Decentralization and Deference: How Different Conceptions of Federalism Matter for Deference and Why That Matters for Renewable Energy

by Ben Raker

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Summary

This Article poses a question about deference that remains surprisingly unresolved: when Congress delegates to both state and federal agencies under a "cooperative federalism" scheme, who gets deference when interpreting that law, the state or federal agency? This question has special significance for energy and environmental law because of how common cooperative federalism is to those fields. The Article discusses a recent series of challenges relating to the Public Utility Regulatory Policies Act that pose this question, and presents an answer: courts should consider whether Congress chose "federalism" or "decentralization," and deference should operate differently depending on that choice.

In 2014, the U.S. Court of Appeals for the Fifth Circuit did a curious thing. In response to a challenge by a wind power developer, the court granted deference to a Texas state agency's interpretation of a federal regulation, even though the federal agency tasked with implementing the act, the Federal Energy Regulatory Commission (FERC), disagreed with that interpretation.[1] In 2013, the Supreme Court of Idaho found that an Idaho state agency had correctly ruled on a matter involving a different wind power developer.[2] The majority opinion failed to mention a decision by FERC that had held to the contrary.[3] In 2016, solar energy developers in Montana found themselves on the losing end of a decision by a Montana state agency.[4] FERC later held that decision to be improper under federal law,[5] but the state agency has not changed course.[6] What is going on?

While each of these cases differs in important ways, they are similar in two respects. First, they all originate in areas of the country where the mandatory purchase requirements of §210 of the Public Utility Regulatory Policies Act (PURPA) of 1978[7] still apply. Second, because these cases arise under PURPA's "cooperative federalism" scheme,[8] they present a question that remains for the most part surprisingly unanswered: who gets deference when the U.S. Congress delegates power to implement an act to both federal and state agencies?[9] Put differently, how does the logic of *Chevron* operate when Congress was not implicitly delegating to a federal agency, but explicitly delegating to federal *and* state agencies?

These questions are important, primarily for two reasons. First, on a particularized level, PURPA remains a crucial part of the puzzle of how to make renewable energy a viable commercial option, which is itself a crucial part

1. *See* Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 391, 394, 44 ELR 20202 (5th Cir. 2014); *infra* Part I.B.1.
2. Idaho Power Co. v. Idaho Pub. Utils. Comm'n, 316 P.3d 1278 (Idaho 2013).
3. Grouse Creek Wind Park, 142 FERC ¶ 61187 (Mar. 15, 2013); *see also infra* notes 111-16, 136-46 and accompanying text.
4. *See* Complaint of Vote Solar et al. for Violations of the Public Utilities Regulatory Policies Act of 1978 (Sept. 19, 2016) [hereinafter Complaint of Vote Solar], https://votesolar.org/files/3114/7430/5616/Complaint_of_MT_Commission_PURPA_Violation_before_FERC.pdf; *see also infra* notes 117-27 and accompanying text.
5. FLS Energy, Inc. et al., Notice of Intent Not to Act and Declaratory Order, 157 FERC ¶ 61211 (Dec. 15, 2016).
6. For the most part. See notes 117-27 and accompanying text, for an explanation of this matter.
7. 16 U.S.C. §824a-3, Pub. L. No. 95-617, 92 Stat. 3117, 3144. After the 2005 Amendments to PURPA, the provision of the law at issue here, §210, is not mandatory for utilities operating in competitive markets. *See* Michael D. Hornstein & Jette S. Gebhart Stoermer, *The Energy Policy Act of 2005: PURPA Reform, the Amendments, and Their Implications*, 27 Energy L.J. 25, 31-34 (2006).
8. *See infra* Parts I.A. and III.A.
9. *See*, *e.g.*, Emily Stabile, *Federal Deference to State Agency Implementation of Federal Law*, 103 Ky. L.J. 237 (2015); Philip J. Weiser, Chevron, *Cooperative Federalism, and the Telecommunications Reform*, 52 Vand. L. Rev. 1 (1999).

of our national energy puzzle.[10] While there may be some benefits to diverse interpretations of federal law throughout the country,[11] certainty is a necessary commodity in the field of renewable power generation,[12] and the risk of individual states or circuits clashing with FERC in regard to PURPA's implementation presents serious problems for renewable energy generation.

