not embrace express unitary standards, nor do they provide a good basis for a court to invoke an implied preemption analysis that discovers a conflict or an obstacle to a national regulatory program. In fact, these statutes contain flexible standards and multiple regulatory goals, and envision substantial coextensive realms for national and subnational regulation, and thus, like environmental law statutes, they are more consistent with a floor preemption approach. As a result, absent congressional intent to the contrary, or clear evidence of a conflict or obstacle, the preemptive scope of these statutes should be understood narrowly, and to favor floor preemption over unitary standards for the energy sector—particularly in the area of clean energy.

A. *Clean Energy Floors in PURPA*

PURPA is a key federal energy statute, and the extent of its preemptive effect has proven to be an important question for subnational clean energy policies. Adopted at a time when the United States was paying close attention to the price of energy and to its heavy dependence on oil imported from the Middle East, the key provisions of PURPA work to encourage the development of cogeneration⁹¹ and certain renewable power generation projects.⁹²

LNG terminal”); *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120, 123 (4th Cir. 2008).

91. See *Niagara Mohawk Power Corp. v. Dep’t of Energy*, 169 F.3d 16, 17 (D.C. Cir. 1999) (“A cogeneration plant produces not only electric power but also steam or other thermal energy that can be used for various industrial or commercial purposes.” (citing 16 U.S.C. § 796)).

First, the statute authorized the Federal Power Commission to exempt these so-called “Qualifying Facilities” (“QFs”) from certain strictures of the Federal Power Act and certain financial reporting requirements under the Public Utilities Holding Company Act of 1935⁹³ (“PUHCA”).⁹⁴ Second, as a financial incentive to encourage the construction of QFs, PURPA required utilities to purchase the electricity these facilities produce at the utility’s “avoided cost” of generating the electricity itself.⁹⁵ These so-called “avoided cost” rates are calculated by states. States have considerable discretion in how they administer PURPA, and can implement the statute by “issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC’s rules.”⁹⁶ However, a state’s determination of avoided costs is subject to review by FERC.⁹⁷

Like environmental standards, FERC’s avoided cost determinations raise the issue of the nature of preemption. Both FERC and courts have considered different preemption approaches, but floor preemption is the approach that is most consistent with PURPA’s goals and statutory framework. Indeed, both the Supreme Court and FERC recognized as much early in PURPA’s history. Despite this cooperative federalism heritage, recent FERC decisions have deviated from this path. Clean energy presents both FERC and courts a propitious opportunity to reclaim PURPA’s cooperative federalism approach in addressing preemption, and preemption tools will be important to their approach.

92. See 18 C.F.R. § 292.204(b) (2012) (“The primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources, or any combination thereof, and 75 percent or more of the total energy input must be from these sources.”).

93. 15 U.S.C. §§ 79–79z (2006) (repealed 2005).

94. Public Utilities Regulatory Policies Act of 1978, Pub. L. No. 95-617, § 210(e), 92 Stat. 3117, 3145 (codified at 16 U.S.C. 824a-3 (2006)).

95. *Id.* § 210, 92 Stat. at 3144 (codified as amended at 16 U.S.C. § 824a-3 (2006)) (“No [rule establishing the price utilities pay qualifying facilities] shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.”).

96. FERC v. Mississippi, 456 U.S. 742, 751 (1982); Am. REF-FUEL Co. of Hempstead, 47 FERC ¶ 61,161, at 61,533 (1989) (“[S]tates are allowed a wide degree of latitude in establishing an implementation plan for section 210 of PURPA, as long as such plans are consistent with our regulations. Similarly, with regard to review and enforcement of avoided cost determinations under such implementation plans, we have said that our role is generally limited to ensuring that the plans are consistent with section 210 of PURPA . . .”).

97. See, e.g., Cal. Pub. Utils. Comm’n, 132 FERC ¶ 61,047, at 61,338 (2010).

1. PURPA Background

PURPA may be the paradigmatic example of a federal energy law enacted by Congress with multiple statutory purposes. The turbulent historical context in which the statute was enacted provides a helpful background for understanding these goals. Due to the 1973 Arab oil embargo, and to dysfunctional price regulation in the natural gas industry,⁹⁸ the 1970s witnessed “dramatic and severe shortages of oil and natural gas and skyrocketing prices of almost every form of energy.”⁹⁹ In the five years prior to PURPA’s enactment, natural gas and oil—which together accounted for about one third of the electricity generation portfolio—had increased in cost by 175% and 400%, respectively.¹⁰⁰ These events brought energy policy to the forefront of national politics and created unprecedented attention and support for energy efficiency and conservation. Moreover, environmental and safety concerns connected with nuclear power¹⁰¹ contributed to the urgency of increasing the use of alternative clean energy sources of electric power.

PURPA’s statutory text recognizes three goals: “conservation of energy supplied by electric utilities”; “the optimization of the efficiency of use of facilities and resources by electric utilities”; and “equitable rates to electric consumers.”¹⁰² Courts and commentators have fleshed out these goals over PURPA’s more than thirty years of implementation.¹⁰³ For instance, the avoided cost element of PURPA’s structure reflects a consumer protection objective. In particular, it has been understood to reflect a goal of utility indifference: that utilities should be economically indifferent in

98. See Richard J. Pierce, Jr., *Reconstituting the Natural Gas Industry from Wellhead to Burnertip*, 25 ENERGY L.J. 57, 65 (2004) (“Regulation of producer prices created the acute gas shortage of the 1970s.”).

99. See Richard D. Cudahy, *PURPA: The Intersection of Competition and Regulatory Policy*, 16 ENERGY L.J. 419, 421 (1995).

100. *S. Cal. Edison Co. v. FERC*, 195 F.3d 17, 19 (D.C. Cir. 1999) (citing S. REP. NO. 95-361, at 32 (1977) and S. REP. NO. 95-442, at 9 (1977)).

101. Cudahy, *supra* note 99, at 421 & n.15.

102. Public Utilities Regulatory Policies Act of 1978 § 101, 16 U.S.C. § 2611 (2006). The present-day FERC counts five goals, adding two to the statute’s original three: developing hydroelectric power at existing small dams; and conserving natural gas while maintaining equitable rates. *What Is a Qualifying Facility?*, FERC, <http://www.ferc.gov/industries/electric/gen-info/qual-fac/what-is.asp> (last visited Apr. 11 2013).

103. See, e.g., *Wheelabrator Lisbon, Inc. v. Conn. Dep’t of Pub. Util. Control*, 531 F.3d 183, 185 (2d Cir. 2008) (describing PURPA as having been designed to “(1) encourage the development of ‘cogeneration’ and ‘small power production facilities’ in order to ‘reduc[e] the nation’s reliance on oil and gas’ and (2) promote renewable energy sources ‘to combat a nationwide energy crisis’” (citing *Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1266 (2d Cir. 2002))).

choosing between purchasing electricity from a PURPA qualifying facility, or generating such electricity itself.¹⁰⁴ Along similar lines, PURPA has also been characterized as seeking to induce competition,¹⁰⁵ and that premise is supportable insofar as it plainly encourages new entrants.¹⁰⁶ Finally, commentators have described PURPA as seeking to increase system reliability through the wide dispersal of small generators,¹⁰⁷ as well as to encourage fuel source diversity.¹⁰⁸

PURPA's multi-purpose nature is also evident in its provisions that require state regulatory commissions to consider whether to adopt a number of policies. While state commissions are required to make a formal decision as to these policies,¹⁰⁹ their adoption is not compelled, nor has the failure to adopt them been penalized.¹¹⁰ These PURPA policies also yield insight into the goals of the federal statute. Five such policies relate to the structure of electric rates¹¹¹ and are aimed at causing rates to better reflect the actual cost of generating electricity at any given time, thus sending an appropriate price signal to consumers (as opposed to deadening the price signal with a fixed rate). For instance, PURPA section 111(d)(2) requires state commissions to consider eliminating declining block pricing, under which a utility would charge a customer less as consumption increased.¹¹²

2. Recent Preemption Determinations Under PURPA

The extent of PURPA's preemptive effect has proven to be an important question for subnational clean energy policies. The leading case is *FERC v. Mississippi*,¹¹³ in which the Supreme Court rejected

104. Jim Rossi, *Clean Energy and the Price Preemption Ceiling*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 243, 252–53 (2011–12).

105. See Cudahy, *supra* note 99, at 425.

106. Until the 2005 Energy Policy Act amended the language of the statute, PURPA required that a qualifying facility be “owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).” 16 U.S.C. § 796(17)(C)(ii) (2000) (amended by Energy Policy Act of 2005, Pub. L. No. 109-58, § 1253, 119 Stat. 594, 970 (codified as amended at 16 U.S.C. § 796(17)(C) (2006))).

107. See Cudahy, *supra* note 99, at 427–28 (“If these [small dispersed] facilities provide the same amount of power as a single large utility plant, the unfortunate possibility of a big plant failure can be avoided.”).

108. See *id.* at 420.

109. Public Utilities Regulatory Policies Act of 1978 § 111, 16 U.S.C. § 2621(a) (2006).

110. See *id.* § 112, 16 U.S.C. § 2622(c).

111. See *id.* § 111, 16 U.S.C. § 2621(d)(1)–(5).

112. *Id.* § 111, 16 U.S.C. § 2621(d)(2).

113. 456 U.S. 742 (1981).

Mississippi's federalism-based facial challenges to the statute.¹¹⁴ A Mississippi U.S. district court had granted summary judgment in favor of the state, holding in a strongly worded opinion that PURPA exceeded Congress's Commerce Clause powers and that it offended the Tenth Amendment by commandeering state regulatory officials.¹¹⁵ The Supreme Court reviewed this determination under a now-repealed direct appeal procedure,¹¹⁶ and held that PURPA was a proper exercise of the commerce power.¹¹⁷ Then, the Court expressly drew upon preemption theory in connection with rejecting Mississippi's Tenth Amendment argument that its state utility commissioners could not be compelled to consider PURPA's elective policies.¹¹⁸ The Court noted that Congress could have preempted the entire field of electric utility regulation and opined that "PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they [comply with PURPA]."¹¹⁹

Despite the Supreme Court's endorsement of a cooperative federalism approach, FERC has vacillated about the extent of the statute's preemptive effect. PURPA expressly states that no FERC rule regarding avoided cost determinations "shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy."¹²⁰ While this appears to endorse the idea that avoided costs will impose a ceiling on state subsidies for energy generated by QFs, this is only *textually* required to the extent that *FERC itself* adopts rules allowing states to exceed avoided costs.

Early in the implementation of PURPA, FERC endorsed a narrow view of the statute's preemptive effect. This left states a broad range of prerogatives to encourage, through alternative means, the same technologies that PURPA sought to promote. In the 1980s, in its early regulations implementing PURPA's avoided cost rates, the Commission explained as follows:

While the rules prescribed under section 210 of PURPA are subject to the statutory parameters, the States are free, under their own authority, to enact laws or regulations providing for

114. *Id.* at 745.

115. *Id.* at 752-53.

116. 28 U.S.C. § 1252 (1984) (repealed 1988).

117. *FERC v. Mississippi*, 456 U.S. at 755-58.

118. *Id.* at 760-61.

119. *Id.* at 765.

120. 16 U.S.C. § 824a-3(b) (2006).

rates which would result in even greater encouragement of these technologies.

.... If a State program were to provide that electric utilities must purchase power from certain types of facilities, among which are included “qualifying facilities,” at a rate higher than that provided by these rules, a qualifying facility might seek to obtain the benefits of that State program. In such a case, however, the higher rates would be based on State authority to establish such rates, and not on the Commission’s rules.¹²¹

This approach nicely parallels the floor preemption approach in environmental statutes, such as the CWA and CAA.¹²²

But in 1995, while considering a Connecticut statute encouraging solid waste plants, the Commission reversed its view of PURPA’s preemptive effect and rejected its prior analysis of a state’s authority to set incentive rates in excess of PURPA avoided costs, stating:

[T]he Commission did not provide any rationale to support [the passage in the 1977 rule quoted above] or any legal analysis. We cannot ascertain at this date any legal basis under which states have independent authority to prescribe rates for sales by QFs at wholesale that exceed the avoided cost cap contained in PURPA. Moreover, for states to mandate rates above avoided cost for a particular class of power suppliers (i.e., QFs) also runs counter to Congress’ and the Commission’s current policies which strongly favor competition among all bulk power suppliers.

...

Henceforth, however, if parties are required by state law or policy to sign contracts that reflect rates for QF sales at wholesale that are in excess of avoided cost, those contracts will be considered to be void *ab initio*.¹²³

Thus, expressly relying on the “Commission’s current policies . . . strongly favor[ing] competition,”¹²⁴ the Commission struck down the Connecticut statute because it required Connecticut

121. Order No. 69, 45 Fed. Reg. 12,214, 12,221 (Feb. 25, 1980) (codified at 18 C.F.R. pt. 292.304).

122. For discussion, see *supra* Part I.A.

123. Conn. Light & Power Co., 70 FERC ¶ 61,012, at 61,029 (1995). For a fuller discussion of the Commission’s reversal position in *Connecticut Light & Power Co.*, see SCOTT HEMPLING ET AL., NAT’L RENEWABLE ENERGY LAB., RENEWABLE ENERGY PRICES IN STATE-LEVEL FEED-IN TARIFFS: FEDERAL LAW CONSTRAINTS AND POSSIBLE SOLUTIONS 33–35 (2010), <http://www.nrel.gov/docs/fy10osti/47408.pdf>.

124. *Conn. Light & Power Co.*, 70 FERC at 61,029.

utilities to purchase electricity from certain waste-to-energy plants at a rate exceeding the utilities' avoided costs.¹²⁵ Since that 1995 *Connecticut Light & Power Co.* proceeding, PURPA has been understood to invalidate subnational policies that result in rates exceeding the utility's avoided cost.¹²⁶ This approach treats avoided costs as reflecting a unitary standard that has a preemptive effect over state policies, insofar as avoided costs are a ceiling on incentive rates that states may wish to allow clean energy facilities to charge.

This approach—treating PURPA's avoided costs as a ceiling on state-mandated incentive rates in order to advance consumer protection purposes—has not clearly been required by judicial decisions. Courts considering the preemptive effect of the avoided cost standard have not ruled on whether states can require a utility to pay favored generation sources more than the utility's avoided costs. In *Independent Energy Producers, Inc. v. California Public Utilities Commission*,¹²⁷ the Ninth Circuit reviewed California rules implementing PURPA, which allowed utilities to dock their payments to QFs by twenty percent if the QF did not comply with certain operating and efficiency standards to advance clean energy goals.¹²⁸ The court rejected this procedure, concluding that “the [California] program is preempted by PURPA insofar as it authorizes the Utilities to determine that a QF is not in compliance with . . . operating and efficiency standards and to impose a reduced avoided cost rate on that QF.”¹²⁹ This Ninth Circuit decision resulted in rejection of a state effort to allow utilities to pay *less* than avoided cost. However, the court left open the question whether utilities can be compelled by a state to pay *more* than their avoided cost. Still, to the extent that the Ninth Circuit treated PURPA's avoided cost language as requiring the setting of rates by both federal and state regulators on the very same terms, it may be interpreted as endorsing the idea of a preemption ceiling in the determination of avoided costs.

