What the FERC – The Likelihood that the Federal Government Can Override California's Renewable Portfolio Standards

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INTRODUCTION

Since coming to power, the Trump Administration ("Administration") has taken substantial steps to scale back the United States' involvement in domestic and international clean energy programs.[1] The list of direct Administration actions against renewable resource integration include pulling out of the Paris Agreement on climate change, suspending the Obama Administration's Clean Power Plan, lifting the moratorium on federal land leases for coal mines, and directing all federal agencies to rescind regulations that impede coal, oil and natural gas processing.[2] Even more alarming is that United States Secretary of Energy Rick Perry has made public remarks implying that the Administration will take steps to potentially limit state clean energy programs as well.[3] A Department of Energy report commissioned by Secretary Perry vaguely concluded that further analysis was needed on how to secure a reliable national energy grid with increasing shut-downs of baseload resources.[4] The study found that economic competitiveness, attributable to monetary incentives and an influx in renewable resources, was a key factor in these closures.[5] Ultimately, the study found that resources such as coal and natural gas were "critical to system resilience."[6]

This Article examines if and how the Administration could use federal preemption to prohibit state Renewable Portfolio Standards (RPS), particularly in the state of California.[7] California's legislature passed its RPS statute in 2002 and the state has since been a leader in renewable energy policy.[8] With the addition of Senate Bill 350 in 2015, California's RPS targets require electric

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[1] Julia Pyper, *How the Trump Administration Could Pre-Empt State Policies to Shore up Baseload Power*, GREENTECH MEDIA (May 4, 2017), https://www.greentechmedia.com/articles/read/how-the-trump-administration-could-preempt-state-policies-to-shore-up-basel#gs._4pqszA.

[2] *Id.*

[3] *See* Stuart Caplan, Brian Harms & Emily Prince, *Trump Administration Considers Preemption of State Renewable Policies*, RENEWABLE ENERGY INSIGHTS, TROUTMAN SANDERS (May 24, 2017), http://www.renewableinsights.com/2017/05/trump-administration-considers-preemption-state-renewable-policies/ (internal quotes omitted).

[4] U.S. DEP'T. OF ENERGY, STAFF REPORT ON ELECTRICITY MARKETS AND RELIABILITY 14 (August 2017) ("[T]he continued closure of traditional baseload power plants calls for a comprehensive strategy for long-term reliability and resilience.").

[5] *Id.* at 13-14.

[6] *Id.* at 14 (noting that with increased decommissioning of baseload resources such as natural gas, coal and large hydro, there will be an added need to further study a comprehensive strategy to develop a domestic energy portfolio that can "ensure grid reliability and resilience.").

[7] *See infra* Part II.C (defining Renewable Portfolio Standards as state-wide programs intended to encourage electric utilities to increase renewable resource utilization).

[8] UNION OF CONCERNED SCIENTISTS, CALIFORNIA'S RENEWABLE PORTFOLIO STANDARD (RPS) PROGRAM (2016), http://www.ucsusa.org/clean-energy/ca-and-western-states/renewables-portfolio-standard#.WaOnpHeGPOQ.

utilities to include fifty percent renewables in their electricity portfolios by 2030.[9] However, due to the nature of the interaction between the state and federal government, state-level policy may also be subject to some federal oversight.[10] The federal government exercises "authority over all interstate and wholesale electricity commerce" via the Federal Energy Regulatory Commission (FERC).[11] However, there are limits on what FERC can regulate; for example, FERC cannot regulate "local distribution of electricity, retail sales rates, siting, construction, environmental matters, or generator safety requirements."[12] Therefore, the question of how the federal government could preempt California's RPS arises when there is a conflict between the state's strong push for renewable energy and the federal government's desire to "intervene in state renewable energy policies to protect grid security and reliability."[13]

A number of Supreme Court cases have sought to resolve similar questions and provide some insight as to how the federal government may proceed to preempt California's RPS policies.[14] The federal government could use the doctrine of field preemption, in which Congress would have intended to preclude any state regulation in a particular area of the law.[15] Alternatively, the federal government could employ conflict preemption, in which it would have to show that the state law is in direct conflict with a federal law thereby making compliance with both laws impossible.[16]

This Article analyzes the preemption doctrine and its applicability to California's RPS Program. Part I of this Article will discuss the relevant law to provide background about the issue starting with the broad concept of preemption and narrowing to the specifics of the California RPS.[17] Part II will focus on various applications of the preemption doctrine.[18] This analysis explores whether conflict preemption or field preemption are sufficient justifications for the federal government to invalidate California's RPS.[19] Part II

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[9] *Id.*

[10] Daniel A. Lyons, *Federalism and the Rise of Renewable Energy: Preserving the State and Local Voices in the Green Energy Revolution*, 64 Case W. Res. L. Rev.1619, 1624 (2014) (noting that while renewable issues are regional in scope, there is still a federal interest that might necessitate the need for cooperative federalism).

[11] Ilya Chernyakhovskiy, Tian Tian, Joyce McLaren, Mackay Miller, and Nina Geller, NATIONAL RENEWABLE ENERGY LABORATORY, U.S. LAWS AND REGULATIONS FOR RENEWABLE ENERGY GRID INTERCONNECTIONS 2 (2016), https://www.nrel.gov/docs/fy16osti/66724.pdf.

[12] *Id.*

[13] *See supra* note 3.

[14] *See jnfra* Part II-IV.

[15] Arizona v. United States, 567 U.S. 387, 401 (2012).

[16] California v. ARC America Corp., 490 U.S. 93, 93 (1989).

[17] *See jnfra* Part I.

[18] *See jnfra* Part II.

[19] *See jnfra* Part II.A-B.

reviews a case study of a similar claim brought against a state RPS program.[20] Part II will also review how the preemption doctrine applies to the California RPS program.[21] Lastly, Part II includes an analysis of dual sovereignty as an additional layer to the preemption doctrine.[22] The focus of Part III will include analysis of a changing regional transmission landscape and alternative regulatory schemes to avoid a preemption challenge.[23] Lastly, the Conclusion will provide conclusory remarks and provide an overview of the next legal steps.[24]

I. BACKGROUND

A. *Preemption*

Though the preemption doctrine appears legalistic and enigmatic, at its core it raises key concerns about how to best balance authority and power between state and federal governments.[25] The United States Constitution provides the primary basis for the analysis of federal preemption.[26] The Supremacy Clause states that the Constitution and all federal laws are the "supreme law of the land."[27] In other words, federal laws are intended to overrule conflicting state laws.[28] This concept, though vague in plain text, was clarified by a number of landmark cases that sought to define and interpret the Supremacy Clause.[29] The United States Supreme Court in *McCulloch v. Maryland* noted that the federal government's purpose is to act on issues that require a cohesive legal structure.[30] Therefore, even though the federal government at its creation was one of limited, enumerated powers, the Court interpreted the Supremacy Clause to give the federal government a fairly expansive hold over policies that might impact

[20] *See jnfra* Part II.C.

[21] *Id.*

[22] *See jnfra* Part II.D.

[23] *See infra* Part III.

[24] *See jnfra* Conclusion.

[25] Stephen Wermiel, *SCOTUS for Law Students (Sponsored by Bloomberg Law): Preemption Again*, SCOTUSBLOG (Mar. 11, 2013, 11:05 AM), http://www.scotusblog.com/2013/03/scotus-for-law-students-sponsored-by-bloomberg-law-preemption-again/.

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

[27] *Id.* ("[The] Constitution, and the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

[28] Hughes v. Talen Energy Mktg., LLC, 136 S.Ct. 1288, 1297 (2016).

[29] *See generally* McCulloch v. Maryland, 17 U.S. 316 (1819); *see also* Gibbons v. Ogden, 22 U.S. 1 (1824).

[30] *McCulloch*, 17 U.S. at 405 ("Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts.").

more than one state.[31] Likewise, and somewhat related to the topic of preemption, the Supreme Court initially took a fairly expansive view of the Commerce Clause in which it held that the federal government could exercise its powers liberally within the confines of the constitution.[32]

Over time, the Supreme Court began to revisit the broad construction of federal power.[33] This coupled with a stricter application of the Tenth Amendment has resulted in significantly more protections for state governments. In *National League of Cities v. Usery*, the Court held that Congress could not regulate in an area that was traditionally left for state governments to manage.[34] Likewise, in *New York v. United States*, the Court took a hard line on limiting the federal government from coercing states to implement federal policy.[35] Similarly in *Printz v. United States*, the Court held that the federal government's involvement in directing state government officials was also not justifiable.[36] These three cases and others in that time frame collectively established the Court's desire to allow states to retain control over certain policy areas and to provide clear limits on federal governmental action.[37]

The modern interpretations of the scope of federal power therefore are often in direct conflict with the Supremacy Clause, which still provides basis for strong federal authority.[38] As such, the Court has looked to the doctrine of preemption to determine when a federal statute should override state law.[39] Whether or not a federal law has a preemptory effect depends on congressional intent,[40] which can either be "explicitly stated in the statute's language or implicitly contained in its structure and purpose."[41] Furthermore, it is important to note that where Congress has delegated authority to an agency to partake in rulemaking, agency regulations are subject to the same preemption principles as federal statutes.[42]

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[31] *Id.*

[32] *Gibbons*, 22 U.S. at 196-97.

[33] *See* Nat'l League of Cities v. Usery, 426 U.S. 833 (1975); New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997).

[34] *Nat'l League of Cities*, 426 U.S. at 852.

[35] *See New York*, 505 U.S. at 149.

[36] *See Printz*, 521 U.S. at 933.

[37] *See* Paul S. Weiland, Comment, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 Harv. Envtl. L. Rev. 237, 252 (2000) ("Collectively, these decisions may be indicative of the Court's tendency to scrutinize federal actions to a greater degree now than in the past.").

[38] *See id.*

[39] *Id.*

[40] Atay v. Cnty. of Maui, 842 F.3d 688, 699 (9th Cir. 2016).

[41] Cipollone v. Liggett Grp., 505 U.S. 504, 516 (1992).

[42] Fellner v. Tri-Union Seafoods, L.L.C., 539 F.3d 237, 243 (3d Cir. 2008) ("Where Congress has delegated the authority to regulate a particular field to an administrative agency, the agency's regulations issued pursuant to that authority have no less preemptive effect than federal statutes, assuming those regulations are a valid exercise of the agency's delegated authority.").