Second, on a more general level, cooperative federalism schemes are a well-established part of the repertoire of federal policy construction options.[13] For example, cooperative federalism is particularly common in our major environmental laws, and the question of deference is bubbling up there as well. In 2016, the U.S. Court of Appeals for the Ninth Circuit decided a case in which Arizona argued that it deserved deference over the U.S. Environmental Protection Agency (EPA) when it came to Arizona's state implementation plan under the Clean Air Act.[14] Challenging the assumption that federal agencies should always get deference in questions of interpretation of federal law seems to be in the air. Solving this deference riddle, therefore, will help provide a more coherent framework for addressing the inevitable problems of similar cooperative federalism schemes.[15]

This Article aims to solve that riddle, at least in regard to PURPA, and aims to provide a data point for how to solve that riddle with regard to other statutes. Specifically, it will borrow from the work of Edward Rubin and Malcolm Feeley and argue that "federalism" is sometimes better thought of as "decentralization."[16] A common assumption is that federalism, and perhaps cooperative federalism especially, is intended to capitalize on the experimental benefits of using states as laboratories, and to allow locally tailored solutions.[17] This assumption overlooks another primary goal of decentralization: that it makes administration of complex statutes easier.

If we assume that federalism is justified primarily by state-by-state experimentation and locally tailored administration, then deference to the state agency in the face of disagreement with the federal agency may make sense. If, however, we think of federalism as decentralization, and decentralization simply as an administrative tool, then the justification for deference to state agencies erodes. I argue that PURPA is an example of "managerial decentralization," and therefore courts should not grant deference to state agency interpretations of PURPA or FERC regulations when FERC has a contrary interpretation.

Part I of this Article will explain the background of the immediate issue by discussing the framework and history of PURPA, as well as an overview of the different decisions by recent courts and state agencies interpreting provisions of PURPA §210. Part II will justify the conceptual framework of thinking about different recipients of deference based on different conceptions of federalism; discuss how courts have dealt with deference in the context of cooperative federalism; and discuss the confusion surrounding federalism and the concept of decentralization and present a counterexample of "experimentalist decentralization." Part III will argue that PURPA §210 should be thought of as a managerial decentralization statute, and therefore deference should not be given to state agencies in interpretive decisions that conflict with FERC. Part IV concludes.

I. Power, PURPA, and Public Utility Commissions: The Law at Issue and Its Interpretation

This section will focus primarily on a 2014 decision by the Fifth Circuit, *Exelon Wind 1, LLC v. Nelson*,[18] in which a federal court upheld a Texas state agency's interpretation of a FERC regulation in the face of a contrary opinion by FERC, and will explore similar cases that involve litigation under the same statute and disagreements between state agencies and FERC. Before discussing these cases in detail, the section will orient the reader with the basic history and function of PURPA and the provision of that law at issue in these cases.

A. PURPA §210

The 1970s began with an oil shock that caused tremendous turmoil in the United States.[19] As the decade progressed, gas lines, oil rationing, and cardigan sweaters[20] came and went, but the realization that the United States had an energy problem remained. The Richard Nixon, Gerald