FERC itself seems to have adopted this unitary standard approach in avoided cost determinations, and a recent FERC ruling arising from a California clean energy policy illustrates its significance for state clean energy policies generally.¹³⁰ California had enacted

125. *Id.*

126. *See, e.g.*, *Midwest Power Sys.*, 78 FERC ¶ 61,067, at 61,244 (1997).

127. 36 F.3d 848 (9th Cir. 1994).

128. *Id.* at 852.

129. *Id.* at 859.

130. A feed-in tariff is broadly defined by the National Renewable Energy Laboratory as follows:

feed-in tariff legislation, A.B. 1613,¹³¹ which directed the California Public Utility Commission (“CPUC”) to promulgate the details of a state-administered feed-in tariff for combined heat and power (“CHP”) and renewable facilities.¹³² However, affected utilities complained that California had exceeded its authority by requiring them to pay for power from these facilities at a rate that was more than their avoided costs.¹³³ The CPUC applied to FERC for a declaratory order to the effect that the California feed-in tariff was not preempted by PURPA or the Federal Power Act.¹³⁴ FERC sided with the complaining utilities rather than the state of California.¹³⁵ As to PURPA, FERC construed the statute to preempt any state feed-in tariffs mandating that utilities pay prices that exceed the avoided cost under PURPA,¹³⁶ consistent with its position in *Connecticut Light & Power Co.* The FERC viewed itself as confined to this result, because if the feed-in tariff beneficiaries were to operate outside of PURPA, they would then be selling energy for resale, and this would bring them within another statute FERC is charged to implement, the FPA (addressed in greater detail below).¹³⁷ In all, FERC’s approach treated PURPA avoided costs as a statutory ceiling on California feed-in-tariffs.

Although FERC’s decision on California’s feed-in tariff was largely mitigated by an order on motions for clarification as described below, the ruling effectively caps state and local feed-in tariffs at

[A] publicly available, legal document, promulgated by a state utility regulatory commission or through legislation, which obligates an electric distribution utility to purchase electricity from an eligible renewable energy seller at specified prices (set sufficiently high to attract to the state the types and quantities of renewable energy desired by the state) for a specified duration; and which, conversely, entitles the seller to sell to the utility, at those prices for that duration, without the seller needing to obtain additional regulatory permission.

HEMPLING ET AL., *supra* note 123, at iv–v.

131. CAL. PUB. UTIL. CODE §§ 2840–2845 (2013). A.B. 1613 prescribed ten-year contracts at advantageous rates for renewable and cogeneration plants under twenty megawatts. Elec. Regulation Comm., Energy Bar Ass’n, *Report of the Electricity Regulation Committee*, 32 ENERGY L. J. 265, 316 (2011).

132. Elec. Regulation Comm., *supra* note 131, at 316.

133. Cal. Pub. Utils. Comm’n, 132 FERC ¶ 61,047, at 61,326 (2010).

134. *Id.*

135. *Id.* at 61,337–38.

136. *Id.* at 61,338.

137. *Id.* (“Any CHP generator that is not a QF but is a public utility must, pursuant to section 205 of the FPA file with the Commission the rates it proposes to charge under the CPUC’s AB 1613 tariff, and, consistent with section 205 of the FPA, the CHP generator must demonstrate that such rates are just, reasonable and not unduly discriminatory or preferential.”).

PURPA's avoided costs and brings compliance with that cap within FERC's regulatory purview.¹³⁸ It reflects an approach to preemption that is more in line with ceiling preemption and a unitary federal standard for utility rates under PURPA than a floor preemption approach.

3. Reclaiming PURPA's Clean Energy Floor

FERC's decision on California's feed-in tariff and its prior decisions in the same vein risk extending PURPA's preemptive reach to a length that is not required or even envisioned by the statute. Initially, PURPA does not even *direct* that any state-administered feed-in tariff needs to operate under the auspices of the federal statute.¹³⁹ The rationale is that such a state policy could operate entirely independently of PURPA, as FERC appreciated shortly after the statute was enacted.¹⁴⁰ Indeed, California's feed-in tariff program did not limit its beneficiaries to facilities eligible for QF status under PURPA.

The reason that a strong unitary preemption approach was not *envisioned* by PURPA is grounded in the statute's multi-purpose nature. Treating PURPA's avoided cost measure as a ceiling prioritizes the goal of consumer protection, but inhibits state and local policies designed to further other statutory goals of PURPA. California's feed-in tariff for renewable power, for example, acted to advance several of the goals of the PURPA statute. It encouraged small renewable and combined-heat-and-power facility development, and in encouraging such small facilities, it also supported distributed generation and fuel source diversity. It also eased new market entry

138. Rossi, *supra* note 104, at 250–51 (noting that FERC's orders are premised on the principle that any feed-in tariff power buyback price above FERC-approved avoided cost is prohibited by PURPA).

139. See Conn. Light & Power Co., 70 FERC ¶ 61,012, at 61,023 (1995) (“[I]f the facility addressed by the Connecticut statute is not a QF and the seller is not a public utility . . . this Commission does not have jurisdiction over its rates.”).

140. See *id.*; see also Stanley A. Martin, *Problems with PURPA: The Need for State Legislation to Encourage Cogeneration and Small Power Production*, 11 B.C. ENVTL. AFF. L. REV. 149, 171 n.199, 202 (1983). Martin explains:

There is an argument being advanced that PURPA has preempted the states from setting higher rate standards. The majority opinion in [FERC v. Mississippi] seems to counter this argument. Justice Blackmun made two references to Congress' ability to preempt the field to encourage cogeneration and small power production, but he also implied that Congress had not preempted the states from enacting laws similar to PURPA.

Id. at 171 n.199.

and thereby increased competition. Indeed, it could be argued that the California feed-in tariff went a long way toward advancing many of PURPA's goals. Thus, FERC's decision could be viewed as elevating a consumer protection goal above the other purposes of the statute—and unnecessarily so, given PURPA's flexible language.

Even after FERC's decision, with any state and local feed-in tariffs decidedly subject to the PURPA statute and FERC's oversight, one can envision an interpretation of PURPA that would not treat PURPA's avoided cost provision as a unitary federal ceiling, and that would allow for a floor preemption allocation of authority in the feed-in tariff context. Indeed, the Commission itself recognized this residual opportunity in its order on rehearing. The Commission explained that a state could calculate a utility's avoided cost under PURPA to include costs related to the environmental attributes of the electricity it would otherwise need to purchase.¹⁴¹ FERC explained,

[J]ust as a state may take into account the cost of the next marginal unit of generation, so as well the state may take into account obligations imposed by the state that, for example, utilities purchase energy from particular sources of energy Therefore, the CPUC may take into account actual procurement requirements, and resulting costs, imposed on utilities in California."¹⁴²

Thus, while states may not include an explicit "adder" for clean energy, they theoretically may recognize, in their calculation of the utility's avoided cost, the relatively greater value to the utility of renewable energy.¹⁴³

PURPA's allocation of responsibility for calculating avoided cost—whereby the state calculates the rate in the first instance, subject to FERC oversight if challenged—readily lends itself to the familiar floor preemption of environmental law. A state or locality interested in promoting clean energy may be able to do so by accounting for the additional expenses of environmental benefits in the avoided cost calculation. One author has observed that in a state like California with an aggressive renewable portfolio standard

141. Cal. Pub. Utils. Comm'n, 133 FERC ¶ 61,059, at 61,267–68 (2010).

142. *Id.* at 61,266 (footnote omitted).

143. *Id.* at 61,267–68.

(“RPS”),¹⁴⁴ it would be fair to presume in setting avoided costs that the marginal generation that the utility avoids by purchasing from the QF would be not just *any* generation—but specifically renewable generation.¹⁴⁵ In this way, a state or locality inclined to support clean energy could effectively enact a feed-in tariff “floor,” as long as it can point to an ambitious RPS as its basis for generous avoided cost rates. Federal regulation of greenhouse gases under the Clean Air Act could also establish the foundation for a state’s presumption that a utility’s avoided cost is that of renewable generation,¹⁴⁶ and states that elect to enforce *supra*-federal emissions standards in that context could again use those heightened standards as a basis for a relatively more generous avoided cost rate for renewables.

Another potential method of creating a floor preemption scheme under PURPA is through renewable energy credit (“REC”) programs (also called “green tag” programs). Under such a program, a renewable generator is awarded a tradable REC for each increment of renewable electricity it produces and sells.¹⁴⁷ The subnational regulator may require utilities or other businesses to acquire such RECs, or companies may elect to do so voluntarily.¹⁴⁸ Thus, a renewable generator that is also a PURPA QF will enjoy both the avoided cost rate associated with the sale and the value of the REC.¹⁴⁹ The Commission has recognized the separateness of avoided cost PURPA compensation and value derived from RECs,¹⁵⁰ thus clearing the way for states to enact REC programs to encourage renewable generation. In like vein, FERC has also allowed states to set PURPA rates at above avoided cost if the utility is compensated through tax credits.¹⁵¹

In sum, FERC’s interpretation of PURPA’s avoided cost requirement imposes a preemptive federal ceiling to preclude certain state and local clean energy regulations such as feed-in tariffs, except

144. A “Renewable Portfolio Standard” as used in this Article refers to a state regime that purports to require utilities, and possibly other power suppliers, to derive a particular proportion of their electricity from specified renewable resources.

145. See David Yaffe, *Are State Renewable Feed-in Tariff Initiatives Truly Throttled by Federal Statutes After the FERC California Decision?*, ELECTRICITY J., Oct. 2010, at 9, 14–16.

146. *Id.* at 15–16.

147. See HEMPLING ET AL., *supra* note 123, at 14–15.

148. *Id.*

149. See *id.* at 14.

150. Am. Ref. Fuel Co., 105 FERC ¶ 61,004, at 61,007 (2003).

151. CGE Fulton, L.L.C., 70 FERC ¶ 61,290, at 61,844 (1995); see HEMPLING ET AL., *supra* note 123, at 16.

under narrow circumstances. However, PURPA is a statute designed to serve multiple energy regulatory purposes, and can also assume a floor preemption role, accommodating state and local policies that seek to promote the goals of the statute other than consumer protection. Which preemption role the statute will take is in the hands of FERC in the first instance, and ultimately the courts, but the best interpretation of the statute is a floor preemption approach—not a ceiling or unitary standard approach that FERC has occasionally endorsed.

B. Extending Clean Energy Floors to the Federal Power Act

Unlike PURPA, which the Supreme Court has recognized as a cooperative federalism statute in its original design,¹⁵² Congress was not clear regarding the form of preemption tools in Part II of the FPA.¹⁵³ Because the FPA is a pervasive price-regulation regime, the way courts approach the preemption effects of the FPA will be the most important test of whether floor preemption is at home in the context of subnational clean energy policies, and energy law generally.¹⁵⁴ In a number of areas, such as the determination of rates for wholesale power sales, the FPA gave FERC jurisdiction to

152. See *supra* notes 112–118 and accompanying text (discussing *FERC v. Mississippi*, 456 U.S. 742 (1981)).

153. The provisions of Part I of the FPA concern hydroelectric power, and are peripheral to our discussion. Part I of the FPA has also given rise to numerous preemption decisions. See, e.g., *Albany Eng'g Corp. v. FERC*, 548 F.3d 1071, 1073 (D.C. Cir. 2008) (“Our review of the text and legislative history of the FPA generally and § 10(f) specifically convinces us that [FPA] § 10(f) must, in order to accomplish the full objectives of Congress, be understood to preempt all state orders of assessment for headwater benefits.”). However, these decisions are largely confined to hydroelectric matters, and they do not help us explain the preemption tools we highlight in this Article. When we reference the “FPA,” we refer to Part II.

154. Of course, in numerous of the preemption rulings in energy law, Part II of the FPA has already been the statute at issue. See, e.g., *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 49 (2003) (holding as preempted a Louisiana Public Service Commission order that impermissibly “trapped,” or prohibited a utility from recovering, certain costs for which FERC had approved utility’s recovery); *New York v. FERC*, 535 U.S. 1, 4–5 (2002) (upholding FERC’s determination in Order No. 888 to preempt state regulation of unbundled retail transmission); *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 370 (1988) (holding that FERC’s approval of cost allocation for a nuclear facility precluded a subsequent state review and reallocation based on the “prudence” of the decision to build the facility); *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.* 295 F.3d 918, 928 (9th Cir. 2002) (dismissing as preempted by federal law certain state tort claims against utility companies, because such tort claims would allow claimants to “obtain state law money damages allegedly resulting from the operation of an interstate electricity intertie expressly approved by FERC”).

determine electricity prices, a regulatory decision that inevitably has some preemptive impact on state regulators, but, as has always been recognized, does not entirely displace the authority of states in regulating utilities. The conventional judicial approach to interpreting the FPA embraces a unitary standard preemption approach, which treats FERC-determined prices under the FPA as preempting any subnational efforts to set wholesale power prices. We maintain that this conventional approach to preemption tools is misguidedly simplistic, and that the history and structure of the FPA favor an alternative approach—energy federalism—that allows the use of floor preemption tools.

1. FPA Background

The common lay perception may be that electricity is a single “good,” but in fact the regulation of electricity recognizes multiple constituent services that are bundled together in the delivery of electricity to the end consumer. These services include power generation, frequently referred to as supply or the “wholesale” sale of energy; transmission, which is the long distance transportation of electricity over high voltage lines; and “retail” distribution, which is the delivery of energy to end-use customers, at a customer-friendly voltage, using smaller, radial lines. Historically, states largely regulated distribution and retail issues related to power generation, and approved the costs of generation, transmission, and distribution to customers in bundled rates. Against the backdrop of this traditional regulatory role, much of which preceded adoption of Part II of the FPA in 1935, the most significant jurisdictional components of the FPA speak to federal authority over the sale of energy at wholesale and electric power transmission.

The statutory provision responsible for the historically sweeping federal influence on the interstate electric industry is FPA section 205, which provides that the rates for power subject to the Commission’s jurisdiction must be “just and reasonable,” and that rates that fail to meet this standard are unlawful.¹⁵⁵ Further, rates must not “grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage.”¹⁵⁶ The Commission is responsible for defining these standards, subject to judicial review. The “just and reasonable” price standard extends federal regulation to every wholesale sale of electricity that is

155. 16 U.S.C. § 824d(a) (2006).