There are three categories of preemption courts rely on: express preemption, field preemption, and conflict preemption. The latter two are generally grouped together as implied preemption.[43]

1. Express Preemption

Where a statute expressly states in plain language that it preempts state law, there is no question that the federal law will govern.[44] In other words, if the statute contains explicit preemptory language, then it would be a clear indication of congressional intent to override all state laws on the matter.[45] While it is relatively easy to identify preemptive language in a statute, it is much harder to identify the entire "scope of the preemption that Congress intends."[46] To that end, some courts have sought to look beyond the plain language of statutory text.[47] For example, the Supreme Court in *Cipolone v. Ligget Group* used "extratextual methods of statutory interpretation" that it had condoned in previous cases, but it did so only after noting that there was clear congressional intent via the plain text language.[48] Thus, in determining the scope of an explicit preemption, courts must turn to traditional methods of statutory interpretation including those that go beyond the text.[49] As such, it can be a challenge to translate what congressional intent means in practice.[50]

2. Implied Preemption

When there is no express congressional directive, federal law would preempt state law in two instances: (1) if it is in direct conflict with a federal law; or (2) if the federal law occupies a field so thoroughly such that it would be unlikely that Congress had also intended to have simultaneous state regulation.[51] These methods are called conflict preemption and field preemption, respectively.[52] The

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[43] Joel B. Eisen, *New (Clear?) Electricity Federalism: Federal Preemption of States' "Zero Emissions Credit" Programs*, 45 ECOLOGY L. CURRENTS 149, 153 (2018).

[44] Puerto Rico v. Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938, 1946 (2016).

[45] CSX Transp. v. Easterwood, 507 U.S. 658, 664 (1993) ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.").

[46] *Types of Preemption Analysis*, https://www.wneclaw.com/conlaw/typesofpreemption.html (last visited April 14, 2019).

[47] *See, e.g.*, Cipollone v. Liggett Grp., Inc., 785 F.2d 1108 (3d Cir. 1986); Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987); Malone v. White Motor Corp., 435 U.S. 497 (1978). *See also* Jamelle C. Sharpe, *Toward (A) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 GEO. MASON. L. REV. 367, 386 (2011) (noting that courts were supplementing an existing reliance on statutory language).

[48] *See Cipollone*, 785 F.2d at 1108.

[49] *See* Sharpe, *supra* note 48.

[50] *Id.* at 387 ("[I]nherent difficulty of being Congress's 'faithful agent' in preemption cases, even where Congress has provided express instructions in enacted statutory language.").

[51] Atay v. Cty. of Maui, 842 F.3d 688, 699 (9th Cir. 2016).

[52] Arizona v. U.S., 567 U.S. 387, 401 (2012); California v. ARC America Corp., 490 U.S. 93,

key challenge with respect to these forms of preemption is identifying an actual conflict of laws.[53] What that often entails is "consideration of whether Congress intended to set exclusive standards or merely minimum standards permitting states to impose more stringent controls."[54] Furthermore, a statute with express language indicating that Congress did not intend for preemption does not necessarily indicate that the language precludes all possibility of using implied preemption.[55]

Conflict preemption exists where (1) it would be impossible for a party to comply with both state and federal requirements; or (2) where the state law is an obstacle to fulfilling the federal law.[56] However, "[t]he existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute."[57]

In field preemption, congressional intent to preempt can be inferred where there is essentially no room for any supplementary state regulation.[58] The whole field will be preempted where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[59]

While the concepts of preemption are relatively simple to understand, the application of this doctrine to existing law poses a more challenging task.[60] An analysis of preemption requires a thorough understanding of the federal laws and the possible conflicting state laws at hand.[61]

B. *The Federal Energy Regulatory Commission and the Federal Power Act*

In 1935, Congress passed the Federal Power Act (FPA), which provided the primary basis for federal regulatory oversight of the domestic sale of electricity.[62] In 1977, Congress went a step further by creating the Federal Energy Regulatory Commission (FERC) via the Department of Energy

93 (1989).

53 *See* Sharpe, *supra* note 49.

54 *Id*.

55 Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995).

56 Farina v. Nokia, Inc., 625 F.3d 97, 122 (3d Cir. 2010).

57 Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982).

58 Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).

59 *Id*.

60 *See infra* Part II-IV.

61 *See infra* Part I.B-C.

62 16 U.S.C. § 824 (2012 & Supp. 2015). *See also* CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL POWER ACT (FPA) AND ELECTRICITY MARKETS 2 (Mar. 10, 2017), https://www.everycrsreport.com/files/20170310_R44783_dd3f5c7c0c852b78f3ea62166ac5ebdbd1586e12.pdf (summarizing the Act as "address[ing] the regulation of electric utilities engaged in interstate commerce, delineating federal and state jurisdiction, respectively, with respect to wholesale and retail sales").

Organization Act.[63] In this way, Congress gave FERC "exclusive authority to regulate the sale of electric energy at wholesale in interstate commerce."[64] In particular, FERC is tasked with controlling prices for interstate transactions and regulating rates and charges in relation to public utilities with respect to interstate transmissions or wholesale sales.[65] The concept of federal regulation of energy matters was thoroughly questioned in *Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric*, which concerned rate setting between two states.[66] There, the Court held that where the primary interest in the business transaction is not local to the state and is actually a national interest in disguise, Congress should have regulatory authority.[67] The *Attleboro* case left open a fundamental question about the line between interstate and intrastate effects of electricity that would impact how it would be regulated by the federal government.[68] *Attleboro* was seen as a "gap" in electricity regulation that prompted further clarification by Congress.[69] Ultimately, Congress updated the Federal Power Act to make it clear that states were prohibited from controlling wholesale electricity rates in interstate commerce.[70] In doing so, Congress bolstered FERC's jurisdiction and gave FERC the actionable authority of regulating wholesale electricity rates.[71]

Courts have continued to clarify what defines FERC's authority.[72] For example, the Court in *FERC v. Electric Power Supply Association* held that transactions must be "direct[ly] related to wholesale transactions."[73] This expanded definition allows FERC to fully "[occupy] the field of setting wholesale rates," which in turn makes regulating small-scale renewable development more feasible.[74] FERC also has jurisdiction over ensuring that

[63] CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL POWER ACT (FPA) AND ELECTRICITY MARKETS 3 (Mar. 10, 2017), https://www.everycrsreport.com/files/20170310_R44783_dd3f5c7c0c852b78f3ea62166ac5ebdbd1586e12.pdf.

[64] Allco Fin., Ltd. v. Klee, 861 F.3d 82, 87 (2d Cir. 2017).

[65] FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 762 (2016).

[66] Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 90 (1927).

[67] *Id.*

[68] Frank R. Lindh, *Federal Preemption of State Regulation in the Field of Electricity and Natural Gas: A Supreme Court Chronicle*, 10 ENERGY L. J. 277, 285 (1989).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] John Bullock, *With Energy Law Federalism Under Construction, State Policymaking May be Delayed*, NYU ENVTL. L. J., http://www.nyuelj.org/2016/11/with-energy-law-federalism-under-construction-state-policymaking-may-be-delayed/. *See generally* New York v. FERC, 535 U.S. 1 (2002); FERC v. Elec. Power Supply Ass'n 136 S. Ct. 760 (2016); Allco Fin., Ltd. v. Klee, 861 F.3d 82, 87 (2d Cir. 2017).

[73] FERC v. Elec. Power Supply Ass'n 136 S. Ct. 760, 774 (2016).

[74] John Bullock, *With Energy Law Federalism Under Construction, State Policymaking May be Delayed*, NYU ENVTL. L. J., http://www.nyuelj.org/2016/11/with-energy-law-federalism-under-construction-state-policymaking-may-be-delayed/. *See also* PPL EnergyPlus, LLC v. Nazarian, 753

wholesale rates are just and reasonable under the Mobile Sierra Doctrine.[75] This was reaffirmed in *New England Power Generators Assn., Inc. v. FERC* where the Court held that rates resulting from freely negotiated contracts are assumed to be "just and reasonable" as long as they are in the public interest.[76]

Meanwhile, states are generally responsible for managing retail sales, transmission, and certifying new electric generation resources.[77] However, even then, the federal government still retains some oversight over traditionally state-managed energy activities. For example, there are regional transmission organizations (RTOs) that "manage electric power systems across the United States by which much of the wholesale electricity is transported."[78] In these systems, the "transmission of power [is] regulated by FERC."[79] Another example of federal oversight of transmission is FERC's designation of the North American Reliability Corporation (NERC) to ensure reliability standards. Given the interconnectedness of energy markets, in 2005, Congress enacted the Energy Policy Act of 2005, which authorized FERC to select an organization to "establish and enforce reliability standards for the bulk-power system."[80] Both of these examples show that while there is some delineation between federal and state responsibilities over energy management, that the line remains blurry.

C. California Law

A renewable resource portfolio regulation requires that electricity buyers procure a certain percentage of clean energy resources to supplement their wholesale energy portfolio.[81] RPS is seen as a "market-friendly" way to encourage renewable integration as a means of phasing out fossil fuels.[82] California's RPS was originally established in 2002 as a statutory scheme to

F.3d 467 (4th Cir. 2014).

[75] Dave Poe, *A New Groundwork for Applying the Mobile-Sierra Standard*, LAW360 (March 25, 2013 12:37 PM), https://www.law360.com/articles/424901/a-new-groundwork-for-applying-the-mobile-sierra-standard (noting that the Mobile Sierra Doctrine refers to the idea that "a rate that is the result of freely negotiated contract is presumed to be 'just and reasonable' under the Federal Power Act and may only be upset if that presumption is rebutted by evidence demonstrating that it is contrary to the public interest").

[76] *Id*.

[77] FEDERAL ENERGY REGULATORY COMMISSION, FERC AND THE STATES (last visited April 14, 2019), https://www.ferc.gov/students/ferc/states.asp.

[78] CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL POWER ACT (FPA) AND ELECTRICITY MARKETS 4 (Mar. 10, 2017), https://www.everycrsreport.com/files/20170310_ R44783 _dd3f5c7c0c852b78f3ea62166ac5ebdbd1586e12.pdf.

[79] *Id*.

[80] Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594, 941.

[81] Ryan Wiser et al., *Renewable Portfolio Standards: An Introduction to Experience from the United States*, 1, Lawrence Berkeley National Laboratory, NCSL Clean Energy and Air Quality Working Group 1 (May 3, 2007), http://eetd.lbl.gov/ea/ ems/reports/62569.pdf.