10. *See infra* Part III.B.
11. *See infra* Part II.C.
12. *See* Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 404, 44 ELR 20202 (5th Cir. 2014) (Prado, J., dissenting) (noting that in order "to encourage [renewable power] production, [FERC] regulations had to provide the certainty that comes with having a long-term obligation"); *see also infra* Part III.B.
13. *See infra* Part II.A.; *see also infra* Part III.A. (discussing the Clean Air and Clean Water Acts).
14. Arizona ex rel. Darwin v. Environmental Prot. Agency, 815 F.3d 519, 530 (9th Cir. 2016) ("Arizona (with the support of [Salt River Project Agricultural Improvement and Power District]) contends, to the contrary, that Section 169A's allocation of initial [best available retrofit technology] authority to the states requires that we defer to '*the state's* expert judgments, not to EPA's.'").
15. For instance, the Clean Power Plan involved a cooperative federalism approach that, like PURPA, involves a federal agency promulgating regulations that will then be implemented by states. *See* Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014, 80 Fed. Reg. 64966 (proposed Oct. 23, 2015).
16. *See* Malcolm M. Feeley & Edward Rubin, Federalism: Political Identity and Tragic Compromise (2008); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903 (1994).
17. *See* Rubin & Feeley, *supra* note 16, at 917-26 (discussing the common justifications for federalism, including "citizen choice" and "experimentation").
18. Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 44 ELR 20202 (5th Cir. 2014).
19. Meg Jacobs, Panic at the Pump: The Energy Crisis and the Transformation of American Politics in the 1970s 49-85 (2016) (discussing the Arab oil embargo and social and political turmoil that resulted).
20. *See* Video: President Carter—Report to the Nation on Energy (Miller Center of Public Affairs 1977), https://www.youtube.com/watch?v=MmlcLNA8Zhc.

Ford, and Jimmy Carter Administrations were all hobbled with energy-related political problems. Finally, in 1978, Congress passed the National Energy Act in response to this energy crisis.[21] PURPA was part of this "broad-ranging" response to the primary energy problem of the 1970s: "the insecurity of [the] oil supply."[22] In its final form, PURPA contained six titles designed to address that problem, including energy conservation measures aimed at utilities,[23] new regulations for natural gas,[24] and incentives for small hydroelectric projects.[25]

One aim of PURPA, addressed in Title II, and specifically in §210, was to diversify the U.S. electric energy supply, which was heavily reliant on coal and oil.[26] The enacting Congress correctly determined that "traditional utilities were reluctant to purchase power from . . . nontraditional facilities," such as smaller renewable energy producers.[27] To achieve the aim of diversification, Congress delegated to FERC the task of promulgating regulations that would promote generation from small power producers.[28]

Congressional delegation in PURPA is in fact two-tiered: Congress delegated to FERC to determine how "to encourage cogeneration and small power production," but also to *state* regulatory authorities, which were tasked with implementing FERC's rules.[29] In essence, Congress had the aim of decreasing reliance on oil and gas in the nation's electric energy supply by increasing the amount of energy generated by other sources; Congress delegated to an expert agency the task of determining *how* to accomplish that goal; and that expert agency relied on states to implement its rules. Ultimately, "[i]n PURPA . . . the Federal Government attempt[ed] to use state regulatory machinery to advance federal goals."[30]

There were two primary issues that prevented more renewable power from coming online in the late 1970s, and these issues largely remain impediments nearly 40 years later.[31] First, utilities were "reluctant" to purchase power from nontraditional facilities.[32] In 1978, this was in part due to the fact that utilities were fully integrated—they produced and sold power—and thus were reluctant to purchase power from anyone.[33] Further, the nature of renewable energy creates complications for utilities. Most important is the fact that renewable energy is generally fickle.[34] A solar array or wind farm may produce large amounts of electricity when the sun is shining and the wind is blowing, but none at night or in calm weather.[35] Utilities would prefer more consistent power production because of the physics of grid management, but also because of the economics of the electricity market.[36] The power market restructuring of the 1990s has somewhat alleviated the first problem of integration,[37] but the problem of consistency continues to make utilities reluctant to integrate more renewable energy.[38]

The second primary issue impeding renewable energy generation was that regulation of these sources by "state and federal utility authorities imposed financial burdens [that] discouraged their development."[39] Again, later regulatory changes, including PURPA itself, have alleviated this problem, but broadly speaking, the higher cost of renewables relative to electricity produced from fossil fuels remains an obstacle to greater renewable energy production.[40]

FERC sought to address these problems by promulgating rules that forced utilities to buy energy from facilities that met certain characteristics—known as "qualifying facilities" or "QFs."[41] Essentially, these facilities are sup-