156. *Id.* § 824d(b).

recognized to be in interstate commerce.¹⁵⁷ Although throughout the twentieth century and up until the present day most state commissions have regulated retail rates and guaranteed a return on the utilities' prudent investments,¹⁵⁸ courts have extended the reach of federal jurisdiction over energy sales to *any* contract and tariff terms that can influence the wholesale price of electricity.¹⁵⁹ Thus, although states retain the jurisdiction to set the retail rates that local utilities can charge, section 205 along with section 201 means that virtually anytime the state-jurisdictional utility *purchases* power from another entity, the price will be subject to federal price regulation. Federal price regulation extends pervasively throughout the electric power industry.

Part II of the FPA was enacted in 1935, a time when power was produced and delivered by vertically integrated local monopolies. For many years section 205 was not particularly important to federal energy policy: state regulatory authorities bundled the price of transmission into retail rates, most transmission issues were handled through bilateral contracts between neighboring utilities, and interstate markets were largely isolated. Since 1935, electricity markets have become vastly larger and more complex, and interstate transactions are an indispensable feature of the provision of power. Moreover, subsequent amendments to the FPA expanded federal authority to provide adequate transmission for interstate markets in electric power.¹⁶⁰ Consequently, today the federal government's reach to address transmission issues is one of the most litigated issues related to federalism in the energy industry.¹⁶¹

157. See *id.* § 824a(d).

158. See, e.g., *New York*, 535 U.S. at 5.

159. See *Pub. Serv. Co. of N.M. v. FERC*, 832 F.2d 1201, 1208 (10th Cir. 1987) (noting that FERC may consider evidence of retail price squeeze in setting wholesale rates); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1144 (D.C. Cir. 1984); *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1178 (8th Cir. 1982) (noting that states do not have exclusive jurisdiction over retail rates where price squeeze is alleged); *Anaheim v. FERC*, 669 F.2d 799, 801 (D.C. Cir. 1981) (finding FERC has authority to allow wholesale cost recovery of losses stemming from anticompetitive retail conduct).

160. See Energy Policy Act of 1992, Pub. L. No. 102-486, § 721, 106 Stat. 2776, 2915-16 (amending FPA section 211, 16 U.S.C. § 824j, to allow the Commission to require a transmitting utility to provide transmission services to another utility); Energy Policy Act of 2005, Pub. L. No. 109-58, § 1241, 119 Stat. 594, 961-62 (2005) (adding a new section 219 to the FPA, 16 U.S.C. § 824s, allowing the Commission to award incentive rates for transmission projects on a case-by-case basis).

161. See generally Jim Rossi & Thomas Hutton, *Judge Cudahy and the Deference Tension in U.S. Energy Law*, 29 YALE J. ON REG. 371 (2012) (discussing litigation involving transmission issues in the context of Judge Cudahy's approach to decision-making).

As with PURPA, any preemption analysis of the FPA must begin with some understanding of Congress's goals in passing the statute. The conventional account of the significance of the FPA, what we will call the "consumer populism" account, is that the statute (in particular its "just and reasonable" standard) reflects an effort by a New Deal Congress to protect consumers from monopoly abuses by utilities by keeping rates as low as possible.¹⁶² Consumer populism is consonant with early twentieth century utility regulation's focus on keeping rates as low as possible to protect consumers.¹⁶³ Bundled retail rates at the state level largely emphasized this purpose. Protecting consumers was also a major purpose that Congress endorsed when legislating at the height of the New Deal in the original Part II of the FPA.¹⁶⁴ Moreover, in 1935, political and financial abuses of the electric utility holding companies of the early American electric industry were only a recent memory,¹⁶⁵ and in the context of a severe financial depression, consumer protection was a foremost concern. Federal regulators continued to emphasize the goal of preserving low rates to protect consumers in the early years of the FPA's implementation, including in expanding rural access to electric power, accommodating post-World War II economic expansion, and building out an interstate electric infrastructure to accommodate new technologies such as nuclear power. Part I of the FPA, which regulated hydropower, also endorsed a low rate goal fifteen years before Part II was adopted.¹⁶⁶

162. See David Spence & Robert Prentice, *The Transformation of American Energy Markets and the Problem of Market Power*, 53 B.C. L. REV. 131, 141–43 (2012).

163. See RICHARD HIRSH, *POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY INDUSTRY* 9–28 (1999) (discussing development of the "utility consensus" of cost of service regulation during the progressive era, which appealed to consumer protection stakeholders through a guarantee of low rates).

164. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373–74 (1973) ("There is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.").

165. See HIRSH, *supra* note 163, at 9–31; HAROLD L. PLATT, *THE ELECTRIC CITY: ELECTRICITY AND THE GROWTH OF THE CHICAGO AREA, 1880-1930*, at 41–50 (1991) (discussing the corruption of government-business relationships and the consolidation of power in public utility holding companies in Chicago); Richard D. Cudahy & William D. Henderson, *From Insull to Enron: Corporate (Re)Regulation After the Rise and Fall of Two Energy Icons*, 26 ENERGY L.J. 35, 36 (2005).

166. For discussion of FPA's low rate goal, which included a specific statutory goal apart from "just and reasonable" rates for preference power for municipal and cooperative utilities, see Robert R. Nordhaus, *Yardstick Competition in a Deregulated Electric Industry*, 12 NAT. RES. & ENV'T 256, 257 (Spring 1998). Notably, Congress chose

In terms of its preemptive effect, the consumer populism account of the FPA favors using the supremacy of federal law to limit the prices that states can authorize firms to charge, in order to reinforce the goal of protecting consumers from monopoly abuses. This approach sees the FPA as setting a ceiling on prices, or as adopting “just and reasonable” rates as a unitary preemption standard.¹⁶⁷ Most federal cases interpreting the FPA reinforce this approach. For example, a well-established principle in the case law interpreting the FPA holds that just and reasonable wholesale rates approved by FERC must be passed through by state regulators, so long as the wholesale transaction is prudent. Known as the “filed rate doctrine,” this ceiling preemption approach was originally designed to protect interstate railroad consumers against monopolistic price discrimination.¹⁶⁸ Under the filed rate doctrine, which draws on an implied preemption analysis, FERC’s traditional cost-based rate setting under Part II of the FPA (adopted during the New Deal) has been recognized by courts as preempting state regulators from setting prices that depart from a FERC-approved rate. For example, in *Nantahala Power & Light Co. v. Thornburg*,¹⁶⁹ the U.S. Supreme Court noted that the approval of a filed rate by FERC precludes state regulators from determining that the rate is unreasonable.¹⁷⁰ The Court grounded this doctrine in “Congress’ desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.”¹⁷¹ Recent decisions have broadened this implied preemption analysis even further to recognize that FERC’s policy of favoring competitive wholesale markets preempts state and local pricing initiatives that exceed just

this kind of low rate and preference language in some statutes, such as Part I of the FPA, with respect to federal utilities such as TVA, and with respect to projects such as Niagara Redevelopment Act, but Congress did not include it in the portions of the FPA that regulate the wholesale rates for all electric utilities.

167. The nature of this standard highlights the significance of framing preemption tools such as floors and ceilings in energy law. Preemption floors may sometimes be reframed as ceilings, but in many instances doing so requires rewriting the goals of a statute. See *infra* notes 251–52 and accompanying text for discussion of this concern in the context of the FPA.

168. Rossi, *supra* note 19, at 1598–1605.

169. 476 U.S. 953 (1986).

170. *Id.* at 966.

171. *Id.* Interestingly, many circuit courts and FERC have recognized an exception to this doctrine that would allow a state to deny a utility the opportunity to recover costs incurred as the result of buying power at the FERC-established wholesale rate if the specific purchase, apart from the rate itself, is deemed imprudent by state regulators. See Rossi, *supra* note 19, at 1607.

and reasonable rates.¹⁷² This approach treats just and reasonable rates under the FPA as a unitary ceiling on wholesale prices.

2. Preemption Under the FPA: The “Attleboro Gap” and the FPA’s Energy Federalism Framework

The unitary preemption standard reinforced by the consumer populist account of the FPA’s purpose overlooks that the framework Congress put in place in Part II of FPA in 1935 was designed to address a broad set of concerns related to federalism in energy regulation. The concept of energy federalism that we introduced above offers an alternative account of the FPA’s purposes and framework, holding that Congress’s original design in the FPA was not limited to consumer populism and a price ceiling approach, but instead established a framework for the articulation of national energy goals and their implementation by states, given variations in geographic circumstances. Assessing the statute against the backdrop of energy law at the time of the statute’s adoption supports this broader interpretation of the FPA as an energy federalism framework statute. In addition, as we argue below, Congress has consistently endorsed the energy federalism approach to the FPA in amending the FPA since 1978, addressing important new concerns in the energy industry like reliability, energy security, efficiency, and conservation. Congress’s recent amendments to the FPA elevate these new concerns as goals of the FPA, just as consumer populism may have been elevated at the time of the New Deal.

Even at the time of the FPA’s adoption in 1935, Congress was concerned with the statute’s federalism implications. Congress envisioned expanding national power to address state conflicts that are at odds with federal goals, but doing so without completely displacing state regulation. Prior to adoption of the FPA in 1935, state commissions were powerless to regulate any interstate transactions by utilities. The Supreme Court made this explicit in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*¹⁷³ In that case, Rhode Island’s Narragansett Electric Lighting Company had entered into a twenty-year contract to supply the full electricity

172. See *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1045–48, 1056–59 (9th Cir. 2001) (finding wholesale market set rates approved by FERC preempt the California Governor’s effort to protect consumers against strategic manipulation of California’s deregulated power market); *Town of Norwood v. New Eng. Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000) (citations omitted) (addressing market-based rates approved by FERC under the filed rate doctrine).

173. 273 U.S. 83 (1927).

requirements of the Massachusetts-based Attleboro Steam and Electric Company.¹⁷⁴ The parties filed the contract rate with the Public Utilities Commission of Rhode Island.¹⁷⁵ Several years later, Narragansett obtained a rate increase from the Rhode Island PUC, over Attleboro's objections.¹⁷⁶ After the rate hike was appealed through the Rhode Island courts, the Supreme Court granted certiorari. The Court described the problems that could arise from price regulation exclusively at the state level:

[I]f Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island.¹⁷⁷

It ruled that the rate between Narragansett and Attleboro "is . . . not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress."¹⁷⁸

Thus, the Supreme Court disqualified both Massachusetts and Rhode Island from regulating pricing terms of the electricity contract, leaving any regulation of such prices to a federal regime that did not yet exist because Congress had not yet legislated to regulate this kind of interstate commerce. Notwithstanding the consumer populism concerns described above, this so-called "*Attleboro* gap," whereby neither the exporting state nor the importing state could regulate the pricing of electricity sold across state lines, was the immediate impetus for the 1935 amendments to the FPA.¹⁷⁹

While the expansive implied preemption reach of filed rate doctrine cases seems to endorse a strong consumer populism account

174. *Id.* at 84.

175. *Id.*

176. *Id.* at 85–86.

177. *Attleboro*, 273 U.S. at 90.

178. *Id.*

179. *See* *Duke Power Co. v. Fed. Power Comm'n*, 401 F.2d 930, 934 (D.C. Cir. 1968) ("[I]t was primarily to fill the '*Attleboro* gap' that Congress . . . passed the Federal Power Act as its first exertion of national authority over the operating electric utilities." (footnotes omitted)).

of the FPA's purpose, an alternative way of understanding these and other preemption cases is that courts are identifying the goals of the FPA and applying it as an energy federalism framework statute. These cases have established the basic principle of ensuring that federal energy policy is consistent with and preserves the ability of state regulators to protect customers in their jurisdictions, but they also recognize that the FPA has evolved to address a diverse range of energy goals and is no longer focused solely on consumer populism, if it ever was. Thus, although many courts have interpreted the FPA as endorsing ceiling preemption in the electric industry under the filed rate doctrine, even in setting rates the statute does not necessarily preclude a floor preemption approach to clean energy policies.

The preemptive effect of the FPA will continue to be a topic of litigation in coming years, and given recent electricity market developments, the question will have considerable importance for subnational clean energy policies. Specifically, the FPA's "just and reasonable" rate standard extends to electricity transactions conducted over Regional Transmission Organizations ("RTOs"), including the price of electric power transmission, a service that is essential to ensuring reliability and power supply diversity, including the integration of renewable resources.¹⁸⁰ These RTOs have been established at the Commission's urging¹⁸¹ over approximately the last ten years to facilitate greater competition by breaking up the vertically integrated nature of the electric industry. RTOs encourage greater competition in electricity *generation* by separating it from *transmission*, which is believed to be a natural monopoly for which competition will never be practical. RTO participants surrender

180. RTO decisions affecting wholesale prices must be filed with FERC under the FPA, and FERC applies the existing statutory principles including the "just and reasonable" rate standard. See Order No. 2000, Regional Transmission Organizations, 65 Fed. Reg. 810, 812 n.5 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35); see also generally Ill. Commerce Comm'n v. FERC, 576 F.3d 470 (7th Cir. 2009) (reviewing reasonableness of the Pennsylvania-New Jersey-Maryland's ("PJM") RTO rates that had been approved by FERC). FERC decisions are reviewed in the federal courts of appeals. See, e.g., *id.* at 473 (reviewing a determination by PJM). In this sense, RTO rules are backed by federal authority, and unlike states and localities, do not have native authority that can be "preempted." We acknowledge that agency and judicial decisions rejecting RTO rules are not "preemption" decisions within the traditional legal meaning of the term. Nevertheless, we adopt a broadened understanding of "preemption" to encompass agency and judicial rejection of RTO rules, on the rationale that a decision of a non-federal, regional entity with regulatory authority is being rejected under federal law.

181. See Order No. 2000, Regional Transmission Organizations, 65 Fed. Reg. at 810 (stating that the Commission was "amending its regulations under the [FPA] to advance the formation of Regional Transmission Organizations (RTOs)").

control of their transmission facilities to the RTO, which allocates access to transmission neutrally among generators, without preference to the transmission owner's generation. With important exceptions, these formally voluntary RTOs have been successful, and they now administer energy transmission over broad swaths of the country.

The recent Seventh Circuit case *Illinois Commerce Commission v. FERC*¹⁸² (“*ICC*”) is a prime example of the potential preemptive impact of the Federal Power Act on RTOs, if federal courts take a unitary standard approach consistent with preemption ceilings rather than floors. *ICC* illustrates how a consumer populism interpretation of the FPA can limit the autonomy of non-federal regulators to address transmission pricing, in contrast to an energy federalism approach that is consistent with preemption floors, which would enhance the authority of subnational regulators to address transmission pricing. In *ICC*, the court of appeals reversed the Commission's approval of the Pennsylvania-New Jersey-Maryland (“*PJM*”) RTO's method of allocating the costs of high-voltage transmission system upgrades among participating utilities.¹⁸³ *PJM*'s methodology was simply to allocate the project cost pro rata among the *PJM* participants, with the rationale that high-voltage projects increase system-wide reliability and thereby benefit the entire system, even though they will not directly provide service to many *PJM* customers.¹⁸⁴ In a decision written by Judge Posner, a Seventh Circuit panel rejected this reasoning as overly facile, and charged the Commission with ensuring that the costs imposed on any customer must be at least “roughly commensurate” with benefits.¹⁸⁵

182. 576 F.3d 470 (7th Cir. 2009).