[82] *Id*. at 2.

facilitate the displacement of fossil fuels and replace them with state-mandated percentages of new renewable generation.[83] The first target was thirty percent by 2013 and this target has increased periodically over the last decade and a half, ultimately resulting in a fifty percent target by 2030.[84] In 2018, the California Governor approved SB 100, which once again increased the RPS targets to sixty percent by 2030.[85] Utilities have the option of entering into electricity contracts, also known as Power Purchase Agreements, with eligible renewable energy project developers in order to meet the RPS compliance obligations.[86] RPS includes agency oversight on project technology eligibility as well as the "process for selecting the least cost bidders of renewable energy that best fit that utility's resource needs."[87]

In 2015, the California Legislature proposed a significant amendment to the California RPS and renewable energy management in the state.[88] Senate Bill 350, known as the Clean Energy and Pollution Reduction Act of 2015, was primarily intended to set new targets for clean energy and greenhouse gas reduction policies.[89] However, SB 350 also sought to start the process of expanding the jurisdictional reach of the California Independent System Operator (CAISO), which coordinates the "safe and reliable transportation of electricity on the power grid."[90] SB 350 required studying the impacts of this grid expansion.[91] The "results show[ed] that by expanding the energy grid, California would reach its 50 percent renewable energy goal while saving consumers up to $1.5 billion annually by 2030, lowering greenhouse gas emissions and adding jobs in California."[92] This bill was later supplemented by AB 813, which sought to expand or "regionalize" the CAISO footprint to encompass more of the Western Interconnection than merely California and parts of Nevada and the Pacific Northwest.[93] However, after delays caused by

[83] CAL. PUB. UTIL. CODE § 399.11 et seq. (2017).

[84] *Renewables Portfolio Standard*, DATABASE OF ST. INCENTIVES RENEWABLES & EFFICIENCY (Apr. 19, 2017), http://programs.dsireusa.org/system/program/detail/840.

[85] S.B. 100, 2017-2018 Reg. Sess. (Cal. 2018), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB100.

[86] *Id. See also* CAL. PUB. UTIL. CODE § 399.11 et seq. (2017).

[87] The California Energy Commission and the California Public Utilities Commission does these tasks, respectively. *Renewables Portfolio Standard*, DSIRE (Apr. 19, 2017), http://programs.dsireusa.org/system/program/detail/840.

[88] *Clean Energy & Pollution Reduction Act SB 350 Overview*, CALIFORNIA ENERGY COMMISSION, (last visited April 14, 2019), http://www.energy.ca.gov/sb350/.

[89] *Id.*

[90] Clean Energy and Pollution Reduction Act of 2015, S.B. 350, 2015 Sen. (Cal. 2015); CALIFORNIA ISO, THE ROLE OF THE CALIFORNIA ISO (2019), http://www.caiso.com/about/Pages/OurBusiness/The-role-of-the-California-ISO.aspx.

[91] *SB 350 Studies – Overview*, CAL. INDEP. SYS. OPERATOR (Sept. 2016), https://www.caiso.com/Documents/ISORegionalEnergyMarketFAQ.pdf.

[92] *Id.*

[93] Julia Gheorghiu, *California Approves Bill to Limit Utility Liability for Wildfires but not*

numerous uncertainties,[94] the regionalization effort was abandoned by California legislators.[95] Even though CAISO's expansion is unlikely,[96] there is a risk to the RPS program if there is inaction.[97] While at least one legal scholar has predicted that this expansion "would not alter FERC's jurisdiction and would not displace any existing state authority over environmental matters,"[98] the current Administration could seek ways to bypass this authority.[99] Therefore, this Article will explore potential tactics that the federal government may employ to federally preempt California's progressive renewable energy regime.

II. LEGAL ANALYSIS

A. *Conflict Preemption as a Potential Means of Overriding the California RPS*

The federal government does not have a comprehensive regulatory scheme for renewable energy other than some tax and incentive programs.[100] There are a number of reasons to explain why the United States has shied away from a national renewable energy policy: inefficiency of political institutions in addressing environmental concerns, inability to reach consensus with the various political actors, and concern with sharp rises in prices often associated with renewable integration, to name a few.[101] However, despite these rationales, the fact still exists that a majority of renewable policy is implemented by state jurisdictions given that FERC only has jurisdiction over wholesale

CAISO Expansion, UTILITY DIVE (Sept. 4, 2018), https://www.utilitydive.com/news/california-approves-bill-to-limit-utility-liability-for-wildfires-but-not/531483/.

94 Jim Paterson, *California Governor Postpones CAISO Expansion*, AMERICAN PUB. POWER ASS'N (Aug. 10, 2016), https://www.publicpower.org/periodical/article/california-governor-postpones-caiso-expansion (noting that a "regional power market" could lead to increased use of coal-generated power thereby increasing the region's greenhouse gas emissions).

95 Gheorghiu, *supra* note 90.

96 Hudson Sangree, *CAISO Expansion Bills Dies in Committee*, RTO INSIDER (Sept. 1, 2018), https://www.rtoinsider.com/caiso-western-rto-99047/ (clarifying that the latest unsuccessful ISO regional expansion bill was the third in the last three years and may be attributable to the "strong opposition both inside and outside of California").

97 *See* Stuart Caplan, Brian Harms & Emily Prince, *Trump Administration Considers Preemption of State Renewable Policies*, TROUTMAN SANDERS: RENEWABLE ENERGY INSIGHTS (May 24, 2017), http://www.renewableinsights.com/2017/05/trump-administration-considers-preemption-state-renewable-policies/ (internal quotes omitted).

98 Ann E. Carlson & William Boyd, *Evaluation of Jurisdictional and Constitutional Issues Arising from CAISO Expansion to include PacifiCorp Assets*, CAL. INDEP. SYS. OPERATOR (Aug. 1, 2016), https://www.caiso.com/Documents/LegalEvaluationOfISOExpansion.pdf.

99 *See* Caplan, Harms & Prince, *supra* note 93.

100 John Miller, *How Effective are US Renewable Power Policies?*, ENERGY CENTRAL: THE ENERGY COLLECTIVE (Dec. 3, 2013), http://www.theenergycollective.com/jemiller_ep/311406/how-effective-are-us-renewable-power-policies.

101 *See generally* E. Donald Elliot, *Why the United States Does Not Have a Renewable Energy Policy*, 43 ENVTL. L. REP. 10095, 10095-97 (2013).

transportation of electricity.[102] Therefore, while express preemption may not apply in this case, there may be a stronger case to study the various implications of implied preemption such as conflict preemption.[103]

An application of conflict preemption may require "a state-by-state analysis of the impacts an RPS program is having on the security of the electric system in that state or region."[104] This is largely because each RPS program is vastly different among the states.[105] Therefore, the focus of this Article will be exclusively relevant to California's RPS and the implications that federal law might have on this particular program.[106]

1. Conflict Preemption in Case Law

Preemption was a central issue in *Oneok v. Learjet*, where the Court reviewed a claim that the price charged for natural gas from interstate pipelines purportedly affected both the retail prices as well as the wholesale market prices.[107] The plaintiffs in the case wanted to bring charges against entities that bought gas from interstate pipelines under state antitrust laws.[108] At the time, there was a clear regulatory gap for interstate transactions. Congress, therefore, felt it appropriate to authorize FERC to set rates for these transactions.[109] Furthermore, after discovering instances of price manipulation by sellers in the market, Congress also passed the Energy Policy Act which authorized FERC to regulate on the basis of preventing such manipulation as it relates to FERC's enumerated authority.[110]

The Court noted that by passing these statutes, Congress intended to fully occupy the field of wholesale sale and the transportation of natural gas.[111] Case precedent supported the idea that courts should focus on Congress' targets and

[102] *See supra* note 77; *Id. See also infra* Part II.D (discussing case law that elaborates on the challenges of establishing a bright-line).

[103] *See supra* Part I(A)(i).

[104] *See* Caplan, Harms & Prince, *supra* note 93.

[105] *Renewables Portfolio Standard*, DATABASE OF ST. INCENTIVES RENEWABLES & EFFICIENCY (Apr. 19, 2017), http://programs.dsireusa.org/system/program/detail/840; NAT'L CONF. OF ST. LEG., STATE RENEWABLE PORTFOLIO STANDARDS AND GOALS (Feb. 1, 2019), http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx.

[106] *See supra* Introduction. Note that there are other states that have already set targets for 100% renewable procurement. For example, Hawaii and Washington have targeted 100% by 2045. Other states like New Mexico and California have 100% carbon-free targets by 2045. Sierra Club, 100% Commitments in Cities, Counties, & States, https://www.sierraclub.org/ready-for-100/commitments (last visited May 16, 2019) (bearing in mind that "carbon-free" includes a broader set of energy resources than "renewable" and thus is divisive).

[107] Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1592 (2015).

[108] *Id*.

[109] *Id*. at 1596.

[110] *Id*. at 1598.

[111] *Id*. at 1594.

goals in passing a given statute.[112] Here, the federal regulation on natural gas was limited to preempting actions affecting interstate purchases in the wholesale markets.[113] In contrast, the state antitrust laws were not limited to only the natural gas industry; this was a broader regulatory scheme intended to affect all business transactions in the state.[114]

Given this reasoning, the Court agreed with the preceding Ninth Circuit holding and found that "FERC was not regulating a wholesale sale of gas but [rather was regulating] the practices that affected wholesale sales of gas as well as retail sales of gas."[115] As it turns out, this intended purpose of the federal law related to the content of the state antitrust law, which focuses on practices affecting retail rates.[116] However, it did not arise under field preemption.[117] Therefore, while the Court held that federal law did not preempt the state law in this case, the Court also noted that a conflict preemption analysis would be more appropriate.[118]

Oneok's holding represents the Court's desire to uphold Congress' legislative design, which includes a "careful balance" to ensure that state authority is not "handicap[ped] or dilute[d]."[119] However, where Congress has not fully occupied the field, the Court found that FERC and the states could both regulate.[120] As such, an analysis of whether or not the two bodies of law—state and federal—could coexist would be more appropriate.[121] This would fall under a conflict preemption analysis.[122] Therefore, while *Oneok* does not specifically analyze conflict preemption, it does explain why a court may turn to conflict preemption as opposed to other forms of implied preemption.[123] Rather than relying on whether or not the federal law was intended to occupy a field, conflict preemption is better suited for cases like *Oneok* where the state law interferes with the purpose of the federal law.[124]

The Court specifically addressed the application of conflict preemption in *Mississippi Power & Light v. Mississippi* where the Court reviewed a case of cost distribution of a nuclear power plant as ordered by FERC.[125] The plaintiff

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112 *Id*. at 1599–1600.