21. *See* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 745, 12 ELR 20896 (1982); *Exelon Wind*, 766 F.3d at 384; *see also* Richard D. Cudahy, *PURPA: The Intersection of Competition and Regulatory Policy*, 16 Energy L.J. 419, 421 (1995); *infra* Part III.A.
22. H.R. Rep. No. 95-543 (1977), *reprinted in* 1978 U.S.C.C.A.N. 7673, 1977 WL 9627, at **3-5. This was the U.S. House of Representatives Committee Report on the National Energy Act, which was a suite of several statutes, including PURPA.
23. PURPA, tit. I, Pub. L. No. 95-617, 92 Stat. 3117, 3120 (1978), 16 U.S.C. §§2611 et seq.
24. PURPA, tit. III, Pub. L. No. 95-617, 92 Stat. 3117, 3149 (1978), 15 U.S.C. §§3201 et seq.
25. PURPA, tit. IV, Pub. L. No. 95-617, 92 Stat. 3117, 3154 (1978), 16 U.S.C. §§2701 et seq.
26. *See Exelon Wind*, 766 F.3d at 384; Congressional Research Service, The 95th Congress and Energy Policy 1 (96-IFC 1, Comm. Print 1979) [hereinafter 95th Congress and Energy Policy] (noting that the U.S. economy was relying on oil and gas for three-fourths of its energy).
27. Federal Energy Regulatory Comm'n (FERC) v. Mississippi, 456 U.S. 742, 750, 12 ELR 20896 (1982).
28. *See id.*; *see also Exelon Wind*, 766 F.3d at 404 (Prado, J., dissenting); H.R. Rep. No. 95-543 (1977), *reprinted in* 1978 U.S.C.C.A.N. 7673, 7690, 1977 WL 9627, at *21; 18 C.F.R. §§292 et seq.
29. *See FERC*, 456 U.S. at 750.
30. *Id.* at 759.
31. *See id.* at 750-51 (describing the two "problems [that] impeded the development of nontraditional generating facilities"). To be clear, there were, and are, other problems that renewable energy producers face. FERC determined that there were three primary issues: (1) utilities were not required to purchase the energy produced by renewables, (2) "some utilities" charged higher rates for "back-up service," and (3) small power producers that supplied power "ran the risk of being considered an electric utility" and thus subject to further regulation. *See* Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12214, 12215 (Feb. 25, 1980). These three issues, however, generally fit within the two issues described in *FERC*: basically, utilities were not willing to do business with other electricity generators, and other electricity generators faced regulatory and cost obstacles on their own.
32. *FERC*, 456 U.S. at 750.
33. *See* Cudahy, *supra* note 21, at 422 ("[T]he utilities, for various reasons—including cost—were reluctant to purchase power from their potential competitors.").
34. Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 386, 44 ELR 20202 (5th Cir. 2014) ("Wind is a notoriously fickle energy source.").
35. *See* Troy A. Rule, Solar, Wind, and Land 159-60 (2014).
36. The electric grid does not currently, and did not in 1978, incorporate very much storage of electricity. The electricity produced at any given moment has to be consumed simultaneously, or be wasted. Renewable sources like wind and solar therefore make life harder for utilities that would, generally, rather rely on consistent sources of energy such as coal- or gas-fired power plants.
37. *See* Cudahy, *supra* note 21, at 437-38.
38. See *infra* notes 50-55 and accompanying text, for an example.
39. Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 751, 12 ELR 20896 (1982).
40. *See* U.S. Energy Information Administration, Levelized Cost and Levelized Avoided Cost of New Generation Resources in the Annual Energy Outlook 2015, at 6 (2015), *available at* http://www.eia.gov/outlooks/archive/aeo15/pdf/electricity_generation_2015.pdf.
41. *See* 18 C.F.R. §292.203 (basic requirements for QFs) and §292.304(d)(1) (requirement that utilities purchase power from QFs).