183. *Id.* at 474, 478.

184. *Id.* at 474.

185. *Id.* at 477. Judge Posner referenced the FPA in explaining the majority ruling, and did find that FERC lacked any authority under the FPA to approve the rates. *Id.* at 476 (“FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members.”). Yet Judge Posner's decision also appears to impose a heavier reasoning requirement on FERC. The court seemed as dissatisfied with the Commission's lack of explanation for the approach that it took to allocating costs as with the substantive approach the Commission took to allocating costs. *See id.* at 477 (“[W]e are not authorized to uphold a regulatory decision that is not supported by substantial evidence on the record as a whole, or to supply reasons for the decision that did not occur to the regulators.” (citations omitted)). Still, the court required the Commission to reconsider the process by which it satisfies itself that RTOs rates are “just and reasonable.” *Id.* at 478. This suggests that at a minimum, how courts are interpreting the FPA can even inform their application of arbitrary and capricious

Such approaches to reviewing agency policy choices against the backdrop of the FPA will continue to have significance for energy policy and renewable energy. In FERC's landmark Order 1000,¹⁸⁶ issued in 2011, FERC gave RTOs heightened responsibility for regional planning, including the construction of new transmission lines.¹⁸⁷ Included in this mandate was the express mandate for RTOs to "consider" state policies in their regional planning processes—including, importantly, state renewable portfolio standards.¹⁸⁸ This is an important potential expansion of RTO authority by FERC because, prior to Order 1000, RTOs did not enjoy the specific authority to plan transmission development to accommodate increased reliance on renewable energy, and transmission construction simply turned on what was requested by new generators or planned by utilities.¹⁸⁹ Now, however, RTOs are responsible for developing plans for new transmission construction that account for state renewables policies.¹⁹⁰ RTO decisions on how to spread the costs of such new transmission lines will significantly affect the economics of renewables projects.

Given the courts' willingness to reject electricity market planning under the pervasive FPA price ceiling regulation regime, reinforced by the filed rate doctrine, RTOs must ensure that their regional planning processes do not run afoul of the FPA. After the *ICC* case, RTOs must ensure that the costs of new transmission projects are allocated in a manner "roughly commensurate" with their benefits. RTOs have new responsibility to facilitate state clean energy policies as described above, but courts have set the precedent for striking down RTO plans against the backdrop of the FPA. Therefore, the success of state clean energy policies could foreseeably be affected by whether courts endorse a consumer populism interpretation of the FPA, or recognize a broader energy federalism approach.

principles to FERC's policy decisions regarding transmission and its planning, siting, and pricing.

186. See Order No. 1000, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49,842 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35 (2012)).

187. *Id.* at 49,851.

188. *Id.* at 49,873.

189. *Id.* at 48,957 n.72 ("PJM acknowledges in its comments that under its existing transmission planning process, it cannot build transmission to anticipate the development of future generation, including renewable energy resources, that are not associated with specific generator interconnection requests.").

190. See *id.* at 49,845.

3. Identifying Clean Energy Floors in the FPA

While a ceiling preemption approach gives federal regulators the ability to cap power prices, a rigid ceiling preemption approach is not consistent with the federalism framework Congress put in place in the FPA. By limiting rates to only prices that FERC has approved, a ceiling approach to the filed rate doctrine precludes state and other subnational regulators from setting rates that depart from the filed rate, even if those rates advance other goals that are consistent with federal law. The energy federalism framework of the FPA does not require this outcome unless the exclusive or primary goal of the FPA is considered to be maintaining low energy prices to protect consumers. Moreover, when assessed in the context of recent energy pricing policies, energy federalism reveals a new opportunity for preemption analysis under the FPA for courts to open up space for policy experimentation in the energy sector. If, in contrast to the consumer populism account, the FPA is instead understood as a framework statute like PURPA that endorses multiple goals, the statute is consistent with a preemption floor rather than a ceiling. We believe that there is a place for floor preemption in interpreting the FPA because the FPA's "just and reasonable" standard need not be construed as a unitary federal "ceiling" in all contexts.

The legislative history of the FPA does not direct a unitary preemption interpretation, nor do later acts of Congress or later judicial interpretations. Evaluating the intent of the FPA's drafters presents a problem familiar to other statutory contexts: considering the intent of the authors as to matters that were inconceivable at the time of the statute's enactment. For example, it is impossible to know what the drafters of the FPA would have thought of nuclear power in 1935, or of modern state and local clean energy initiatives. What is clear, however, is that they did not enact the FPA solely to keep power prices low. Instead, they enacted it to reach places that state regulation could not—i.e., to bridge the *Attleboro* gap.¹⁹¹ Indeed,

191. For instance, the House Committee on Interstate and Foreign Commerce summarized the Act's purpose as follows:

The new parts are designed to meet the situation which has been created by the recent rapid growth of electric utilities along interstate lines. The percentage of electric energy generated in the United States that was transmitted across State lines increased from 10.7 in 1928 to 17.8 in 1933. . . . Under the decision of the Supreme Court of the United States in [*Attleboro*], the rates charged in interstate wholesale transactions may not be regulated by the States. Part II gives the Federal Power Commission jurisdiction to regulate these rates.

H.R. REP. NO. 74-1318, at 7-8 (1935).

preservation of the states' regulatory authority to experiment and adapt to regional circumstances was an important issue when the bill was under consideration, and its legislative history reflects this. A contemporary House of Representatives report on the bill asserted, "Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill."¹⁹² The legislature also placed broadly limiting hortatory language into the Act itself. For example, section 201 states, "Federal regulation of matters relating to . . . the transmission of electric energy in interstate commerce . . . is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States."¹⁹³

As to the FPA's actual application, despite judicial decisions applying the filed rate doctrine that emphasize the FPA as a ceiling on wholesale rates, the statute has never been construed to require that electricity be produced and sold at the lowest *possible* price, and the plain language of the FPA obviously does not compel such an interpretation. Notably, Congress can make that requirement explicit when it wishes, as it did as early as 1915 in the Niagara Power Project Act¹⁹⁴ and in the power preferences for municipal utilities and cooperatives buying power from federally-operated hydro projects.¹⁹⁵ For example, Congress prescribed rates governing the sale of hydropower produced at dams operated by the Army Corps of Engineers several years after Part II of the FPA was adopted, in the 1944 Flood Control Act.¹⁹⁶ Such energy was to be marketed by the Secretary of the Interior, and now, by the Department of Energy through four Federal Power Marketing Administrations, at the "lowest possible rates . . . consistent with sound business principles."¹⁹⁷

192. *Id.* at 8.

193. 16 U.S.C. § 824(a) (2006).

194. Niagara Power Project Act, Pub. L. No. 85-159, § 1, 71 Stat. 401, 401 (1957) (codified as amended at 16 U.S.C. § 836 (2006)) (providing that "project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use").

195. See Clinton A. Vince & Nancy A. Wodka, *Recent Legal Developments and Legislative Trends in Federal Preference Power Marketing*, 7 ENERGY L.J. 1, 7, 62-63 (1986) (discussing Bonneville Power Authority and other federal project "preference power" rates).

196. Flood Control Act of 1944, ch. 665, 58 Stat. 887 (1944) (codified as amended in scattered sections of 16, 33, and 43 U.S.C.).

197. Flood Control Act of 1944 § 5, 16 U.S.C. § 825s (2006).

In stark contrast, the term “just and reasonable” is self-evidently subjective and capable of meaning different things under different circumstances. The Supreme Court made this clear in *NRG Power Marketing v. Maine Public Utility Commission*.¹⁹⁸ *NRG* involved the New England Independent System Operator’s (“NE-ISO”) attempts to establish a regional market for energy capacity.¹⁹⁹ While most of the interested parties were satisfied with NE-ISO’s market design, some were not.²⁰⁰ Six entities challenged the agreement establishing the NE-ISO market.²⁰¹ The complainants focused in particular on the agreement’s invocation of the “*Mobile-Sierra*” doctrine,²⁰² which, when applicable, means that a contract may only be set aside if the rate is so extreme as to injure the “public interest.” The *NRG* complainants argued that they should not have to meet that higher “public interest” burden of proof if they challenge rates set under the NE-ISO market, because they refused to enter into the agreement from the beginning.²⁰³

In ruling against the complainants, the *NRG* majority rejected the notion that the FPA involves multiple standards of review.²⁰⁴ Rather, there is one standard, “just and reasonable,” but it means different things in different contexts.²⁰⁵ In the context of a rate set in a private agreement between energy market participants, the party challenging the justness and reasonableness of the rate has a higher hurdle than in other circumstances; under *Mobile-Sierra*, it must show that the rate is so unreasonable as to be contrary to the “public interest.”²⁰⁶ However, this higher bar is simply what is “just and reasonable” in that context.

198. 130 S. Ct. 693 (2010).

199. *Id.* at 697. “Capacity,” in the energy market context, is the right to call on energy, as opposed to energy itself. *See* *Blumenthal v. FERC*, 552 F.3d 875, 878 (D.C. Cir. 2009).

200. *NRG Power Mktg.*, 130 S. Ct. at 697.

201. *Id.* at 698.

202. The *Mobile-Sierra* doctrine refers to two Supreme Court cases decided on the same day, *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 34 (1956). *NRG Power Mktg.*, 130 S. Ct. at 698.

203. *NRG Power Mktg.*, 130 S.Ct. at 696, 700.

204. *Id.* at 700.

205. *Id.* (“[T]he public interest standard is not, as the D.C. Circuit presented it, a standard independent of, and sometimes at odds with, the ‘just and reasonable standard’ . . . rather, the public interest standard defines ‘what it means for a rate to satisfy the just-and-reasonable standard in the contract context.’” (quoting *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 546 (2008))).

206. *See Morgan Stanley*, 554 U.S. at 527 (citations omitted).

On remand from *NRG*, the Commission understood the Court's language to mean that there is "a broad continuum of approaches [that can be employed] to meet the statute's requirement that rates... be just and reasonable."²⁰⁷ The Commission further explained, "Given the flexibility inherent in the statutory 'just and reasonable' standard, the Commission may require varying types and degrees of justification for challenges to particular rates or practices, depending on the circumstances."²⁰⁸ Thus, as *NRG* illustrates, there is no obvious reason that state and local policy priorities—like RPSs—could not be considered in the inquiry as to whether a rate (or an RTO's cost-allocation proposal for a new transmission line), is "just and reasonable" under the FPA.

A floor preemption approach consistent with the FPA as an energy federalism statute, rather than focused on the exclusive goal of consumer populism, is reinforced by changes to the industry, as well as by regulatory and statutory developments since 1935. The preemptive reach of the FPA has gained its current importance not because the law has changed, but because in the years since 1935, the electric industry has become an increasingly regional, interstate enterprise. As described above, the FPA will reach virtually any transaction conducted through the increasingly prevalent medium of an RTO.²⁰⁹ But this intervening industry evolution is an unsatisfactory justification for preempting state and local clean energy policies. Given Congress's focus on retaining state regulatory authority, the authors of the Act would have been bemused to see the FPA upend state and local regulatory initiatives.

Even though, as a matter of history, consumer populism once comprised a major goal of Part II of the FPA, FERC's regulation of electric power under the FPA should be viewed as no longer solely concerned with protecting consumers. Instead, over time the regulatory contract has expanded beyond incumbent utilities and

207. *Devon Power LLC*, 134 FERC ¶ 61,208, at 62,043–44 (2011).

208. *Id.* at 62,044–45.

209. RTOs are approved and overseen by FERC, and they administer multi-state markets in transmission, and often also energy and capacity markets. *See* ISO/RTO COUNCIL, 2009 STATE OF THE MARKETS REPORT 5, 24–27 (2009), <http://www.isorto.org/atf/cf/{5B4E85C6-7EAC-40A0-8DC3-003829518EBD}/2009%20IRC%20State%20of%20Markets%20Report.pdf>. There has been no challenge of which the authors are aware to the notion that transactions conducted through RTOs are transactions in interstate commerce.

their customers.²¹⁰ State regulators have endorsed the incorporation of broader values into the regulatory contract's "just and reasonable" standard (or the equivalent state standard), including public interest goals such as environmental protection, efficiency, and conservation.²¹¹ FERC itself recognized the evolving regulatory contract by shifting in favor of deregulation and competition in the 1990s, in particular through the introduction of wholesale competition,²¹² which has allowed new entrants in the industry to proliferate.

Congress's own enactments reinforce the incorporation of these broader goals. The National Environmental Policy Act of 1969 ("NEPA"),²¹³ which was specifically designed to authorize agencies such as the Atomic Energy Commission (the Nuclear Regulatory Commission's predecessor) to consider environmental impacts of their decisions (an authority that at least some agencies claimed they previously lacked),²¹⁴ can also be viewed as directing federal

210. See generally JIM ROSSI, *REGULATORY BARGAINING AND PUBLIC LAW* (2005) (developing the argument that the terms of the regulatory compact have shifted beyond a bilateral firm-consumer contract).

211. As the historian Richard Hirsh describes it, fundamental shifts have occurred in the "utility consensus" behind price regulation at the state level, increasingly recognizing environmental and conservation values as well as traditional consumer protection goals in the implementation of state law, even where the applicable statute was not updated by the legislature. See HIRSH, *supra* note 163, at 268. An important innovation in this regard is state adoption of conservation policies such as time-of-day rates and demand-side management, and incorporation of the costs of these into just and reasonable rates. For further discussion of how these goals are included in state statutes, see generally Michael Dworkin et al., *Revisiting the Environmental Duties of Public Utility Commissions* (2006), 7 VT. J. ENVTL. L. 1 (2006) (reviewing the statutory authority of state public utility commissions to consider environmentally significant issues in regulating utility companies); cf. Jeremy Knee, Article, *Rational Electricity Regulation: Environmental Impacts and the "Public Interest,"* 113 W. VA. L. REV. 739 (2011) (explaining that although state regulators should take environmental considerations into account in their decision-making and some have done so, many utility regulators have not taken this step in a meaningful fashion).

212. Wholesale competition and regulation of wholesale markets became an official FERC policy in 1996, when the Agency issued its landmark Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540, 21,540 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385).

213. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (2006), amended by Lake Pontchartrain Basin Restoration Program, Pub. L. No. 112-237, 126 Stat. 1628 (2012).