113 *Id*.

114 *Id*. at 1601.

115 *See* Caplan, Harms & Prince, *supra* note 97.

116 *Id*.

117 *Id*.

118 *Id*.

119 Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1601 (2015).

120 *Id*. at 1602–03.

121 *Id*. at 1595.

122 *Id*.

123 *Id*. at 1602.

124 *Id*. at 1595.

125 Miss. Power & Light Co. v. Mississippi, 487 U.S. 354, 356 (1988).

alleged that by allocating the costs of the power plant to the state, FERC had interfered with the state's authority to set retail rates.[126] At the time, Mississippi law allowed the state Public Utilities Commission to set rates that it deemed just and reasonable for the public and utility needs.[127] But under federal law, FERC was also able to use a "just and reasonable" justification for its actions and did just that in this case.[128]

Here, there was a clear conflict in the bodies of law with respect to "just and reasonable" rates.[129] As such, the Court reasoned that the states could not regulate areas of the law over which FERC has rightful jurisdiction.[130] The states do not have the authority to make a determination on what is just and reasonable, particularly if it interferes with a FERC determination of what constitutes a just and reasonable rate.[131] Orders of this nature from FERC are "binding on the states, and states must treat those allocations as fair and reasonable when determining retail rates."[132] Therefore, the Court held in this case that state regulation was in fact preempted by federal law.[133]

2. Application to California's RPS

Given the above considerations, it is likely that conflict preemption is not a sufficient justification for the federal government to invalidate California's RPS.[134] The RPS program is intended to incentivize renewable energy procurement in a way that is balanced enough to maintain grid stability.[135] On the contrary, as demonstrated in the above cases, FERC's primary duty is regulating the interstate wholesale market.[136] On its face, RPS is a state-based policy that seeks to promote state-level procurement.[137] In that regard, it is unlikely that the federal government could make any case of preemption, especially conflict preemption, given that the state-centric RPS would not interfere with FERC's wholesale jurisdictional duties.[138] While there might be an argument that the incorporation out-of-state generation might affect this jurisdictional divide, even an interstate sale of electricity can implicate out-of-

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.* at 374.

131 *Id.* at 371.

132 *Id.*

133 *Id.* at 377.

134 *See supra* Part II.A.

135 S.350, 2015 Leg., Reg. Sess. (Cal. 2015).

136 *See supra* Part I.B.

137 *See supra* Part I.B.

138 *See* FEDERAL ENERGY REGULATORY COMMISSION, FERC AND THE STATES, https://www.ferc.gov/students/ferc/states.asp (last visited April 14, 2019).

state generation.[139] For example, the California RPS program is currently set up to allow out-of-state generation to count towards RPS goals if they meet other state agency-mandated criteria.[140] Furthermore, while "FERC's jurisdiction over the sale of power has been specifically confined to the wholesale market," this is not the case for transmission.[141] FERC retains jurisdiction over the transmission of electricity "without regard to whether the transmissions are sold to a reseller or directly to a consumer."[142]

3. Counterargument

In *Oneok*, the court based its preemption analysis on the distinction between retail rates and wholesale rates as regulated by the Natural Gas Act.[143] Where regulation of retail rates had an incidental effect on wholesale rates, there was no preemption argument.[144] In *Mississippi*, however, there was a more direct conflict of state and federal law.[145] There, the primary concern was the state and federal government's simultaneous attempts to set "just and reasonable" retail rates.[146] The Court found that states could not interfere with federal authority to make a just and reasonableness determination.[147] *Mississippi* is consistent with previous Court findings that when a state law is intended to conflict with federal authority, then that law is preempted.[148] But in cases like *Oneok*, where there

[139] *See* Joel H. Mack et al., *All RECs are Local: How In-State Generation Requirements Adversely Affect Developments of a Robust REC Market*, 24 ELECTRICITY J. 8, 14-15 (2011), *available at* https://www.lw.com/thoughtLeadership/in-state-generation-requirements-hurt-rec-market. *See also* Christian Roselund, California is Already Getting 30% of its Power from RPS Renewables (w/Chart), PV Magazine (Jan. 5, 2018), https://pv-magazine-usa.com /2018/01/05/california-is-already-getting-30-of-its-power-from-rps-renewables/ (noting that the 30% generation comes from both in-state and out-of-state sources).

[140] *See* Joel H. Mack et al., *All RECs are Local: How In-State Generation Requirements Adversely Affect Developments of a Robust REC Market*, 24 ELECTRICITY J. 8, 14-15 (2011), *available at* https://www.lw.com/thoughtLeadership/in-state-generation-requirements-hurt-rec-market.

[141] New York v. FERC, 535 U.S. 1, 20 (2002).

[142] *Id.*

[143] *See Oneok*, 135 S. Ct. at 1600.

[144] *Id.* at 1602 (noting that the state's attempt to regulate the market conditions which unintentionally had an impact on "jurisdictional and nonjurisdictional rates" was not preempted). *See also* Jim Rossi, *Opinion Analysis: Scaling Back Federal Preemption in Energy Markets*, SCOTUSBLOG (Apr. 22, 2015, 12:25 PM), http://www.scotusblog.com/2015/04/opinion-analysis-scaling-back-federal-preemption-in-energy-markets/.

[145] *See supra* Part II.A.i.

[146] *Miss. Power & Light Co.*, 487 U.S. at 356.

[147] *Id.*

[148] Reply Brief for Petitioner at 1, Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591 (2015), (No. 13-271), 2013, (citing Kurns v. Railroad Friction Prods. Corp., 132 S. Ct. 1261, 1268 (2012)), http://sblog.s3.amazonaws.com/wp-content/uploads/2013/11/Western-States-Cert-Reply.pdf, ("When a state-law claim is 'aimed at' a subject Congress committed to federal control, that claim is preempted.").

was no intentional effect, the case is more uncertain.[149] While the Court in *Oneok* did not make a determination on conflict preemption, the Court did find that a conflict preemption analysis could apply where state actions conflict with federal rate-setting.[150]

Given that the intent of RPS is clearly aimed at renewable energy integration, the applicability of conflict preemption under *Mississippi* is relatively easy to contest.[151] FERC and California authority do not overlap because California's RPS program is not intended to affect wholesale rates that are under FERC's jurisdiction.[152] However, the Court's suggestion in *Oneok* that conflict preemption could apply poses an interesting question of whether or not intended impact is relevant.[153] Relying on precedent, the *Oneok* Court held that conflict preemption could apply where state regulation of retail sales conflicts with the "uniform federal regulation" intended by federal law.[154] While the parties in *Oneok* did not argue conflict preemption, it is important to note that the court was able to identify an incidental impact to wholesale rates resulting from a state program not directly related to wholesale rate-setting.[155] The California RPS program does not necessarily intend to impact wholesale rate-setting, however, projects bidding into the RPS program are required to comply with wholesale interconnection requirements.[156] That is, there is at least a distinct wholesale component to projects in the RPS program.[157] Furthermore, the RPS program might have an impact on wholesale rates because the program generally forces utilities to solicit energy from renewable resources.[158]

Yet, the ultimate outcome of a conflict preemption analysis is uncertain at best.[159] The *Oneok* Court merely suggested the use of conflict preemption and did not make a determination on it.[160] Further, the majority opinion in *Oneok* advised future courts to "tread cautiously" when dealing with preemption

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149 *See Oneok*, 135 S. Ct. at 1602.

150 *Id.*

151 *See* PACIFIC GAS & ELECTRIC CO., RENEWABLES PORTFOLIO STANDARD 2014 SOLICITATION PROTOCOL 12 (2015).

152 *See id. See also supra* Part II.A.i.

153 *See Oneok*, 135 S. Ct. at 1602.

154 *Id.* (citing Fed. Power Com. v. La. Power & Light Co., 406 U.S. 621, 633–35 (1972) (pertaining specifically to the Natural Gas Act).

155 *Id.*

156 *See* PACIFIC GAS & ELECTRIC CO., RENEWABLES PORTFOLIO STANDARD 2014 SOLICITATION PROTOCOL 12 (2015) (requiring that projects have a wholesale interconnection agreement). Wholesale market refers to the transactions between electricity generators and power suppliers like utilities, *Market for Electricity*, PJM https://learn.pjm.com/electricity-basics/market-for-electricity.aspx (last visited April 14, 2019).

157 *Id.*

158 *See Renewables Portfolio Standard*, DSIRE (Apr. 19, 2017), http://programs.dsireusa.org/system/program/detail/840.

159 *See Oneok*, 135 S. Ct. at 1602.

160 *Id.*

analyses for transactions that are not purely wholesale.[161] Even though the RPS has a wholesale component, the focus of the efforts to increase renewable integration is to impact the mix of energy for retail sales.[162] Relying on the argument that wholesale rate-setting is only one part of the purpose of the RPS program could sway a court's opinion in favor of the state.[163] Therefore, to avoid conflict preemption of California's RPS, California should primarily rely on the *Mississippi* holding.[164] The outcome of a conflict preemption analysis per the *Oneok* holding is uncertain and likely would not be enough on its own to federally preempt RPS.[165] However, even if the *Oneok* holding was sufficient, California can rely on the fact that the RPS transactions are not purely wholesale, and therefore, courts would be more likely to exercise restraint in preemption findings.[166]

B. *Field Preemption as a Potential Means of Overriding the California RPS Program*

Field preemption exists where Congress has drafted the regulation such that it intended to regulate the entire field without leaving room for state regulation.[167] The extent of field preemption is generally determined by how distinctly the regulation meets the following three characteristics: (1) the nature of the federal power, (2) the federal government's goal in regulation, and (3) the obligations imposed by the regulation.[168] There is ample authority that makes it clear that FERC is the entity authorized to regulate the wholesale market for electricity, including the market's rates.[169] Given there are no other federal laws directly governing renewable energy resources, a discussion of how California's RPS program could interfere with wholesale electricity rates between states is the first place that the federal government would likely seek to find field preemption authority.[170]

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[161] Jim Rossi, *Opinion Analysis: Scaling Back Federal Preemption in Energy Markets*, SCOTUSBLOG (Apr. 22, 2015, 12:25 PM), http://www.scotusblog.com/2015/04/opinion-analysis-scaling-back-federal-preemption-in-energy-markets/. *See generally* Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591 (2015).