posed to be the small power producers and cogeneration facilities envisioned by Congress. In order to avoid rent-seeking, Congress required that the rates paid by the utilities for this power be "just and reasonable."[42] To that end, FERC promulgated regulations mandating that the cost of this power must be equivalent to the amount that the utility would have to pay to generate the power itself or purchase it from other (i.e., non-qualifying) facilities, an amount known as "avoided cost."[43]

While the *rate* at which QFs could sell their power had to be calculated according to FERC regulations, those regulations also mandated the *manner* in which QFs could sell their power. The regulations provide QFs with two ways to sell their power to utilities. First, QFs can sell their power to the utility at the time that the power is produced.[44] Under that arrangement, the avoided cost would be determined by the "spot market"—that is, the QF would be able to charge only so much as it would have cost the utility at the time they purchased the power to provide the power through other means.[45] Alternatively, QFs can enter into a long-term contract with the utility, known as a "legally enforceable obligation" or "LEO."[46] In other words, the first option simply provides a definite market for QFs to sell their power, whereas the second option allows QFs even more certainty by allowing them to essentially force the utility into a long-term contract.[47] Small renewable power generators, which generally fit the definition of QFs, often rely on the presence of long-term contracts to achieve financing for their construction and operation.[48]

B. LEOs and Their Limits

The regulations that provide for the two sales options outlined above seem to require that both options are always available to all QFs. FERC's regulation states that "[*e*]*ach* qualifying facility *shall* have the option" to either provide power "as available" or through an LEO.[49] Under PURPA's "cooperative federalism" scheme, however, these regulations are implemented by state agencies, generally public utility commissions (PUCs); and several recent actions by PUCs have limited the ability of some QFs to form LEOs. The following section will discuss some of these cases.

42. 16 U.S.C. §824a-3(c)(1).
43. *See* Allco Renewable Energy Ltd. v. Massachusetts Elec. Co., 208 F. Supp. 3d 390, 393 (D. Mass 2016).
44. 18 C.F.R. §292.304(d)(1).
45. *Id.* ("[T]he rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery.").
46. *Id.* §292.304(d)(2).
47. It is worth noting that this is a two-way street: by forcing the QF into an LEO, the QF also forces itself into the same contract. Under the first option, the QF has no obligation to sell any power to the utility, even though the utility has a continuous obligation to purchase whatever power the QF produces.
48. *See* Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 404, 44 ELR 20202 (5th Cir. 2014) (Prado, J., dissenting); *see also* Joel Eisen et al., Energy, Economics, and the Environment 749 (4th ed. 2015) ("renewable energy projects can be more expensive than their fossil fuel counterparts, in that . . . they sometimes require larger up-front investments and have longer payback periods").
49. 18 C.F.R. §292(d) (emphasis added).

1. Firm Versus Fickle: The Case of Exelon Wind

In Texas, the PUC of Texas (PUCT) issued regulations to implement FERC's PURPA regulations that required QFs to provide "firm power" as a condition precedent to being able to form LEOs.[50] "Firm power" is defined as power "from a [QF] that is available pursuant to a legally enforceable obligation for scheduled availability over a specified term."[51] Essentially, the PUCT regulation only allows QFs to enter LEOs if they can provide guaranteed power over the term of the contract.[52] In ordinary business terms, this rule makes sense: a supplier cannot enter into a long-term contract with a distributor unless the supplier can keep up its supply for the length of the contract.

Renewable power generation, however, is no ordinary business. As noted above, two of the most common sources of renewable energy, wind and solar, are inherently fickle.[53] As a result of PUCT's regulation, wind farms, given current technological limits on their ability to store energy, were unable to enter into LEOs with utilities in Texas.[54] Several other states, including California, have similar firm/non-firm power distinctions in their regulations regarding LEOs, but it is unclear whether they would be applied similarly.[55]

Exelon Wind is a large wind energy production company with wind farms throughout the United States.[56] They ran a facility in Texas that meets the criteria to be considered a QF.[57] This wind power facility, like virtually all wind power facilities, could not supply "firm power."[58] Exelon repeatedly tried to force Southwestern Public Service Co., a local utility, to enter an LEO to purchase all of Exelon's power.[59] Southwestern claimed that Exelon was asking for much higher prices in their LEO proposal than