214. *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1120 (D.C. Cir. 1971) (finding AEC compliance rules inadequate under NEPA). As Judge Skelly Wright observed in his *Calvert Cliffs* opinion, the responsibility of the Agency "is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage" but instead "it must itself take the initiative of considering

regulators to shift away from an exclusive focus on consumer protection. Beyond NEPA, which does not change any agency's substantive authority, in the past forty years the FPA has also been amended on multiple occasions to address goals much broader than consumer protection, such as energy security and conservation.²¹⁵

Statutes with a more particular focus, such as PURPA, amended the FPA to authorize FERC to bring an even broader range of goals into play. With respect to FERC's authority over power supply, as is discussed above, PURPA amended the FPA to give FERC new authority over the pricing of certain energy sales related to efficiency and conservation.²¹⁶ With respect to transmission, PURPA added FPA sections 211 and 212 to address interconnection and reliability,²¹⁷ and these provisions were later amended in 1992 to expand federal authority to mandate transmission access.²¹⁸ In 2005, Congress added sections 215 and 216 to the FPA to allow FERC backstop preemption authority to site transmission lines where states lacked either the authority or wherewithal to do so on their own.²¹⁹

While no one doubts that the FPA gave FERC extensive authority to protect consumers, the addition of amendments and new statutes reflects new values such that the FPA's "just and reasonable"

environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation." *Id.* at 1119. While later cases retreat from the aggressive enforcement of NEPA Judge Wright endorsed in *Calvert Cliffs*, the basic legal principle that NEPA expands the values that an agency can consider in making its decision remains valid. *See* A. Dan Tarlock, *The Story of Calvert Cliffs: A Court Construes the National Environmental Policy Act to Create a Powerful Cause of Action*, in ENVIRONMENTAL LAW STORIES 77, 104–05 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

215. For instance, PURPA was actually a series of amendments to the FPA, and it added conservation values to the FPA regime. *See* Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, § 2, 92 Stat. 3117, 3119 (codified at 16 U.S.C. § 2601 (2006)). The Energy Policy Act of 2005 contained FPA amendments designed to enhance energy security. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1211(a), 119 Stat. 594, 941–46 (codified at 16 U.S.C. § 824o (2006)) (providing for the establishment of a reliability entity to promulgate standards concerning cybersecurity, among other things); *id.* § 1221(a), 119 Stat. at 946–51 (codified at 16 U.S.C. § 824p (2006)) (providing for the United States Department of Energy to designate transmission congestion corridors where "the designation would enhance national defense and homeland security").

216. Public Utility Regulatory Policies Act of 1978 § 210, 92 Stat. at 3144 (codified as amended at 16 U.S.C. § 824a-3 (2006)).

217. Public Utility Regulatory Policies Act of 1978 §§ 203–04, 16 U.S.C. §§ 824j, 824k (2006).

218. Energy Policy Act of 1992, Pub. L. 102-486, §§ 721, 722, 106 Stat. at 2915–16 (codified as amended at 16 U.S.C. §§ 824j, 824k (2006)).

219. Energy Policy Act of 2005 § 1221, 119 Stat. at 946 (codified at 16 U.S.C. § 824p (2006)).

mandate is properly viewed as having evolved beyond the narrow New Deal notion that regulators are solely concerned with protecting the customers of a utility from monopolistic abuses.²²⁰ Where, as in the case of the FPA today, a statute endorses a range of goals without clearly favoring one, preemption ceilings are generally not an effective means of advancing the statute's values since they limit the ability of regulators to balance goals in implementing the statute.

In sum, regardless of whether consumer populism was one of the purposes of the FPA as originally adopted, it was not an exclusive purpose, nor is it the primary purpose given the way that energy statutes have evolved. The energy federalism framework Congress originally adopted in Part II of the FPA allows energy law to adapt to multiple goals, and Congress has emphasized these other goals in its subsequent enactments. In this sense, the FPA has continued to play a significant role in providing federal regulators the ability to articulate federal goals and the flexibility to coordinate state experiments that adapt those goals to regional needs and circumstances—an approach that is consistent with how cooperative federalism statutes such as PURPA, as well as many environmental statutes, are interpreted.

4. Examples of Possible Floor Preemption in the FPA

The scope of preemptive federal authority over many energy issues seems pervasive as a result of several age-old statutory regimes, coupled with the far reach of Congress's Commerce Clause authority in the energy industry. Congress has often addressed energy regulation in the form of broad energy "mega-statutes," featuring numerous compromises and addressing a host of related and unrelated issues that have arisen since Congress's last energy legislation. In these statutes, Congress has rarely prescribed

220. PURPA is certainly not the only other statute of relevance to FERC in regulating wholesale electricity prices. Apart from procedural statutes, such as NEPA, other energy statutes with which the Agency must comply (many of which have been incorporated into provisions of the FPA through amendments and new sections) include the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified as amended in scattered sections of 10, 16, 22, 26, 30, and 42 U.S.C.) (amending and adding provisions of the FPA); Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified as amended in scattered sections of 12, 16, 25, 26, 30, and 42 U.S.C.) (amending and adding various provisions to the FPA); Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986) (codified in scattered sections of 16 U.S.C.) (amending various provisions of the FPA); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 (codified as amended in scattered sections of 42 U.S.C.) (restricting the development of new power plants powered by oil and natural gas).

regulatory regimes so thorough as to occupy the field in any particular area. Considerable authority over issues including electric power regulation and fracking remains in the hands of state and local regulators. Adding to this issue is a federalism lag, as Congress revises federal energy laws—including agency jurisdiction and goals—only infrequently and incompletely.

Moreover, as with any other legislation, mega-statutes can fail to accomplish their intended effect as a result of unfavorable treatment in the courts. For instance, in the Energy Policy Act of 2005, to address a widely recognized shortage of new electric transmission construction, Congress gave FERC a new authority to issue federal permits to build electric transmission lines where states failed to issue the necessary permits—so-called “backstop” siting authority.²²¹ Aspects of FERC’s implementation of its backstop siting authority were challenged, and the two resulting appellate court decisions greatly cabined FERC’s authority and then deferred its use for years.²²² Thus, absent additional congressional action, a regulatory adjustment that Congress considered to have been necessary in 2005 will go unrealized.²²³

The lack of congressional corrections to such judicial interpretations should not be surprising. Congress has shown itself particularly ineffective in passing energy legislation to address climate change and to promote clean and renewable energy. For example, federal legislators have tried but repeatedly failed to enact climate

221. Energy Policy Act of 2005 § 1221(a), 119 Stat. at 946–51 (codified at 16 U.S.C. § 824p(b)(2006)). For a superb defense of this approach to preempting state and local siting decisions as a type of cooperative federalism program, see generally R. Seth Davis, Note, *Conditional Preemption, Commandeering, and the Values of Cooperative Federalism: An Analysis of Section 216 of EPA Act*, 108 COLUM. L. REV. 404 (2008) (engaging in this discussion).

222. See *Cal. Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1095–96 (9th Cir. 2011) (requiring the Department of Energy to prepare a new Congestion Study—a precursor to the siting of transmission lines—for failure to consult with affected states); *Piedmont Env’tl. Council v. FERC*, 558 F.3d 304, 324–25 (4th Cir. 2009) (holding that even after passage of the Energy Policy Act of 2005, FERC does not have the authority to site transmission lines when state has denied the permit within the statutory one year period).

223. See, e.g., Sandeep Vaheeshan, *Preempting Parochialism and Protectionism in Power*, 49 HARV. J. ON LEGIS. 87, 123–29 (2012) (arguing that Congress must ultimately act to substantively preempt state and local decisions regarding the siting of transmission lines); cf. Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 289 (2011) (advocating a less intrusive process preemption approach for transmission siting, whereby Congress would impose procedural constraints on state and local siting processes).

change legislation and renewable portfolio standards.²²⁴ The federal wind power production tax credit, critical for wind developers to obtain tax equity financing and largely credited with the prodigious growth of wind power in recent years, is in constant risk of being discontinued.²²⁵ Despite little organized opposition to this tax credit program, Congress has repeatedly declined to make it permanent.²²⁶ Consequently, its extension into future years is revisited annually, and wind power projects are condemned to being financed and developed in fits and starts.²²⁷ Today, few would assert that comprehensive climate change legislation is likely to be passed by Congress in the near future.

In marked contrast to federal congressional inaction, many states and other subnational authorities have displayed impressive enthusiasm and ingenuity in energy regulation, particularly in addressing climate change and promoting clean energy. State and local governments have become leaders on a variety of fronts, adopting standards and goals for renewable energy,²²⁸ setting building standards,²²⁹ and giving priority to a number of other innovative and

224. The most famous example of this effort in recent years was the passage of the Waxman-Markey Climate Change Bill by the U.S. House of Representatives. See American Clean Energy and Security Act of 2009, H.R. 2998, 111th Cong. (2009). For discussion of some of the interest group impediments to climate change legislation related to the energy sector, see Jim Rossi, *The Political Economy of Energy and Its Implications for Climate Change Legislation*, 84 TUL. L. REV. 379, 404–27 (2009).

225. See *Renewable Electricity Production Tax Credit (PTC)*, DATABASE OF ST. INCENTIVES FOR RENEWABLES & EFFICIENCY (DSIRE), http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=US13F&re=1&ee=1 (last visited Apr. 8, 2013) (describing the history of the enactments extending the production tax credit).

226. See *id.*

227. *Production Tax Credit for Renewable Energy*, UNION OF CONCERNED SCIENTISTS (Jan. 4, 2013), http://www.ucsusa.org/clean_energy/smart-energy-solutions/increase-renewables/production-tax-credit-for.html (“Lapses in the PTC . . . cause a dramatic slowdown in the implementation of planned wind projects and layoffs at wind companies and manufacturing facilities. Upon restoration, the wind power industry takes time to regain its footing, and then experiences strong growth until the tax credits expire. And so on.”).

228. See Lincoln L. Davies, *Power Forward: The Argument for a National RPS*, 42 CONN. L. REV. 1339, 1357–64 (2010) (discussing dozens of approaches to RPSs among the states); Joshua P. Fershee, *Changing Resources, Changing Market: The Impact of a National Renewable Portfolio Standard on the U.S. Energy Industry*, 29 ENERGY L.J. 49, 61–62 (2008) (discussing various state RPS approaches).

229. See, e.g., Thomas Hutton, *Toward Better and More Uniform Building Efficiency Codes*, 28 VA. ENVTL. L.J. 121, 129–44 (2010) (discussing the potential role of building codes as a mechanism to address climate change and describing the diversity of state approaches to implementing such standards).

“adaptive” climate change initiatives.²³⁰ In this respect, the states are once again giving substance to Justice Brandeis’s timeless account of states as “laboratories of democracy.”²³¹ But whatever the virtues of state and local innovation, it will be fruitless to the extent that federal law preempts it. Floor preemption in the context of the FPA provides an opportunity for such innovation to flourish in ways that advance national energy goals, especially in the context of clean energy issues such as transmission, demand response (explained in greater detail below), and conservation policies.

a. *An FPA Clean Energy Floor for Transmission Cost Allocation*

Consider electric power transmission line cost allocation. While the Seventh Circuit panel opinion in *ICC* will be a serious new challenge to the efforts of subnational entities to spread the costs of new transmission projects for clean energy,²³² a dissent by Judge Cudahy hints at the more flexible approach that the energy federalism interpretation of the FPA would allow. In contrast to Judge Posner’s emphasis on cost causation as a way of determining just and reasonable rates consistent with the consumer populism goal of the FPA, Judge Cudahy reasoned:

[I]t is not possible to realistically determine for each utility and with reference to each major project the likelihood that rate-simplification will reduce litigation, or to calculate the precise value of not having to cover the costs of power failures and of not paying costs associated with congestion, and all this over the next forty to fifty years. Concerns about the real value to individual utilities of the stability and efficiency provided by improvements to the backbone grid are answered by their voluntary participation in the power pool and its collaborative “RTEP” (or regional transmission expansion planning) process. Rate-making based on cost causation is assured by this process, since universal cost-sharing is recommended only when

230. See, e.g., Adelman & Engel, *supra* note 58, at 1846–49 (discussing various state climate change initiatives).

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

232. See *supra* notes 182–185 and accompanying text (discussing Judge Posner’s panel opinion).

developments are found to benefit the integrated system as a whole.²³³

He observed that imposing a precise quantification of benefits, or even rough proportionality, is inconsistent with past practice in regional grid pricing to address issues such as cascading outages and is not required by any of FERC's rules or precedents or the statutory language of the FPA.²³⁴ Judge Cudahy's approach is consistent with understanding the FPA as an energy federalism statute to the extent that it recognizes that the just and reasonable standard incorporates a broader range of values, including goals related to reliability and preserving the integrity of the system-wide grid as a whole. In this sense, the approach Judge Cudahy endorsed in his dissent envisions the FPA's just and reasonable standard as a floor designed to allow subnational (i.e., RTO) differentiation in pricing approaches, rather than as a ceiling that limits pricing and cost allocation innovations.²³⁵

The judicial approach to preemption under the FPA will decide the fate of important new initiatives for the energy industry, including Order 1000. The Commission could conceivably take a permissive view of what is "just and reasonable" in connection with the costs of building transmission to access renewables, by adopting a broad understanding of who benefits from those projects. Indeed, in approving the Midwest Independent Transmission System Operator's ("MISO") transmission tariff in 2011, FERC adopted an approach to spreading costs similar to that at issue in the *ICC* case, although MISO made efforts to better explain how those bearing the costs would benefit from the lines.²³⁶ On the other hand, if a narrow understanding of the "beneficiaries" of that transmission is adopted by FERC and the courts, RTO efforts to spread the costs of building transmission necessary to reach far-flung renewable resources in order to satisfy the clean energy policy of one or more states could be rejected as impermissible under the *ICC* ruling. Thus, state clean

233. Ill. Commerce Comm'n v. FERC, 576 F.3d 470, 479 (7th Cir. 2009).

234. *Id.* at 480–82.

235. *Id.* at 481 ("The big picture here is that FERC's proposal to spread the cost of very high voltage transmission [within the region] . . . seems to me in the interest of efficient, high-capacity transfer capability and of the closely linked improvement of reliability which affects the system generally.").