[162] Galen Barbose, *U.S. Renewables Portfolio Standards: 2017 Annual Report*, LAWRENCE BERKELEY NATIONAL LABORATORY (Jul. 2017), https://emp.lbl.gov/sites/default/files/2017-annual-rps-summary-report.pdf.

[163] *See* Rossi, *supra* note161. *See generally Oneok*, 135 S. Ct.

[164] *See supra* Part II.A.i.

[165] *Oneok*, 135 S. Ct. at 1602.

[166] *See* Rossi, *supra* note 161. *See generally Oneok*, 135 S. Ct.

[167] Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).

[168] Hines v. Davidowitz, 312 U.S. 52, 70 (1941).

[169] *See, e.g.*, FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 773 (2016).

[170] John Miller, Comment to *How Effective are US Renewable Power Policies?*, THE ENERGY COLLECTIVE (Dec. 3, 2013), http://www.theenergycollective.com/jemiller_ep/311406/how-effective-are-us-renewable-power-policies.

1. Field Preemption in Case Law

One of the key cases on field preemption and its application to energy law is *Hughes v. Talen Energy Marketing*.[171] In *Hughes*, the Court reviewed Maryland's regulatory scheme to encourage new in-state generation.[172] In electricity systems, there is usually an Independent System Operator or a Regional Transmission Operator in place to manage the electrical grid either in one state or across multiple states.[173] In Maryland, that entity is called PJM Interconnection and its primary function is to anticipate future electricity needs and to accordingly acquire new generation and long-term bilateral contracts for capacity.[174] PJM Interconnection generally seeks out bids for new generation and capacity via auction until it has enough to meet the anticipated demand, and would provide some fixed price for the selected bids.[175] Given the implications to the wholesale market, FERC is fairly involved in reviewing these transactions.[176] There are two primary FERC rules that would apply to capacity transactions: (1) the "Minimum Offer Price Rule (MOPR)" which requires new generators to bid capacity at or above a price specified by PJM; and (2) the "New Entry Price Adjustment (NEPA)", which gives new generators a stable capacity price for their first three years in the market and concurrently eliminates the risk that the new generator is unable to recover its costs.[177]

Maryland's state government took issue with the fact that PJM Interconnection was not sufficiently encouraging the new generation needed for its electricity needs.[178] To address this gap, Maryland solicited bids for the construction of a new power plant and ultimately authorized the construction of a gas-fired plant.[179] The new plant was signed with its own contract price that was different than the price that PJM Interconnection would authorize.[180] The

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171 *See* Stuart Caplan, Brian Harms & Emily Prince, *Trump Administration Considers Preemption of State Renewable Policies*, RENEWABLE ENERGY INSIGHTS, TROUTMAN SANDERS (May 24, 2017), http://www.renewableinsights.com/2017/05/trump-administration-considers-preemption-state-renewable-policies/ (internal quotes omitted). *See generally* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016).

172 *Hughes*, 136 S. Ct. at 1290.

173 *See id*. *See also* Union of Concerned Scientists, How the Electricity Grid Works (Feb. 18, 2015), http://www.ucsusa.org/clean-energy/how-electricity-grid-works#.WfeoJBNSxE4 (defining the electrical grid as a means for "transmit[ting] power generated at a variety of facilities and distribut[ing] it to end users").

174 *Hughes*, 136 S. Ct. at 1290. Capacity bids are those resources that are able to deliver some amount of electricity capacity in a time of need, but are not used regularly to meet typical electricity needs. *See* PJM, *Capacity Market (RPM)* (last visited April 14, 2019), https://learn.pjm.com/three-priorities/buying-and-selling-energy/capacity-markets.aspx.

175 *Hughes*, 136 S. Ct. at 1290.

176 *See Hughes*, 136 S. Ct. at 1294.

177 *Id*.

178 *Id*. at 1290.

179 *Id*. at 1294.

180 *See id. at 1294-95*

practical implications of this contractual agreement were that the power plant would be able to bid into PJM's auction at a lower price because it would still be guaranteed a presumably higher contracted rate from the state of Maryland.[181] The Court found that these practical notions would offset the PJM price signals and auction mechanism and inevitably impact the wholesale electricity capacity rates offered by PJM.[182] By impacting the interstate wholesale rate, Maryland would be overstepping the balance of the authority between the state and federal government as set by the Federal Power Act (FPA).[183] The Court further noted that Congress passed the FPA precisely to address this concern.[184] In other words, the FPA was intended to centralize authority over wholesale electricity markets whereby the balance between state and federal authority is distributed to comprehensively address the field.[185] As such, the Court held that that the Maryland program was preempted by federal law under the doctrine of field preemption.[186] The Court also specified that a state could seek to encourage new development through other means that are "untethered to a generator's wholesale market participation."[187]

2. Application to California's RPS

Field preemption is not a sufficient justification for the federal government to invalidate California's RPS. FERC interacts with state policy, given that it regulates transmission of electricity.[188] Transmission of electricity refers to the process of moving electricity from a generation source across a "super highway" of power lines to ultimately reach the electricity consumer.[189] While there are generally intrastate and interstate components to transmission, The U.S. Supreme Court has explicitly held that electricity transmission "is essentially national in character" which means that its regulation "can only be attained by the exercise of the power vested in Congress."[190] This means that even the

[181] *Id.* at 1295.

[182] *Id.* at 1297.

[183] *Id.* at 1290.

[184] *Id.* at 1298 ("A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.")

[185] *See id.* at 1297 (citing FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 780 (2016)) (finding that the powers between state and federal government are to be "'complementary' and 'comprehensive,'" so that there are no gaps "for private interests to subvert the public welfare").

[186] *Id.* at 1290.

[187] *Id.* at 1299.

[188] *Diligent Oversight Ensures a Competitive Market*, CALIFORNIA ISO, https://www.caiso.com/rules/Pages/Regulatory/Default.aspx (last visited April 14, 2019).

[189] INSTITUTE FOR ENERGY RESEARCH, ELECTRICITY TRANSMISSION, https://www.institutefor energyresearch.org/electricity-transmission/ (last visited May 24, 2019).

[190] Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 90 (1927).

intrastate transmission is subject to FERC regulation. The transmission of electricity, including the interstate transmission of electricity, is managed by CAISO.[191] Thus, while the interaction between state and federal oversight is somewhat limited, there are some implications of FERC jurisdiction to California's renewable policies.[192]

CAISO is required to operate under a FERC-approved "tariff," which essentially provides the basic structure for the energy market being regulated and provides the basis for direct FERC jurisdiction.[193] In *Hughes*, the primary concern was the capacity market, which would look at the prospective energy needs of the electricity market.[194] California's RPS does include some overlap with capacity markets.[195] In fact, in California, a program called the Resource Adequacy program requires load-serving entities to demonstrate that they have some level of capacity beyond what is needed to serve the projected energy load for their service territory.[196] This program is generally intended to secure long-term grid reliability.[197] Within the context of renewable energy projects, CAISO will study a renewable project and determine its contribution to Resource Adequacy.[198] Specifically, renewable energy projects are categorized as "energy only," meaning that a project is not able to provide capacity services or as "deliverable," meaning that the project can provide capacity services to meet the load-serving entity's Resource Adequacy needs.[199] California's RPS allows load-serving entities to exercise some flexibility in how they select their projects, however, most entities show some preference for deliverable renewable energy projects.[200] For example, Pacific Gas and Electric, the investor-owned

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191 *See id.*

192 *See supra* Part I.C.

193 *Supra* note 188.

194 *See generally Hughes*, 136 S. Ct. 1288 (2016).

195 *See* Pacific Gas and Electric Company, Renewables Portfolio Standard 2014 Solicitation Protocol 12 (Jan. 5, 2015), https://www.pge.com/includes/docs/pdfs/b2b/wholesaleelectricsupplier solicitation/RPS2014/RPS_Solicitation_Protocol_01052015.pdf.

196 Alex Makler, *What is Resource Adequacy?*, POWER (Oct. 15, 2007), http://www.powermag.com/what-is-resource-adequacy/. In California, load-serving entities are those entities that are authorized to sell power to consumers in the CAISO service territory. CAISO, Load Serving Entity Definition Refinement: Draft Final Proposal 8 (Sept. 12, 2016), https://www.caiso.com/Documents/DraftFinalProposal-LoadServingEntityDefinititionRefinement.pdf.

197 *Id*.

198 Tam Hunt, *What Developers Should Know About 'Deliverability' in California*, GREENTECH MEDIA (Mar. 27, 2014), https://www.greentechmedia.com/articles/read/what-developers-should-know-about-deliverability-in-california#gs.9=MaEEE.

199 *Glossary of Terms and Acronyms*, CAISO (Nov. 13, 2015), http://www.caiso.com/Pages/glossary.aspx; click forward until entries 351-400 (definition for "Energy-Only Deliverability Status"). *See also* Hunt, *supra* note 198.

200 *See, e.g.*, Pacific Gas and Electric Company, Renewables Portfolio Standard 2014 Solicitation Protocol 12 (Jan. 5, 2015).

utility serving a majority of California ratepayers, clearly states a preference for resources that can contribute to the Resource Adequacy needs in its solicitation for the RPS program.[201]

In connection with the *Hughes* analysis, which focused on capacity markets, a discussion of California's RPS might similarly include a discussion of capacity.[202] In *Hughes*, the Court held that impacts to the capacity markets that were managed by PJM would interfere with FERC's authority to regulate the wholesale rate.[203] Here, as it currently stands, CAISO is a California-focused market which has the same functionality as PJM.[204] Therefore, any future expansion of CAISO that results in an expansion of the service territory could ultimately impact FERC's authority over wholesale interstate rates because a CAISO expansion would make the market an interstate market.[205] Furthermore, the rates used in the RPS program are determined and negotiated by the bidder.[206] Therefore, these rates could impact the interstate capacity market should CAISO choose to move forward with its expansion. However, as the current state of the CAISO market stands, there is no concern for impact to the interstate market via the California RPS program, which only currently impacts the electricity market in California.[207] Therefore, it is unlikely that the federal government could make a case for field preemption of the California RPS as it is today.[208]

a. Counterargument

Even without a CAISO expansion, California's RPS program may still be vulnerable to preemption because RPS impacts capacity markets and the capacity rates under FERC's jurisdiction.[209] FERC regulates the CAISO per the Federal Power Act and requires that the CAISO conform to certain operational standards.[210] FERC's authority over the CAISO pertains exclusively to "the bulk

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201 *Id.*

202 *See* Part III.A-B.