236. We think that this approach thus likely meets even the standard endorsed by Judge Posner in the *ICC* case. For another view that highlights the significance of the preemption issue in this context, see Gabe Maser, Note, *It's Electric, but FERC's Cost-Causation Boogie-Woogie Fails to Justify Socialized Costs for Renewable Transmission*, 100 GEO. L.J. 1829, 1853 (2012).

energy policies and RTO autonomy would be stymied under the just and reasonable standard.

b. An FPA Clean Energy Floor for Feed-In Tariffs

A floor preemption approach to the FPA would also open up more opportunities for feed-in tariffs as another important form of state and local experimentation in clean energy policy. FERC's feed-in-tariffs order, discussed above in connection with PURPA, also found preemption for larger scale renewable projects under the FPA's just and reasonable standard.²³⁷ This determination certainly would not have been required under a floor preemption approach. In this sense, the FPA might even be seen as consistent with state and local efforts to promote and subsidize renewable energy, not as a limit on them.²³⁸

c. An FPA Clean Energy Floor for Demand Response

Yet another important pricing issue on the horizon for national clean energy policy whose fate may depend on how preemption is approached is so-called "demand response," or efforts to reduce the consumption of electricity by reinforcing incentives for customers to purchase less.²³⁹ FERC has recently adopted an innovative set of new

237. Cal. Pub. Utils. Comm'n, 132 FERC ¶ 61,047, at 61,337 (2010).

238. Another way of recognizing a floor preemption approach to the Federal Power Act is to find that it does not apply to a transaction. For example, in Sun Edison LLC, 129 FERC ¶ 61,146, at 61,146 (2009), a solar power company petitioned for a declaratory order to the effect its rooftop solar installations need not comply with the FPA. *See id.* The company explained that its business model involved installing and owning rooftop solar panels, and selling the electricity to the customer owning the building. *Id.* While the great majority of its installations only offset, and never exceeded, the building's total electric needs, occasionally the output of some installations would exceed the building's load, and would be contributed into the electric system of the local utility under the applicable net metering system. *Id.* at 61,619. This "sale for resale"—from SunEdison, to a customer, to the local utility—could be viewed as a wholesale electricity transaction subjecting SunEdison to the federal price oversight of the FPA. However, citing to existing precedent, the Commission agreed with SunEdison that a sale for resale under the auspices of a state net metering program will not implicate the FPA so long as the customer's net metering proceeds do not exceed the customer's charges in any billing period. *Id.* at 61,620–21. Thus, the Commission has observed a gap within the FPA's sweeping preemption to allow for state net metering programs to encourage small third-party installations.

239. A natural incentive to consume less electricity exists in the avoidance of the purchase price for whatever increment is foregone. Demand response programs supplement that existing incentive.

policies regarding demand response.²⁴⁰ FERC's demand response rules are highly complex, but at their core they set out to create incentives in the pricing of electric power that actually reduce the consumption of electricity, including the possibility that firms could be compensated not to purchase electricity in wholesale markets.²⁴¹ Much like a new transmission line, demand response can alleviate congestion and provide reliability benefits to the entire system.²⁴² It also can advance values associated with conservation and environmental protection, insofar as reductions in demand may allow plants to operate at more efficient levels, or make the construction of new facilities unnecessary.²⁴³ Given the enormous opportunity demand response presents to reduce demand and change investment decisions about new power plants and transmission lines, FERC Chairman Jon Wellinghoff has described demand response as the "killer app for the smart grid."²⁴⁴

However, for FERC's new demand response approach to survive legal challenges, the Commission will likely need to depend on an expansive interpretation of the goals of the FPA as including not only consumer protection, but also reliability, conservation, and environmental goals.²⁴⁵ Moreover, if FERC's demand response pricing rules are interpreted as a ceiling under the FPA, state and local conservation approaches that require utilities to make conservation-minded decisions in procuring wholesale power could be preempted if they require utilities to pay more than the rates

240. See generally Demand Response Compensation in Organized Wholesale Energy Markets, Order No. 745, 76 Fed. Reg. 16,658 (Mar. 24, 2011) (codified at 18 C.F.R. pt. 35) (providing market rules for demand response in organized wholesale energy markets).

241. *Id.* at 16,666.

242. *Id.*

243. Some environmental law scholars have begun to recognize the significance of reducing demand and changing consumption patterns in advancing environmental goals. See John C. Dernbach, *Harnessing Individual Behavior to Address Climate Change: Options for Congress*, 26 VA. ENVTL. L.J. 107, 144–56 (2008); Michael P. Vandenberg & Anne C. Steinemann, *The Carbon-Neutral Individual*, 82 N.Y.U. L. REV. 1673, 1687–95 (2007).

244. *Wellinghoff: FERC Creating Market for DR, the 'Killer App'*, SMARTGRIDTODAY (June 20, 2010), <http://www.smartgridtoday.com/articles/wellinghoff-ferc-creating-market-for-dr-the-killer-app-1?v=preview>; see Jon Wellinghoff & David L. Morenoff, *Recognizing the Importance of Demand Response: The Second Half of the Wholesale Electric Market Equation*, 28 ENERGY L.J. 389, 393–96 (2007).

245. Although to date many conservation policies related to pricing, such as demand-side management, have been adopted by state regulators, in fact there is a long-standing foundation in federal statutes for conservation policies as well. See generally James W. Moeller, *Electric Demand-Side Management Under Federal Law*, 13 VA. ENVTL. L.J. 57 (1993) (discussing the history of federal demand-side management).

FERC has approved for avoided consumption. For example, a state-approved plan to reward utility conservation that leads it to reduce its purchases and participation in the wholesale market, especially where the costs exceed the proportional payment plan FERC has approved in its demand response rules, runs afoul of the FPA if FERC's rates are considered a ceiling. But it is hard to see how such a plan presents an obstacle to federal goals of promoting efficiency, conservation, and energy independence under the FPA. A unitary preemption approach will limit the ability of states and localities to reward utilities for their conservation practices and to innovate in other conservation measures.²⁴⁶ By contrast, treating FERC's demand response policies as a preemption floor would encourage state and other subnational regulators to innovate.

d. The Implications of an FPA Clean Energy Floors on Federal Subsidies

In addition to promoting innovation, floor preemption in statutes such as the FPA helps to reduce overreliance on federal subsidies in promoting renewable and clean energy and to encourage the use of subnational subsidies over federal programs. If financial incentives for renewable projects run afoul of a unitary "just and reasonable" ceiling under the FPA, it steers the primary responsibility for clean energy subsidies toward the federal government. This can preclude local or regional allocation of project costs by regulators closest to those who stand to benefit the most from these projects. Another unintended result of expanding federal authority may be overreliance on federal tax breaks and subsidies as the primary vehicle for promoting investments in clean energy.²⁴⁷ By contrast, clean energy floors provide an opportunity to better distribute the risks of clean energy investments geographically—focusing on those jurisdictions whose constituencies want to undertake the cost and risk of clean energy policies in exchange for the perceived benefits. Subnational entities such as cities, states and regional institutions are much better suited than federal regulators to adapt investments to specific

246. Although it preceded FERC's actual adoption of demand-response rules, for an excellent discussion of the possible preemption challenges to demand response, see Wellinghoff & Morenoff, *supra* note 244, at 412–19 (urging a coordinated federalism approach to demand response).

247. See JENKINS ET AL., *supra* note 3, at 14 (“[N]early all clean tech segments remain reliant on public policy support and subsidy. That support is now poised to decline precipitously, presenting new challenges and raising the possibility of market turmoil ahead for several US clean tech markets.”).

regional opportunities and challenges, and are more likely to place the costs of these programs with those groups of customers most likely to benefit. Clean energy floors can also provide for more frequent updating and adaptation of subsidies as new technologies develop.

III. FLOOR PREEMPTION'S CHALLENGES FOR MULTI-PURPOSE REGULATORY STATUTES

Floor preemption has considerable promise to overcome problems with fragmentation, stagnation, and stalemates in the interpretation of energy statutes in developing clean energy policies. Yet subnational regulatory innovations in energy law have been hobbled by courts' expansive implied preemption approach to statutory standards, as is perhaps best illustrated by judicial decisions imposing price ceilings for renewable projects under PURPA and judicial inventions such as the filed rate doctrine that impose wholesale electric power price ceilings under the FPA. Such doctrines emphasize a singular statutory purpose as completely preempting state or local regulation under a conflict or obstacle analysis, and limit innovation by subnational regulators including states, localities, and RTOs. Although floor preemption is consistent with the history and framework of both PURPA and the FPA, at least in addressing certain clean energy issues, not every energy statute, and certainly not every regulatory statute, calls for cooperative federalism. Congress has a variety of federalism approaches at its disposal in addressing regulation issues. In this Part, we address some of the limits to floor preemption. After surveying some of these pragmatic limits to floor preemption, including the challenge of multiple-goal statutes and public choice problems, we advance an implied preemption framework to assist courts in identifying strong statutory candidates for floor preemption in energy law and other regulatory contexts, and also highlight when it is inappropriate to impose a floor preemption approach on statutes.

A. *Regulatory Baselines and Multiple Goal Statutes*

One challenge involved in favoring clean energy floors in energy statutes centers on the difficulty and indeterminacy of setting baselines in view of statutory guidance. Baseline concerns pervade modern regulation, as any effort to push regulatory standards in a direction must be evaluated with respect to its change from a status

quo.²⁴⁸ Floor preemption is well adapted to unilinear regulation problems involving identified baselines, like quantitative pollution controls intended to protect the environment. In such contexts, regulatory goals and targets are sufficiently well defined. If all policy choices are to be evaluated with respect to their ability to mitigate the same social ill, the floor approach can be used to ratchet all policy, both federal and state, in a similar direction on the same continuum. Moreover, to the extent that federal authorities clearly define the regulatory baseline and articulate threshold goals for regulation, it is rather simple to monitor whether various subnational approaches to regulation are faithful to the federal floor. Perhaps this is one reason that floor preemption has fit environmental law statutes so well.²⁴⁹ A floor preemption system is created, whether or not Congress has done so expressly, when states are allowed to select different points on a continuum that translate to the shared goal of more stringent environmental regulation.

By contrast, it may be argued that standards in energy statutes depart from this model in at least two respects. First, as described above, energy statutes are typically not focused on addressing a single social ill, but are more frequently focused on solving multi-dimensional problems. Second, goals in energy statutes do not translate neatly into numerical standards along a single value continuum, and thus are arguably less appropriate for a cooperative floor preemption system. Neither concern is fatal to the idea of clean energy floor preemption, though each inevitably presents some challenges for any approach to preemption in energy law.

First, the argument that floor preemption is only appropriate for unilinear goals would leave floor preemption for only the narrowest regulatory problems. While it is true that on occasion Congress has itself defined quantitative thresholds for problems in statutes,²⁵⁰ in most cases Congress delegates the definition of thresholds to

248. See J.B. Ruhl & James Salzman, *Gaming the Past: The Theory and Practice of Historic Baselines in the Administrative State*, 64 VAND. L. REV. 1, 18–25 (2011) (explaining the importance of comparing proposed regulations with historic baselines).

249. For instance, to the extent that Congress has selected a maximum permissible number of parts per million (ppm) of a toxin, in a floor preemption regime state regulators can impose a higher regulatory burden on industry by selecting a more stringent standard (in this case, a lower number of ppm).

250. Statutes themselves may include specific thresholds (such as utilizing current pollution levels as a baseline) and may also incorporate future goals or targets, such as the 1970 amendments to the Clean Air Act, which set a ninety percent reduction target for automobile emissions by 1975. Pub. L. No. 91-604, § 6(a), 84 Stat. 1676, 1690 (1970) (codified as amended at 42 U.S.C. § 7521 (2006)).

administrative agencies. Indeed, virtually every federal safety and environmental standard in statutes delegates some discretion to agency regulators to take into account a variety of different goals in defining a pollution standard.²⁵¹ The EPA's definition of the "best available control technology" ("BACT") for emissions, for instance, is not decided by simply picking a point on a numerical continuum, but by balancing a number of considerations, including energy consumption, total source emissions, regional impacts, and cost.²⁵² Nevertheless, BACT serves as a federal floor. Thus, pollution standards in environmental law often involve multiple goals that must be balanced against the pursuit of pollution control objectives. It would be an oversimplification of environmental law to suggest otherwise. While they differ in kind from numerical environmental standards, the standards in energy statutes, which are expressed in terms such as "avoided cost" or "just and reasonable rates," also involve a balance of multiple purposes. Thus it is not necessary to limit floor preemption to only neatly-packaged quantitative problems with pre-defined baselines in statutes.

Moreover, floor preemption is conceptually better adapted than unitary preemption to multi-purpose statutes where Congress has delegated authority to agency actors, and may be more consistent with managing such delegations. A preemption floor provides a federal regulator with the authority to make key decisions, while also giving state and local governments the ability to adapt and experiment. Such an approach allows Congress to retain a threshold standard for evaluating performance with respect to the goals of the statute. Congress enjoys the security of knowing that a certain floor will be met, and can review whether the agency's handling of its delegated authority, and the various state and local approaches, serve the values of the statute. By contrast, a unitary ceiling standard gives Congress no clear standard for evaluating performance, other than whether the ceiling has been surpassed.

Yet one concern with preemption tools such as floors in multi-purpose statutes is that at the extreme they may lead to value relativism and subjectivity in statutory interpretation, potentially obscuring whether the statutes are implemented in a way that is consistent with Congress's intent. For example, another way of

251. For example, regulatory standards promulgated pursuant to the Occupational Safety and Health Act and the CAA that delegate basic tradeoffs to agencies are discussed in Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407, 1425-39 (2008).

252. 42 U.S.C. § 7479(3) (2006).

framing the FPA's "just and reasonable" standard under the filed rate doctrine is not as a ceiling *per se*, but as a floor on the ability of utilities to recover rates. If this were the case, state regulators would be able to allow in-state utilities to recover a firm's costs from retail customers regardless of wholesale rates. Taken to its extreme, such an approach would undermine the point of federal rate regulation altogether, in that it would allow states to favor in-state firms over out-of-state suppliers.²⁵³ However, the purposes of the FPA's price regulation regime, discussed above, did not include ensuring firm cost-recovery—indeed, the history of the FPA features instances of utilities challenging aspects of the statute for failing to provide such recovery.²⁵⁴

Fortunately, when Congress delegates to an agency with multiple regulatory purposes, it is rarely so open-ended that all vectors for consideration are bidirectional; typically, Congress is motivated by a primary purpose or advancing some goal or protecting some value. Thus, close attention to statutory purpose is necessary to guide interpretations of open-ended statutory language. In other words, if assessed against the backdrop of a statute's purposes and the basic directional goals Congress was considering in its adoption and later amendments, preemption tools like floors need not commit courts to the extreme indeterminacy of statutory purpose relativism.

Furthermore, another answer to the value relativism critique is that floor preemption is less likely than unitary preemption to produce judicial statutory interpretations that ossify regulation. Some implied preemption may still be inevitable in defining what floors are, but as we discuss below, these choices will be left in the first instance to regulators; by contrast a unitary preemption approach is more likely to leave definition of the statutory ceiling to courts. Moreover, as judicial approaches such as the filed rate doctrine under the FPA illustrate, once a set of values is defined by judicial precedents, it constrains the ability of both federal and subnational regulators to adapt that statute to new regulatory problems. By contrast, floor preemption ensures that when values are to be weighed or calibrated

253. As discussed above, case law developed under the filed rate doctrine prohibits this kind of conduct. *See supra* notes 166–70 and accompanying text (discussing price squeeze).

254. Many early constitutional challenges to New Deal statutes involving energy and their implementation focused on how federal regulation interfered with the protection of firms' investment-backed expectations. *See* Susan Rose-Ackerman & Jim Rossi, *Disentangling Deregulatory Takings*, 86 VA. L. REV. 1435, 1453–57 (2000) (discussing takings cases under the Natural Gas Act and the FPA).

in multi-purpose statutes it will be done in the first instance not by courts, but by Congress or an administrative agency.