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

204 *See supra* Part II.B. Note that the Energy Imbalance Market, which is a "real-time wholesale energy trading market that enable participants . . . to buy and sell energy when needed." WESTERN ENERGY IMBALANCE MARKET, https://www.westerneim.com/pages/default.aspx (last visited May 24, 2019).

205 *See generally* PACIFICORP, http://www.pacificorp.com/index.html (last visited April 14, 2019).

206 *See, e.g.*, Pacific Gas and Electric Company, Renewables Portfolio Standard 2014 Solicitation Protocol 22 (Jan. 5 2015).

207 *See California's Renewable Portfolio Standard (RPS) Program (2016)*, UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/clean-energy/ca-and-western-states/renewables-portfolio-standard#.WaOnpHeGPOQ.

208 *See supra* Part II.B.i.

209 *See supra* Part II.B.ii.

210 Ann E. Carlson & William Boyd, *Evaluation of Jurisdictional and Constitutional Issues*

transmission system and the wholesale power markets."[211] Changing CAISO's territory will not change FERC's authority.[212] Therefore, in order for courts to find that FERC jurisdiction preempts a state program, like RPS, there would need to be a clear interference with wholesale rates.[213] The federal government would have to show that the state program "directly affects" a FERC-approved electricity rate.[214]

As noted, California's RPS includes a capacity component.[215] In particular, the RPS program allows load-serving entities, such as utilities, to select deliverable renewable energy projects that contribute to the utilities' capacity needs.[216] Since capacity markets are generally under the purview of FERC, this would imply that California's RPS program interferes with FERC jurisdictional duties in a manner that parallels the conflict in *Hughes*.[217] However, in *Hughes*, the state program in question was in clear contradiction of FERC authority because it allowed for capacity rates that were different from the FERC-approved rates.[218] The RPS program, in contrast, does not seek to alter capacity rates.[219] Projects that bid into RPS conform to FERC-approved interconnection requirements, including capacity requirements and costs.[220] Unlike in *Hughes*, the contract rates for projects signed out of RPS do not contradict FERC-approved rates, but rather incorporate pre-existing capacity rates as part of the final contract price.[221] Furthermore, FERC has generally afforded states leniency with respect to how they administer their programs beyond rate-setting.[222] States have extensive powers with respect to "directing and planning resource decisions of utilities operating within their jurisdiction."[223] RPS would likely fall into the category of "directing and planning resources decisions" that

Arising from CAISO Expansion to include PacifiCorp Assets, CAISO 3 (Aug. 1, 2016), https://www.caiso.com/Documents/LegalEvaluationOfISOExpansion.pdf.

211 *Id.* at 5 (citing Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986)).

212 *Id.* at 4 (clarifying that while regionalization would expand the footprint of the CAISO, the function of the entity would remain the same and under FERC jurisdiction).

213 *Id.* at 5.

214 *See* FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 774 (2016).

215 *See* Pacific Gas and Electric Company, Renewables Portfolio Standard 2014 Solicitation Protocol 12 (Jan. 5, 2015).

216 *See supra* Part II.B.ii.

217 *See supra* Part II.B.ii.

218 *See* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1290 (2016).

219 *See* Pacific Gas and Electric Company, Renewables Portfolio Standard 2014 Solicitation Protocol 4-6 (Jan. 5 2015) (reviewing the various purposes and goals of RPS noted show that while capacity is a metric for project bids, wholesale capacity rate-setting is not included).

220 *See id.* at 23–24 (interpreting the mathematical equation on page 24).

221 *See id.* at 12 (clarifying that the pre-existing capacity rates referenced are the deliverability rates – fully deliverable or partially deliverable – that the RPS contracts reference).

222 Carlson & Boyd, *supra* note 200, at 9.

223 *Id.* at 8 (citing Entergy Nuclear Vermont Yankee LLC v. Shumlin, 733 F.3d 393, 417 (2d Cir. 2013)).

are well within the purview of the states. Any incidental impacts that RPS would have on capacity markets would likely be seen as a reasonable impact as long as the impacts do not conflict with FERC jurisdiction.[224] Therefore, the RPS program as it currently stands will likely survive any preemption arguments.

C. *Case in Which State Renewable Programs, Including RPS, Were Not Preempted*

A theoretical understanding of federalism and the federal preemption doctrines is an important first step in determining how the federal government could override state renewable policies.[225] However, a court's analysis and treatment of an RPS program in the face of federal energy policy provides unique insights that are relevant with respect to California's RPS.[226]

1. Relevant Case Law

Just over a year after the *Hughes* decision, a federal appellate court decided *Allco Finance, Limited v. Klee*.[227] Unlike *Hughes* and other cases discussed in this Article, *Allco Finance* specifically focused on preemption of a state renewable energy program in Connecticut.[228] In this case, the plaintiff alleged two complaints against two Connecticut regulatory schemes: (1) the program that authorizes utilities to execute contracts with renewable energy generators that win bids via a solicitation process [hereinafter "Connecticut Solicitation Program"]; and (2) the RPS program that mandates renewable energy targets for utilities in the state [hereinafter "Connecticut RPS"].[229] The RPS-specific claims in this case were argued on the basis of the dormant commerce clause.[230] However, the other program was reviewed under a preemption analysis.[231]

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[224] *See id.* at 9 ("the states are free to employ a whole range of policy instruments and supports to dictate or encourage utilities' decisions regarding generation and procurement as long as they refrain from setting wholesale rates.").

[225] *See* Stuart Caplan, Brian Harms & Emily Prince, *Trump Administration Considers Preemption of State Renewable Policies*, RENEWABLE ENERGY INSIGHTS, TROUTMAN SANDERS (May 24, 2017), http://www.renewableinsights.com/2017/05/trump-administration-considers-preemption-state-renewable-policies/ (internal quotes omitted).

[226] *See* Stephen J. Humes, *Second Circuit Rejects Constitutional Attack Against Connecticut Renewable Bids*, ENERGY AND NATURAL RESOURCES BLOG, HOLLAND & KNIGHT (July 10, 2017), https://www.hklaw.com/energyblog/second-circuit-rejects-constitutional-attack-against-connecticut-renewables-bids-07-10-2017/ (noting that California filed a brief in support of the state party in the case in question and that the outcome of the case should "help[] the wholesale generation and renewable energy industries . . . understand . . . the lines of cooperative federalism in electric power").

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

[228] *Id*. at 86.

[229] *Id*.

[230] *Id*. at 92.

[231] *Id*. at 97.

While this program was not specifically referenced as an RPS program, it is a suitable comparison.[232]

The plaintiff's primary preemption argument in this case rests on the fact that the Federal Power Act gives FERC exclusive authority to regulate wholesale electricity sales.[233] There are some exceptions to this regulatory limit which are explained by the Public Utility Regulatory Policies Act (PURPA).[234] One key PURPA provision created a category of power producers called "Qualifying Facilities" that were eligible to receive more favorable rates and regulatory outcomes.[235] The plaintiffs in *Allco* claimed that the Connecticut program had exceeded the limitations of PURPA when it required utilities to contract with energy facilities that were not "Qualifying Facilities."[236] The Court, however, reasoned that because the Connecticut Solicitation Program included a provision that allowed utilities to negotiate contracts with the winning bids, the presumption was that utilities would not sign contracts if negotiations were unsuccessful.[237] Furthermore, the Court reasoned that regulating utilities is a key function that is "traditionally associated with the police powers of the states."[238] As such, the specifics of which generators can bid into a program like the one in Connecticut are under the state's purview.[239] The Court here agrees with the *Hughes* holding that any incidental impact to wholesale rates is not enough to constitute regulation of the interstate wholesale electricity market.[240] Therefore, the Court ultimately held that the preemption argument on the basis of the PURPA violation was not valid.[241]

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[232] *See id.* at 86. *See also* CAL. PUB. UTIL. CODE § 399.11 (Deering 2017). *See also Renewables Portfolio Standard*, DSIRE (Apr. 19, 2017), http://programs.dsireusa.org/system/program/detail/840 (describing California's RPS program as a solicitation program that requires electric utilities to secure contracts with renewable energy generators, which is akin to the Connecticut program).

[233] *Allco*, 861 F.3d at 97.

[234] *Id.*

[235] FEDERAL ENERGY REGULATORY COMMITTEE, WHAT IS A QUALIFYING FACILITY? (Nov. 16, 2016), https://www.ferc.gov/industries/electric/gen-info/qual-fac/what-is.asp (summarizing the intent of PURPA to encourage conservation and energy efficiency as well as provide fair electricity rates for consumers.).

[236] *Allco*, 861 F.3d at 97 ("Connecticut only has the power to compel its utilities to enter into wholesale interstate energy contracts if it does so within the bounds of the limited exception defined by Section 210 of PURPA.").

[237] *Id.* at 98 ("[The] RFP process, including any selection of preferred projects, does not obligate any [utility] to accept any bid," and that "that the winning bidders will enter into separate contracts with one or more [utilities] at the discretion of the [utilities].").

[238] *Id.* at 101 (citing Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983)).

[239] *Id.* ("Accordingly, we believe that it is settled law that specifying the sizes and types of generators that may bid into the 2015 RFP, as well as the charging of fees to bidders, without more, lies well within the scope of Connecticut's power to regulate its utilities.").

[240] *Id.*

[241] *Id.* at 98.

2. Application to California's RPS

While the previous cases discussed in this Article did not directly touch upon California's RPS program, the *Allco* case provides a much clearer basis for how a state RPS program might be federally preempted.[242] The RPS-related argument in *Allco* was primarily assessed under a dormant commerce clause claim, which is a completely separate analysis.[243] However, the Connecticut Solicitation Program is structured similarly enough to California's RPS that it provides some basis for comparison.[244] With a goal of promoting renewable energy, the Connecticut Solicitation Program required procuring energy contracts to meet renewable energy generation targets.[245] Under California's RPS program, utilities enter into electricity contracts via a similar solicitation process in order meet compliance obligations for renewable energy targets.[246] Therefore, it would be safe to assume a similar outcome for a federal preemption claim against California's RPS as it currently stands.[247] In light of *Allco*, a court would likely find any federal preemption claim against California's RPS invalid.[248]

D. *Considering Dual Sovereignty as Part of the Preemption Analysis*

The cases discussed thus far have focused primarily on the preemption doctrines as a basis for overruling state policies.[249] Aside from a traditional preemption challenge, the Administration can also turn to the general principle of federalism in order to override California's RPS.[250] This approach, referenced here as "dual sovereignty," allows the courts to focus on the root of the preemption doctrine: the balance of state and federal power.[251] The Constitution

242 *See generally supra* Part II.A–B.

243 *Allco*, 861 F.3d at 92.

244 *Id.* at 89.

245 *Id.* at 92–93.

246 *Renewables Portfolio Standard*, DSIRE (Apr. 19, 2017), http://programs.dsireusa.org/system/program/detail/840; *see also supra* Part I.C.

247 *Allco*, 861 F.3d at 101.

248 *See id.*

249 *See supra* Parts II.A-C; *see generally* Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 421–27 (2016).

250 *See generally* Part I.A. *See also* Richard Omoniyi-Shoyoola, *On Federalism in the Trump Era*, THE GATE, UNIV. OF CHICAGO (Aug. 27, 2017, 9:16 AM), http://uchicagogate.com/articles/2017/8/27/on-federalism-in-the-trump-era/ ("In theory, co-operative federalism is characterized by the central and lower level governments using their mutual power and specific advantages to work together to accomplish shared policy goals," that the federal government can encroach on state rights through methods such as coercive federalism); (Coercive federalism is when "the federal government manipulates funding streams and unfunded mandates to push the states in the intended policy direction"). *Id.*

251 Rossi, *supra* note 249, at 433. *See* JAMES T. O'REILLY, *The Basics on Federal Preemption*, *in* FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION AND LITIGATION, 1-30 (2006) (e-book), http://apps.americanbar.org/abastore/products/books/abstracts/5010047samplechp_abs.pdf.

specifically enumerates the powers granted to Congress in Article I, effectively leaving everything not listed as under the purview of the states.[252] Thus, the states generally enjoy broad powers under the Constitution.[253] However, modern interpretations of federalism recognize that there is significantly more overlap between state and federal laws.[254] Part of this overlap can be attributed to the Congressional power of creating federal laws that preempt state laws.[255]

When dual sovereignty is applied to the energy industry, it led to the development of a so-called "bright line" doctrine.[256] The "bright line" serves as a dividing line between federal jurisdiction (traditionally over wholesale rates) and state jurisdiction (traditionally over retail rates).[257] In the 1960s, the Supreme Court interpreted the Federal Power Act as establishing clear limits on this "bright line" whereby the federal government had jurisdiction over all "wholesale sales in interstate commerce".[258] However, changing energy markets have forced courts to reassess this line and to better understand how state energy policies are to operate within the context of federal regulation.[259] Therefore, a dual sovereignty or federalism challenge could add an additional layer of analysis to the likelihood of preemption of the California RPS.

A recent example of the challenge of establishing the energy "bright line" was discussed in *FERC v. Electric Power Supply Association* ("*EPSA*").[260] *EPSA*

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[252] *See* U.S. CONST. art. I, § 1. *See also* Jessica Epstein, *Dual Sovereignty Under the Constitution: How to Best Protect States Against Federal Taxation and Regulation*, 49 ARIZ. ST. L.J. 935, 936 (2017).

[253] *See* Robert R. M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 13, 14 (Cambridge Univ. Press ed., 2009) ("With a federal government of limited powers, and states wielding plenary powers. . .").

[254] *Id. See* Robert R. Nordhaus, *The Hazy "Bright Line": Defining Federal and State Regulation of Today's Electric Grid*, 36 ENERGY L. J. 203, 211 (2015). *See also* Rossi, *supra* note 249, at 402.

[255] *See* Verchick & Mendelson, *supra* note 253, at 14.

[256] Rossi, *supra* note 249, at 399.

[257] *Id.* at 400 ("Courts traditionally refer to this allocation of authority between wholesale (federal) and retail (state) energy sales as the jurisdictional "bright line" that defines spheres of exclusive authority based on a fixed, legalistic inquiry.").

[258] Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215–16 (1964) ("Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction . . . . This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.").

[259] Rossi, *supra* note 249, at 400–02 ("With the rise of interstate energy markets since the 1990s, coupled with the transformation of the traditional public utility, state regulation of the energy sector can no longer operate in isolation of broader regional and national energy policies."). *See also* Robert R. Nordhaus, *The Hazy "Bright Line": Defining Federal and State Regulation of Today's Electric Grid*, 36 ENERGY L. J. 203, 212 (2015) (referencing new technologies such as micro-grids, energy storage, demand response, and real-time pricing as examples of the challenge of "easily distinguish[ing] between wholesale and retail service").

[260] *See generally* FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016); *see also* Jim Rossi,

was a case about demand response, which is a consumer-side energy usage program that is largely unrelated to RPS.[261] However, demand response, like RPS, involves the wholesale markets because consumer reductions in energy use alter the wholesale rates that electricity providers pay.[262] Therefore, the price paid to consumers who responded to demand response signals was a primary concern in *EPSA*.[263] FERC, the entity tasked with promoting demand response programs, issued a rule establishing a "just and reasonable" pricing mechanism for utilities to follow.[264] FERC provided a detailed explanation of its rationale for choosing this mechanism, including an analysis of alternatives.[265] The Court found FERC's justification for the rule sufficient, stating that regulatory judgment is best left to the agency in charge where there is a need for technical proficiency.[266] Thus in *EPSA*, the Court held that it should give deference to federal agency actions where there was reasoned decision-making.[267] This holding established that FERC has "expansive federal authority over wholesale markets" and the related wholesale relates.[268]

This broad view of FERC's jurisdiction poses concerns with respect to California's RPS because it gives the agency more latitude on what it can regulate.[269] The *EPSA* holding was intended to address the challenge of providing a uniform compensation mechanism for demand response among interstate markets.[270] However, it also means that FERC retains a significant amount of power in making determinations that favor the federal government.[271] The implications of this could be drastic. FERC would have enough power on its own to reject renewable provisions that may fall into CAISO's purview. Under

The Brave New Path of Energy Federalism, 95 TEX. L. REV. 399, 433 (2016).

[261] *See* FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 767 (2016) (Demand response is consumer-driven program that incentivizes retail users to "shift their electricity usage during peak periods"); *see also* U.S. DEP'T OF ENERGY, OFFICE OF ELEC. DELIVERY AND ENERGY RELIABILITY, DEMAND RESPONSE, https://energy.gov/oe/activities/technology-development/grid-modernization-and-smart-grid/demand-response (last visited April 14, 2019).

[262] *See* FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 769 (2016) (noting that when consumers curb their energy usage during peak times, utilities have to purchase less electricity from the wholesale market). *See also* PJM, *supra* note 156 (defining wholesale markets as the "buying and selling of power between the generators and resellers").

[263] FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 779 (2016).

[264] *Id.* at 771.

[265] *Id.* at 784 ("[FERC] weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice.").

[266] *Id*.

[267] *See id.* at 782 (keeping in mind that this case was about a demand response program and not specifically renewable energy).

[268] *See id.* at 784; *see also* Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 433 (2016).

[269] *See* Rossi, *supra* note 249, at 433.

[270] FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 769 (2016).

[271] *See* Rossi, *supra* note 249, at 434.

this view, a CAISO expansion becomes inconsequential.[272] Therefore, while dual sovereignty may also play a role in the likelihood of federal preemption of California's RPS, FERC's authority is a secondary issue to the federal preemption question. Understanding dual sovereignty adds another layer of consideration to federal preemption, but, it does not change the outcome of analysis in this Article. Based on the current law, which clearly delineates FERC authority and state authority, it is unlikely that the federal government has a strong preemption claim directly against California's RPS program.[273]

III. NEXT STEPS

Thus far, this Article has focused on whether or not California's RPS program can be preempted under the current federal and state statutory regimes. Based on current case law, the RPS program's impact to FERC's jurisdiction will not be sufficient to trigger federal preemption.[274] Therefore, a federal preemption challenge of RPS under the current CAISO configuration is unlikely to be successful. However, this will not necessarily hold true if the Administration expands the authorities of FERC. As such, there is a need to both understand the implications of changes to FERC as well as to consider alternative options to avoid a preemption challenge.

A. *What Happens if CAISO Expands?*

There are two scenarios of changing regimes that could create cause for concern with respect to state renewable policy: (1) CAISO expansion and (2) FERC jurisdictional changes.

Expanding CAISO to a regional grid, as opposed to a California-only one, could complicate the question of whether California's RPS is preempted by federal law. Currently, this effort has been shot down in the recent legislation

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[272] *Id. See also* CALIFORNIA ISO, *supra* note 193 ("The California ISO is regulated by the Federal Regulatory Energy Commission . . . [and] operates under the terms and conditions of its FERC-approved tariff, which is modified, amended, supplemented or restated as needed.").

[273] Note that it could be argued that legislation prioritizing or subsidizing specific energy resources could impact capacity markets that are under FERC jurisdiction given that it would force capacity purchases. *See* David Thrill, PJM Capacity Market an "Existential Crisis" for Illinois Renewable Goals, Energy News (Mar. 8, 2019), https://energynews.us/2019/03/08/midwest/pjm-capacity-market-an-existential-crisis-for-illinois-renewable-goals/. However, given the limited scope of CAISO as it currently stands and lack of legislation to support more renewable incentives beyond RPS, this issue is not ripe yet for in-depth analysis in California.

[274] *See* Ann E. Carlson & William Boyd, *Evaluation of Jurisdictional and Constitutional Issues Arising from CAISO Expansion to include PacifiCorp Assets*, CAISO 5 (Aug. 1, 2016), https://www.caiso.com/Documents/LegalEvaluationOfISOExpansion.pdf (citing Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986)) (FERC's jurisdiction includes impacts to "the bulk transmission system and the wholesale power markets"); s*ee also supra* Parts II.A, II.B.

session.[275] However, given that the numerous benefits of regional expansion, California could see another push for an expanded grid operator.[276] Should this issue arise in the future, legislators should be careful to continue designing regional expansion bills to ensure that California retains oversight of the renewable policy realm.