B. *Public Choice Problems*

Another objection to adopting widespread floors in preemption analysis of energy statutes is the concern that it may create an opening for decision-making that is plagued by public choice problems. Increasing state and local autonomy can, of course, both encourage parochialism and contribute to collective action problems. Each of these problems merits attention in assessing a statute's approach to preemption, but we maintain that neither inherently favors a unitary standard approach to preemption where Congress has not made that choice itself. Instead, much depends on the statutory framework and on the specified goals of a regulatory program.

Since James Madison's Federalist No. 10,²⁵⁵ federalism discussions have focused on the concern that state or local officials are more likely than their federal counterparts to enact policies motivated by self-interest or parochial local concerns.²⁵⁶ Even where subnational regulators purport to be motivated by consumer or environmental protection concerns, their regulatory decisions may favor incumbent firms or powerful interests. Relatedly, states may enact laws that, intentionally or unintentionally, limit the participation of out-of-state energy producers in energy markets. Given the long history of state-sanctioned power monopolies,²⁵⁷ few regulatory arenas rival energy regulation in presenting a strong risk of state regulation favoring in-state incumbents and disfavoring new entrants and out-of-state firms. Indeed this concern was one of the main purposes behind passage of the FPA, as the statute was designed primarily to help address the *Attleboro Gap*—the void of regulation left behind by the sweeping disqualification of states from regulating interstate transactions.²⁵⁸ The FPA thus provided a structure designed to disable states from the extremes of protectionist wholesale price regulation that imposed significant costs on other states, without displacing the ability of states to pursue their own retail pricing policies.

255. THE FEDERALIST NO. 10, at 84–85 (James Madison) (Clinton Rossiter ed., 1961).

256. See Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN L. REV. 551, 555–59 (2001).

257. See Spence & Prentice, *supra* note 162, at 141–43.

258. See *supra* notes 171173–77 and accompanying text.

However, given the increasing importance of regional, supra-state RTOs, it is far from clear that subnational regulation will lead to protectionist approaches, even in the energy context where powerful firms may have disproportionate influence in state and local politics. Consider the example of regional transmission cost allocation addressed by the Seventh Circuit in *Illinois Commerce Commission*.²⁵⁹ In contrast to the strict cost causation approach of Judge Posner's opinion for the majority, a notable advantage of PJM's proposed (and rejected) approach for regional transmission cost allocation was that it would have encouraged greater investment in transmission lines by allowing investors to spread more broadly the costs of new lines with systemic benefits. PJM's policy presumably sought to counter the traditional resistance to incurring costs for new transmission lines located elsewhere, despite their systemic benefits. PJM's proposed transmission cost allocation plan thus provides a convenient illustration of how subnational autonomy does not necessarily lead to protectionism. In fact, in this context a broader reading of the statute's goals to treat the just and reasonable standard as a floor, rather than a unitary standard, could actually help regional entities innovate to overcome state and local holdouts.²⁶⁰ For this reason, we think courts should be reluctant to impose unitary standards onto multi-purpose statutes to preempt supra-state regulatory approaches, especially where these have been approved by national regulators like FERC.

Putting aside supra-state regulatory approaches as an answer to parochialism concerns, such concerns may be least salient where the policies at issue impose substantial *costs* at the state and local level, as do clean energy policies such as feed-in tariffs and renewable portfolio standards.²⁶¹ A state or local government that enacts clean energy regulation is typically voluntarily incurring a localized cost in exchange for a perceived benefit that is in the future, uncertain, and dispersed beyond its own geography. Such regulation externalizes

259. See *supra* Part II.B.2 (discussing *ICC* case).

260. On the broader advantage of regional entities in addressing renewable energy challenges, see Hannah Wiseman, *Expanding Regional Renewable Governance*, 35 HARV. ENVTL. L. REV. 477, 477-514 (2011) (arguing that regional governance is preferable for overcoming barriers to renewable energy development).

261. Cf. Klass, *supra* note 85, at 364-65 (arguing that an important consideration in granting states greater leeway in regulating is whether there are "concerns regarding states acting in a protectionist manner at the expense of out-of-state industry," and concluding that this concern is unpersuasive in the context of appliance efficiency because "states have been motivated thus far to enact regulations based on efforts to achieve state energy efficiency goals or GHG reduction goals, not protecting local manufacturers").

benefits, not costs. This scenario, much like heightened state environmental regulation, simply does not constitute unfair treatment of neighbors and does not call for restraining state actors under principles designed to combat such mistreatment. Instead, it argues strongly for allowing states and localities the leeway to regulate.

On the other hand, while the ill of state and local protectionism may be overstated in the area of clean energy regulation, this is not to say that this regulatory arena is immune. The protectionism concern can be very real where there is no coordination of policies between jurisdictions, or where one jurisdiction's approach creates non-reciprocal costs that produce highly localized benefits. For example, in existing clean energy regulation, some states have shown an unsettling willingness to mandate that activities necessary for compliance with the regulation be conducted entirely within a state. A prominent example is state renewable portfolio standards. In 2010, the Canadian energy infrastructure company TransCanada sued the state of Massachusetts, alleging that the Massachusetts RPS, which required that in-state long-term power sales contracts to meet the RPS must be with in-state sources,²⁶² violated the dormant commerce clause.²⁶³ In connection with a partial settlement of the case, Massachusetts amended the offending provision of its RPS.²⁶⁴ Other RPSs contain similar requirements²⁶⁵ or provide disproportionate benefits to power suppliers from within a particular state.²⁶⁶

262. MASS. ANN. LAWS ch. 25A, § 11F(g) (LexisNexis 2012) (“In satisfying its annual obligations under subsection (a), each retail supplier shall provide a portion of the required minimum percentage of kilowatt-hours sales from new on-site renewable energy generating sources located in the commonwealth . . .”); see Steven Ferrey, *The New Climate Metric: The Sustainable Corporation and Energy*, 46 WAKE FOREST L. REV. 383, 401 (2011).

263. See Complaint at 1, *TransCanada Power Mktg. Ltd. v. Bowles*, No. 4:10-cv-40070-FDS (D. Mass. Apr. 16, 2010).

264. Order Adopting Emergency Regulations, D.P.U. 10-58, at 5 (Mass. Dep’t of Pub. Utils. June 9, 2010) (codified at 220 MASS. CODE. REGS. 17 (2013)) (stating that the “Department [of Public Utilities] suspends the applicability of the requirement . . . that renewable energy generation sources be located ‘within the jurisdictional boundaries of the [C]ommonwealth, including state waters or adjacent federal waters.’”).

265. California’s RPS, for instance, places the requirement right in the definitions section:

(a) “Renewable electrical generation facility” means a facility that meets all the following criteria:

.....

(2)(A) The facility is located in the state or near the border of the state with the first point of connection to the transmission network of a balancing authority area primarily located within the state.

Viewed sympathetically, such RPS provisions reflect a concern that nearby states will have laxer standards, and allowing jurisdictional utilities to comply with the state RPS by tapping those out-of-state sources will defeat the spirit of the RPS. They can also reflect the desire to increase the stature of the renewable energy industry within the state, a seemingly inoffensive impulse.²⁶⁷ A more skeptical view, of course, is that they represent constitutionally impermissible favoritism for in-state producers, or industrial sectors that are unique to a particular state's geography, and thus disadvantage out of state producers.

It bears noting that there are ways of ensuring against protectionism without re-writing federal statutes to endorse unitary preemption standards. In particular, the federal courts have developed an elaborate dormant commerce clause jurisprudence, and regularly apply it to restrain the protectionist impulses of state governments.²⁶⁸ Although it has long been criticized as inconsistent,²⁶⁹ the dormant commerce clause jurisprudence remains a safeguard for evaluating the most problematic state laws that impose costs on new

(3) If the facility is outside the United States, it is developed and operated in a manner that is as protective of the environment as a similar facility located in the state.

CAL. PUB. RES. CODE §§ 25741(a)(2)(A), 25741(a)(3) (West 2013).

266. See, e.g., CAROLYN ELEFANT & EDWARD A. HOLT, CLEAN ENERGY STATES ALLIANCE, THE COMMERCE CLAUSE AND IMPLICATIONS FOR STATE RENEWABLE PORTFOLIO STANDARD PROGRAMS 14–15 (2011), <http://www.cleanenergystates.org/resource-library/resource/cesa-report-the-commerce-clause-and-implications-for-state-renewable-portfolio-standard-programs-pdf> (highlighting some RPS standards' emphasis on favoring local technologies, such as swine waste in North Carolina, fuel cells in Connecticut, and poultry litter in Maryland).

267. See, e.g., CAL. PUB. RES. CODE § 25740.5(c) (West 2013) ("The program objective shall be to increase, in the near term, the quantity of California's electricity generated by in-state renewable electricity generation facilities."). Indeed, it seems incoherent to say that a state legislature *can* use an RPS to modify the mix of energy that reaches consumers, but cannot use the same legislative tool to require the production of more local clean energy. Nevertheless, that seems to be the result of the interaction between the dormant commerce clause and renewable portfolio standards.

268. See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994). But see *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 340–45 (2007) (distinguishing *Carbone* with a public/private facility analysis); see also Steven Ferrey, *Sustainable Energy, Environmental Policy, and States' Rights: Discerning the Energy Future Through the Eye of the Dormant Commerce Clause*, 12 N.Y.U. ENVTL. L.J. 507, 579–82 (2004).

269. See, e.g., Brandon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 449–477 (2008) (describing how cases applying the Dormant Commerce Clause doctrine show that the doctrine is experiencing "calcification," and lacks consistent rules and Constitutional grounding).

entrants and out-of-state firms without producing broader geographic benefits to justify these costs.²⁷⁰ Attributing a unitary preemption standard to federal energy statutes like PURPA and the FPA could serve a similar purpose, to the extent such statutes are construed to preempt state regulation entirely.²⁷¹ But such an interpretation throws the baby out with the bathwater: it would demean the role of states in a federalist system to suppose that the mere fact that they may occasionally regulate impermissibly in a certain area is reason to preclude them from regulating in that area *ab initio*, especially if this becomes a basic approach to statutory interpretation in areas such as energy regulation.

And finally, to think that protectionist behavior is alleviated by courts favoring unitary preemption standards is to ignore that this context is one where industry ability to lobby Congress and the federal government may be at its strongest. As J.R. DeShazo and Jody Freeman have argued, ceiling preemption is likely to be the result of “defensive preemption”—interest groups’ successful lobbying for federal regulation as a way of bypassing undesirable regulatory approaches at the subnational level.²⁷² If unitary preemption choices by Congress are the result of lobbying by the best-organized industry interest groups, then courts should favor an approach that ensures that this choice only has a preemptive effect where it is express and explicit, rather than put a thumb on the scale in interpreting statutes to favor these interest groups. Statutory interpretation decisions that impose unitary choices through implied preemption would make such choices far less transparent and would encourage the kind of regulatory choices that yield to strong interest groups without widespread and public support.

In short, concerns with self-interest and parochialism should not obstruct a presumption in favor of floor preemption contexts such as

270. *See id.* (discussing the current state of the dormant commerce clause).

271. One possible exception is the provision of the Federal Power Act, section 206, that requires the Commission to ensure that rates are not “unduly discriminatory.” 16 U.S.C. § 824e(a) (2006). Throughout the long history of the FPA, this provision has been applied to prevent discrimination by transmission owners, who are disinclined to transmit energy produced by competitors. *See, e.g.*, Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540, 21,540 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385). To the knowledge of the authors, section 206 has not been applied to prevent state-by-state discrimination, although its language is probably broad enough for that purpose. Nevertheless, as described above, precedent is available that is tailor-made for that purpose.

272. *See* J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1504–16 (2007).

clean energy. It is not clear that floor preemption will favor parochial over national concerns, and the example of transmission line siting illustrates how subnational regulation can actually help in overcoming certain state and local holdout problems. Moreover, with respect to many new policies, including clean energy-oriented policies, parochial decisions seem unlikely because the policies are initially very costly. To the extent that they violate the dormant commerce clause by impermissibly favoring local business, an adequate safeguard exists in the federal dormant commerce clause jurisprudence without reading new values onto federal statutes.

However, having made the above efforts to disarm public choice criticisms of floor preemption, it remains that, in some cases, collective action problems may make a single national standard necessary. We do not dismiss uniformity as a desirable national goal for regulation in appropriate contexts. For instance, regulatory uniformity may be necessary to promote investment, or to allow business to operate in highly uncertain and volatile environments. Nuclear safety standards are one example where such a unitary standard may make sense, since no single state may be able to solve this kind of collective action problem on its own. Also, in some contexts the costs of regulation will be so high and its benefits so diffuse and impossible to identify or monitor that a single standard will be necessary. If promoting uniformity or having a single uniform standard is the major purpose driving a statute or regulatory program, this kind of concern might properly motivate Congress to adopt a unitary standard in the context of a statute.

Our advocacy of a floor preemption approach to energy statutes does not reject these possibilities, but only counsels that such a choice should be a deliberate political choice of either Congress (reinforced by courts through express preemption) or agencies in the form of a regulation. Reliance on courts applying an implied preemption analysis should be disfavored as a means of determining whether uniformity is called for, especially in the context of multi-purpose statutes. Such an approach permits the least political of the branches to decide when uniformity concerns should trump other values in statutes. Moreover, if what is really valued is predictability, federal courts with their limited geographic reach will have limited capacity to make singular legal interpretations unless and until conflicts are resolved by the Supreme Court; this limitation contrasts with both Congress and the executive agencies, which can make explicit political judgments with national scope. For example, until the U.S.

Supreme Court clarified that FIFRA was a floor statute, industry nationwide had to adjust to multiple circuit approaches.²⁷³

C. *A Framework for Evaluating Preemption Tools*

Instead of focusing on the policy question of supremacy, the fundamental question for courts in assessing preemption tools is whether any departure from the federal scheme is consistent with the balance of purposes behind a statute as determined by either Congress or an agency—a question that is fundamentally grounded in statutory interpretation. The challenge for courts in preemption analysis is to articulate a workable analysis for determining whether, in the absence of textual guidance, subnational regulation will be allowed against the backdrop of federal regulatory programs. To a large degree, discussion of preemption tools bears similarity to substantive supremacy choices under preemption doctrine. Yet, while similar political and policy considerations may motivate assessment of preemption tools for legislative and agency decision makers,²⁷⁴ these should not dictate the analysis of reviewing courts. The dispositive preemption question cannot be so simple as whether, in the eyes of a reviewing court, state and local regulation could conceivably produce inconsistencies with any of the purposes embodied in a federal statute. Similarly, Adam Babich has warned that not every conflict with a legislative purpose should result in preemption, as the key touchstone is the “full federal regulatory purpose” of a statute, not an inquiry that gives every identifiable purpose a trump over state and local law.²⁷⁵ Given large, multipurpose federal statutes, most subnational regulation in contexts such as promoting clean energy and other new technologies will present this risk.