With the current Administration in office, there is a concern that increased tensions between red and blue states could threaten state renewable energy goals.[277] Previous negotiations around the expansion gave each state in the expanded grid a single vote in determining how the grid operates, the capacity needed across the region, and how to develop the new infrastructure.[278] This would give the Administration and a number of states that were slated to join the expanded CAISO the power to force more fossil fuels into California. Furthermore, President Trump retains the power to appoint Commissioners to oversee FERC, thus giving him the ability to bring in individuals who can facilitate market rules that would make fossil fuels more favorable.[279] We are already seeing this in practice given that three of the four current FERC commissioners are Trump appointees that were confirmed between a period of 2017-2018.[280] The ability to create new and more stringent rules and the ability to approve specific terms of the CAISO grid expansion gives the Administration the power to redefine FERC's jurisdictional authority over California's RPS.[281]

New market rules, or even just the easier access to an interstate wholesale energy market, are the key points of concern with respect to the likelihood of federal preemption. An expanded grid increases the likelihood that any rates adopted as a result of renewable integration could impact the interstate capacity market.[282] Given that RPS has a capacity component to its solicitation program, there is also a greater likelihood that any grid expansion could impact capacity markets.[283] Arguably, the *Allco* holding may give some comfort to the current

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[275] Julia Gheorghiu, *California Approves Bill to Limit Utility Liability for Wildfires but not CAISO Expansion*, UTILITY DIVE (Sept. 4, 2018), https://www.utilitydive.com/news/california-approves-bill-to-limit-utility-liability-for-wildfires-but-not/531483/.

[276] Sammy Roth, *Will California's Controversial Electric Grid Plan Help or Hurt the State?*, THE DESERT SUN (Feb. 1, 2017), http://www.desertsun.com/story/tech/science/energy/2017/02/01/caiso-pacificorp-pros-cons/96840830/ (noting that benefits include more cost-effective wind energy, easier ability to sell excess solar energy to other states, and overall regional decrease in carbon emissions through selling power from fossils fuels like coal).

[277] *See id.*

[278] *Id.*

[279] *Id.*

[280] FED. ENERGY REGULATORY COMM., COMMISSION MEMBERS (Apr. 11, 2019), https://www.ferc.gov/about/com-mem.asp (bearing in mind that the specific appointment information and confirmation dates for Chairmen Chattarjee, Glick, and McNamee are found under each individual Chairman's web page).

[281] *Id.*

[282] *See generally supra* Part II.A.

[283] *See generally supra* Part II.B.

state of California's RPS.[284] However, in *Allco* the impact to wholesale rates was incidental to the regular functioning of state renewable programs.[285] In contrast, a CAISO expansion would likely make the impacts much more cognizable and measurable, providing more grounds for FERC to override any programs that interfere with its jurisdiction.

The current Administration and Congress have shown a preference for fossil fuels that will be difficult to combat at the state level.[286] Further, the dual sovereignty argument makes it clear that courts will defer to FERC authority where there is reasoned decision-making.[287] The bar is fairly low for what FERC would have to show to get rules passed that prioritize fossil fuels over renewable energy. Based on the *EPSA* holding, FERC was only required to show its rationale and reasonable assessment of alternative options with respect to its chosen regulatory path. Adding CAISO expansion into that mix only strengthens FERC's jurisdictional position. To avoid the risk of preemption under an expanded CAISO, California should continue to not seek grid expansion, particularly into states that currently have high rates of fossil fuels in their energy portfolios.[288]

B. *Other Alternatives*

Given the broad reach that FERC can have over wholesale rates, it would be ideal for California to rely on programs that allow it to set its own rates. For example, the PURPA program allows for renewable energy power producers categorized as "Qualifying Facilities" to receive more favorable rates set by the states as opposed to FERC.[289] The Court in the *Allco* case held that the PURPA violation was not valid given that any incidental impact to wholesale rates is not enough to constitute regulation of the interstate wholesale electricity market.[290] However, a more recent case, *Winding Creek LLC v. Peevey*, illustrates that the courts can interpret existing federal renewable incentive programs, like PURPA,

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284 *See generally supra* Part II.C.

285 *See generally supra* Part II.C.

286 *See* Ken Silverstein, *Can President Trump and Congress Slow Down The New Energy Economy?*, FORBES (Dec. 4, 2017, 11:42 AM), https://www.forbes.com/sites/kensilverstein/2017/12/04/can-president-trump-and-congress-slow-down-the-new-energy-economy/#4660975d3c42 (taking note that while entities can still invest in renewable energy, tax incentives favoring fossil fuels make it difficult to justify).

287 *See generally supra* Part II.D.

288 Sammy Roth, *Jerry Brown and Warren Buffet Want to Rewire the West*, THE DESERT SUN (Feb. 1, 2017), https://www.desertsun.com/story/tech/science/energy/2017/02/01/caiso-pacificorp-california-solar-wind/96201888/ (Examples of fossil-fuel friendly states that would be included in the CAISO expansion include Utah and Wyoming).

289 *See generally* Part II.C.

290 *Id*.

adversely to renewable energy.[291] In December 2017, a United States District Court held that one of California's smaller renewable energy programs was preempted because it did not follow PURPA guidelines.[292] The Court reasoned that the program's pricing structure "stray[ed] too far" from what FERC regulations required.[293] Furthermore, the program included a cap on the cumulative size of projects accepted, which directly conflicted with the PURPA program's "must-take" provisions.[294] In order to get exemptions from the wholesales rates authorized by FERC, California's program would have had to abide by the PURPA provisions.[295] In *Winding Creek*, it clearly did not.[296] Therefore, while federal reach over renewable energy integration at the state-level is limited, *Winding Creek* demonstrates that the federal government still retains some hold with respect to how programs are implemented and designed.

One solution for this problem is for California to review its RPS program for its compliance with PURPA. As it stands today, FERC has determined that states can offer rates different from PURPA as long as there is a PURPA-compliant option included in the program.[297] For RPS, this seems to be relatively easy to confirm. There already is no cap on the collective size of projects that can be signed under the RPS program.[298] Furthermore, the price is negotiated by contract.[299] Thus, it would be possible to add the FERC-determined rates to the total contract price.[300] However, ensuring strict adherence to PURPA guidelines would be the optimal next step to securing

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[291] *See State Cases, California*, STATE CALIFORNIA POWER PROJECT, https://statepowerproject.org/california/#CATAR (last visited April 14, 2019); *see generally* Winding Creek Solar LLC v. Peevey, No. 13-cv-04934-JD, 2017 U.S. Dist. LEXIS 201893 (N.D. Cal. Dec. 6, 2017).

[292] *See* Winding Creek Solar LLC v. Peevey, No. 13-cv-04934-JD, 2017 U.S. Dist. LEXIS 201893, at *24-26 (N.D. Cal. Dec. 6, 2017) (The program at issue in this case is called the Renewable Energy Market Adjusting Tariff (ReMAT) which establishes a set number of total capacity to be contracted with on a monthly from smaller generation facilities); *see also* CALIFORNIA PUBLIC UTILITIES COMMISSION, RENEWABLE FEED-IN TARIFF (FIT) PROGRAM (Jan. 12, 2018), http://www.cpuc.ca.gov/feedintariff/.

[293] *Winding Creek*, 293 F. Supp. 3d at 990. FERC required that the price paid to "Qualifying Facilities" equal the "incremental costs to an electric utility" to have to generate the energy or capacity if it had not sourced resources from the "Qualifying Facility." *Id.* at 982.

[294] *Id.* at 989 (defining a must-take provision as "a mandatory purchase obligation on the part of utilities to buy 'any energy and capacity which is made available from a qualifying facility'" (citation omitted)).

[295] *See id.*

[296] *See id.* at 289 (holding that both issues of non-compliance with PURPA were "straightforward").

[297] *State Cases, California*, STATE CALIFORNIA POWER PROJECT, https://statepowerproject.org/california/#CATAR (last visited April 14, 2019).

[298] *See* PAC. GAS & ELEC. CO., RENEWABLES PORTFOLIO STANDARD 2014 SOLICITATION PROTOCOL 12 (Jan. 5 2015).

[299] *Id.*

[300] *Id.*

California RPS' future.

As an alternative, the state can also turn to other regulatory methods to facilitate a better interaction between state and federal programs. Lobbying for legislation in Congress that leaves the rights of renewable programs exclusively to states is one idea.[301] This could include eliminating the PURPA program altogether or creating new programs that clearly lay out state and federal jurisdiction. State and federal governments can also agree to come to contractual agreements in which they agree to reassess jurisdictional challenges when they arise in an informal process outside of legislation or the courts.[302] A more extreme option includes discussing the possibility of re-structuring FERC so that it includes state representation to allow for more state input in the administrative rulemaking process.[303] These options are all dependent on the limits of the "Bright-Line" divide between federal and state power on energy matters.[304] With a presidential administration that seeks to retain more federal oversight, it is unlikely that these alternative regulatory methods will be as successful as taking immediate action. Thus, to avoid federal preemption, California should ensure that its RPS program is PURPA compliant and it should delay the CAISO expansion until this Administration is phased out.

CONCLUSION

While there was a strong push to accelerate the grid operator expansion timeline in 2016, since then the effort has drastically slowed.[305] Therefore, the concerns outlined in this Article are still in the preliminary stages. However, it seems fairly evident that the Administration would have a strong case for federal preemption if the CAISO were to continue its grid expansion. Even without expansion, there is a likelihood that the Administration could look to other similar federalism principles to override California's progressive RPS program. Ensuring that the California RPS is compliant with existing FERC programs is the first step in securing the future of the state's renewable energy goals. As we wait to see what the Administration's next move will be for the energy sector, further understanding of FERC's limitations and how this is balanced with the states' regulatory role appears to be the optimal next step.

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301 *See, e.g.*, Robert R. Nordhaus, *The Hazy "Bright Line": Defining Federal and State Regulation of Today's Electric Grid*, 36 ENERGY L. J. 203, 213 (2015).

302 *See id*. at 214-15.

303 See *id*. at 215.

304 *See supra* Part II.D.

305 Robert Mullin, *CAISO Expansion in Question as EIM Grows*, RTO INSIDER (Jan. 2, 2017), https://www.rtoinsider.com/caiso-eim-2017-36294/.