Our analysis of clean energy floors illustrates how the answer to this statutory interpretation question will depend on several distinct legal inquiries. The first is whether there is a decision, by either Congress or an agency, to substantively preempt in the first place—a decision that we argue should be understood as analytically distinct from the tools of preemption. Second, in deciding the appropriate tools of preemption, as with other preemption inquiries it will be

273. See Alexandra B. Klass, *Pesticides, Children’s Health Policy, and Common Law Tort Claims*, 7 MINN. J.L. SCI. & TECH. 89, 120–24 (2005).

274. See Klass, *supra* note 85, at 364–65 (presenting four policy factors to assess whether uniformity interests in a regulatory standard are strong enough to justify ceiling preemption).

275. See Adam Babich, *The Supremacy Clause, Cooperative Federalism, and the Full Federal Regulatory Purpose*, 64 ADMIN. L. REV. 1, 5 (2012).

important for a court to engage in a basic statutory interpretation analysis of identifying the goals of a regulatory program. Finally, once these goals have been identified, courts will need to apply an implied preemption analysis to decide which tools best fit which kinds of regulatory programs.

1. Evaluating Congressional Intent to Preempt

Initially, our study of preemption tools in the clean energy context stresses the importance of disentangling the decision of a national political actor, whether Congress or an administrative agency, to substantively preempt state and local law, from a decision regarding the tools of preemption. The former inquiry is, at its core, a political decision by either Congress or an administrative agency to adopt national supremacy with respect to a particular substantive issue of economic or social regulation. Where Congress explicitly makes such a choice itself, courts stand on solid ground in finding some preemption, but even this does not fully answer the issue of which tools are appropriate to the problem. The form and scope of preemption is much more an inquiry into regulatory design for accomplishing a particular purpose. Sometimes Congress will pick this regulatory design itself. As is discussed above, statutes such as the CWA and CAA clearly preempt state and local law, and Congress has also chosen a distinct effect for preemption in such contexts, in the form of floor preemption, over unitary preemption.²⁷⁶

On the other hand, where Congress is silent or ambiguous about substantive preemption, the substantive preemption decision and the regulatory design decision will be made by an agency to which Congress has delegated authority, but they should be assessed as two distinct and independent decisions. As to substantive preemption, ideally an agency will make any substantive preemption decisions in a transparent political process, where an agency head actually makes a political choice, such as in the adoption of a notice and comment rule.²⁷⁷ Courts should favor these kinds of agency substantive decisions to preempt over dubious claims of preemption based on no agency decision,²⁷⁸ or claims of agency preemption that are patched

276. See *supra* notes 34–42 and accompanying text.

277. See Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 899 (2008) (noting that the “additional burdens imposed on the agency by such procedures [as notice and comment rulemaking], moreover, increase the enactment costs of preemptive regulation”).

278. As others have noted, substantive field preemption based on a potential for agency regulation is highly suspect. See generally Jonathan Remy Nash, *Null Preemption*,

together from several disparate, less visible regulatory decisions that do not acknowledge the preemption decision they purportedly support. If a deliberate and visible agency choice to substantively preempt state and local law itself also speaks directly to the tools of preemption, courts should give credence to the agency's choice. If the agency itself has not made any such decision, however, our review of clean energy regulation highlights a remaining need for courts to assess preemption tools before limiting the choices of subnational actors.

2. Identifying Regulatory Goals to Use the Proper Tools

Outside of scenarios where the scope or form of preemption is clearly defined by Congress or an agency, our review of floor preemption in energy statutes stresses the significance of reviewing courts making an effort to identify the range of regulatory purposes in a statute as a part of an analysis of the tools of preemption and their effects. As the Supreme Court noted in *Wyeth v. Levine*,²⁷⁹ “[T]he purpose of Congress is the ultimate touchstone in every preemption case.”²⁸⁰ Several principles might inform courts' identification of statutory and regulatory purposes regarding the scope and form of preemption. The fewer the regulatory goals in a statute, the more likely ceiling preemption will be appropriate, with unitary standards best fitting single dimension regulatory problems and floor preemption best fitting multi-dimension statutes. A related question is whether, in multi-dimensional statutes, some values are given greater weight by Congress. In some instances, there will be evidence that Congress has prioritized these values, and a court will be able to determine how they relate to preemption, using the implied preemption principles highlighted below.

Where Congress itself has not given specific weights to different statutory purposes, it will in many cases have delegated tradeoffs in selecting preemption tools to an administrative agency. As a general matter, judges should be wary of making those tradeoffs themselves, and as with any substantive preemption decision, should favor tradeoffs made by an agency in a transparent political process where an agency has actually made a political choice, such as in the adoption of a rule through the notice and comment process.²⁸¹ Indeed,

85 NOTRE DAME L. REV. 1015 (2010) (arguing that a federal regulator's preemption by inaction exacerbates, rather than mitigates, problems arising from state regulation).

279. 555 U.S. 555 (2009).

280. *Id.* at 565 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

281. *See, e.g.,* Young, *supra* note 277, at 899 (making this argument).

identifying the multiple regulatory purposes of a statute and the balance of values takes on even greater significance for preemption analysis where a court is reviewing an agency regulatory choice, rather than an express choice of Congress, and inevitably requires some judicial humility in approaching the task of identifying preemption tools.

An agency to which these choices are delegated may favor unitary standards over floor preemption. If a court were to establish unitary preemption in such a context, that court should seek to avoid ossifying future adaptations of regulatory solutions over time. Therefore, a court ought to recognize that the agency's use of a certain preemption tool is not the only available interpretation of a statute's goals. In affirming an agency's resolution of a preemption question, a court is endorsing how the agency has chosen to define the regulatory purposes for this particular problem at this particular time—not as a singular reading of the statute that will dictate solutions for every other problem at any possible point in the future. For example, courts deciding that the “just and reasonable” language under the FPA requires FERC wholesale rates to serve as a ceiling on any other rate for wholesale market have not only made a preemption ruling that limits state or local regulators. They have also effectively privileged that reading of the statutory language in judicial opinions, which could preclude FERC itself from adopting a new balance or broader set of goals in interpreting the statute and that have left energy law ill-suited to adapt to new problems, such as climate change.

3. Implied Preemption Analysis

Finally, our discussion of floors in energy statutes highlights that a complete implied preemption analysis should accompany judicial assessment of preemption tools in energy and other regulatory statutes.

However, as discussed in many of the environmental and energy examples in this Article, Congress is often unclear or ambiguous with respect to preemption tools. It has long been acknowledged that, even if Congress has not expressly preempted subnational regulation, a statute may impliedly preempt regulatory choices through the use of tools like unitary standards. Both acts of Congress and agency decisions regarding preemption tools raise implied preemption challenges for courts. As a general matter, if a court is going to make any determination regarding an approach to preemption tools based on the Supremacy Clause, floor preemption is the least activist and

intrusive, is the most politically accountable, and leaves the most space for both federal and subnational law to adapt to new circumstances.

When the source of supremacy in defining preemption tools is an act of Congress, the ultimate inquiry will be into legislative purpose, with a particular focus on the history and structure of the statute at issue. A number of considerations can come into play in assessing the form of preemption in such contexts, including whether Congress itself has given uniformity purposes primacy over other statutory purposes. To begin, absent express evidence of congressional intent to occupy a field, judicial decisions seem to disfavor field preemption based on the mere possibility of federal regulation as an overbroad approach that is inconsistent with any recognition of state autonomy.²⁸² Rather, conflict preemption provides a sounder basis for any implied preemption analysis of the form and scope of agency regulation.²⁸³ In some contexts, such as in determining the preemption effects of product standards, Congress may have good reason to give uniformity purposes primacy, and an implied preemption analysis may lead to a determination that a statute contains unitary standards or a ceiling. But even this kind of analysis may need to evaluate the range of purposes, including whether it is possible for state and local governments to push product standards above the federal floor, and if so, whether Congress intended to foreclose that innovation.²⁸⁴

Where Congress has identified a range of purposes but has delegated the balance of these purposes or the weighing of values to an agency, courts are still in the realm of implied preemption analysis but face additional complexities in deciding the appropriate preemption tools. In making such a decision, courts should take a lesson from basic administrative law preemption principles. Courts should only draw preemption implications from agency action, and should be wary of attributing any preemptive effect to agency inaction.²⁸⁵ For example, this criticism applies to the way the courts

282. For a discussion of field preemption, the ultimate exercise of preemptive power where states are left no ability whatsoever to regulate an activity, as a basis for broad preemption where Congress or an agency is not actively regulating an activity, see Nash, *supra* note 278, at 1041–44.

283. Some have also argued that all obstacle preemption in the context of addressing the form of preemption should be analytically reducible to conflict preemption. See Babich, *supra* note 275, at 7–9.

284. See Klass, *supra* note 85, at 364–67.

285. For critiques of preemption through inaction, see Glicksman, *supra* note 64, at 18–22. See generally Nash, *supra* note 278 (criticizing a finding of preemption where a federal regulator takes no action).

have approached the “just and reasonable” standard under the filed rate doctrine.²⁸⁶

Beyond this consideration, the approach to agency preemption tools should pay attention to democratic accountability. Nina Mendelson has argued that, as a general matter, courts should disfavor agency preemption, especially based on obstacle preemption analysis, absent clear indication of the circumstances that Congress contemplated agency preemption of states.²⁸⁷ Her argument is that, compared to Congress, agency preemption decisions are less likely to be reached through a democratic process that respects the sovereignty interests of states.²⁸⁸ Mark Seidenfeld and Brian Galle call into question whether this view of agency decision making is overly simplistic and overly impressed with the congressional decision making process, and instead advocate giving agencies themselves broad authority to make decisions regarding preemption.²⁸⁹ Yet still, to the extent that Mendelson’s concerns render suspect some broad preemption claims based on agency decisions, this would advise in favor of adopting floor approaches over unitary standards where there is ambiguity or a lack of a clear political choice by the agency. If a court is to find any preemption from agency regulation, it should generally favor a floor approach that leaves agencies the ability to draw on states to fill in the details of regulatory implementation, over a more intrusive judicial finding of a unitary preemption standard.²⁹⁰ A finding of floor preemption would draw on statutory purposes,

286. See Rossi, *supra* note 19, at 1645–46 (noting that an analysis of implied preemption under the filed rate doctrine should evaluate whether an agency actually considered the matter, not merely whether the agency had potential jurisdiction to regulate and did not do so).

287. See Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 706–25 (2008). See generally Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004) (arguing that, absent further guidance from Congress as to when a state law is preempted, courts faced with an ambiguous statute may apply a presumption against preemption, while exercising discretion as to the level of deference paid to an agency’s interpretation).

288. See Mendelson, *A Presumption Against Agency Preemption*, *supra* note 287, at 709.

289. For a superb critique of judicial efforts to limit agency jurisdiction in the name of federalism, see Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008). See also generally Gregory M. Dickinson, *Calibrating Chevron for Preemption*, 63 ADMIN L. REV. 667 (2011) (discussing the interplay between the *Chevron* standard and preemption doctrine and when each should dominate).

290. The risk of “defensive preemption” by industry through unitary standards, and especially preemption ceilings, see DeShazo & Freeman, *supra* note 272, at 1504–16, is all the more reason to require such a choice to be made in a deliberate and transparent manner, as express preemption would require.

which Congress is more likely to have discussed or considered in adopting a statute in the first instance, and not on details Congress is unlikely to have actually considered or voted on.

In this sense, as a preemption tool, the floor approach can provide a middle ground for implied preemption analysis without inviting courts to adopt judicially activist interpretations of statutes that rest on weak democratic accountability and leave little space for federal and subnational law to adapt in solving problems. Some additional implied preemption analysis will still be necessary with our approach. Like unitary preemption, floor preemption analysis requires federal courts to assess whether subnational regulation presents a conflict with or obstacle to a federal regulatory program. But notably, the inquiry for floor preemption relates to whether federal regulation and subnational regulation are moving in similar general directions, given federal goals. Any preemption effect here would relate to a judicial recognition of statutory purposes, as opposed to the selection of a singular approach. Since this focuses on a much broader assessment of the compatibility of regulatory program goals and instruments, it reduces the likelihood of judicial error or inconsistent approaches across circuits. By recognizing the basic floor values of federal programs, where federal regulators (whether Congress or an agency) have a clear direction for federal regulation in mind, federal regulators give state and local regulators clearer signals regarding the direction for regulatory programs. Federal regulators can provide a basic agenda for regulation without dictating the details. For example, if in the context of transmission capacity federal regulators were to endorse reliability goals that include the integration of variable renewable resources into the grid, it would create policy space for state and local regulators and RTOs to provide for approaches to transmission cost recovery with these goals in mind. As an approach to implied preemption, this is less likely to lead courts to controversial statutory interpretation decisions that will constrain the ability of future regulatory agencies in energy and other important policy arenas to experiment and to adapt to new circumstances.

CONCLUSION

Judicial decisions that embrace unitary standards based on an implied preemption analysis in the interpretation of key energy statutes have blinded regulators and courts from seeing the virtues of clean energy floors. Many federal judicial decisions have attributed unitary consumer protection standards to statutes such as PURPA

and the FPA. This conventional approach endorses a singular federalism model for energy statutes, limiting space for policy innovation at both FERC and at the subnational level in addressing important issues such as the promotion of clean energy. Yet it is a mistake to commit major regulatory arenas such as energy regulation to a single federalism model. Energy statutes allow for multiple preemption tools to accommodate a diversity of federalisms rather than a singular approach. In particular, interpreting energy statutes to allow for floor preemption in certain contexts, such as clean energy, holds promise to overcome fragmentation, stagnation, and stalemates, especially where federal agencies already possess considerable regulatory authority but Congress has failed to adopt recent legislation addressing the issue.

While we draw mainly from the energy law example, we also advance a preemption tool framework that agencies and courts can look to in addressing complex, multi-faceted approaches to regulation without imposing onto statutes a one-size-fits-all federalism model. Floor preemption is hardly the only tool for implementing the supremacy of federal law, and we certainly do not intend to suggest that it is a superior form of preemption in all statutory contexts. But in instances where Congress itself has not made an express regulatory choice regarding the form of preemption, regulatory floors allow federalism to address a range of concerns against the backdrop of unclear and ambiguous statutes with multiple purposes that delegate authority to regulatory agencies. Such an approach not only makes policy sense for many areas of regulation, but also provides an adaptive preemption tool for multi-purpose statutes, addresses public choice concerns, promotes accountable regulation to solve new social problems, incorporates new technologies with greater ease, and minimizes the impacts of judicial error. For this reason, an implied preemption framework for assessing regulatory floors will not only be of crucial importance in addressing policy issues such as clean energy, but also may allow a plurality of federalism models to flourish in other regulatory arenas.