50. 16 Tex. Admin. Code §25.242 (2016); *Exelon Wind*, 766 F.3d at 385.
51. 16 Tex. Admin. Code §25.242(c)(5) (2016). This definition is somewhat circuitous: QFs can only enter LEOs if they supply firm power, and firm power is only produced by QFs that enter LEOs.
52. *See Exelon Wind*, 766 F.3d at 385-86.
53. *See supra* notes 35-36 and accompanying text.
54. *See Exelon Wind*, 766 F.3d at 386.
55. Brief of Southwestern Public Service Co., Exelon Wind 1, LLC v. Nelson, No. 12-51228, 2013 WL 2154276, at *48 (2013) [hereinafter Brief of Southwestern]; Oral Argument at 48:00, Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 44 ELR 20202 (5th Cir. 2014) (No. 12-51228) (discussing the fact that the other state provisions have not been challenged and may be applied differently), http://www.ca5.uscourts.gov/oral-argument-information/oral-argument-recordings.
56. Exelon, *Wind*, http://www.exeloncorp.com/companies/exelon-generation/wind/Pages/default.aspx (last visited Sept. 15, 2017) (noting that Exelon is the 12th largest wind energy producer in the United States with projects in 10 states).
57. *Exelon Wind*, 766 F.3d at 386.
58. *See id.* The majority opinion in *Exelon Wind* seems to think that some wind farms would be capable of providing firm power with certain technological upgrades. *See id.* ("Technological advancements have made it possible for some wind farms to provide more consistent service."). It is unclear what technology the opinion is referring to, though the district court, which ruled for Exelon, found that energy storage could theoretically make wind power firm. *See* Brief of Southwestern, *supra* note 55, at 57; *see also Exelon Wind*, 766 F.3d at 387 (noting that PUCT accepted an administrative law judge's (ALJ's) order that Exelon did not produce firm power but disagreed with the ALJ that wind farms are "categorically" incapable of providing firm power).
59. *Exelon Wind*, 766 F.3d at 387.

Exelon would be able to achieve on the spot market.[60] In other words, Southwestern believed that Exelon was trying to lock them into a long-term contract that would produce a windfall for Exelon. Southwestern therefore refused to enter an LEO with Exelon.[61]

After an unsuccessful attempt to force Southwestern into an LEO through administrative appeal, Exelon petitioned FERC to intervene.[62] FERC declined to bring an action, but did issue a declaratory order.[63] To explain the effect of this declaratory order requires a short digression to discuss how §210 is generally enforced. Congress envisioned enforcement of §210 primarily through two means. One method is for FERC itself to bring an action against a state regulatory authority if that state agency is not complying with the federal regulations.[64] Second, individual QFs may also initiate actions. They can do this theoretically at any time by suing the state agency in a state court.[65] They can also petition FERC to intervene.[66] FERC can then choose to bring the action (the first method of enforcement), or can decline, which allows the QF to sue in federal court.[67]

It is not as though FERC's declining an invitation to bring suit amounts to a nonendorsement of the QF's position. The orders with which FERC responds to a QF's position may outline specifically why they think the QF is right on the merits.[68] Such was the case here. FERC's declaratory order unequivocally contradicted PUCT's interpretation of FERC's regulation denying LEOs to non-firm power generators[69]: "FERC's order stated that a Qualifying Facility may form a Legally Enforceable Obligation even if its power is non-firm."[70] With this order in hand, Exelon went to federal court.

The Fifth Circuit, however, upheld PUCT's regulation that utilities do not have to enter LEOs with non-firm power generators, in direct contravention of FERC's order, essentially because they thought PUCT's regulation was a reasonable interpretation of FERC regulations.[71] While the majority opinion was not clearly written to accord with the two-step process of *Chevron*,[72] it nonetheless followed that framework. First, the court found that "[t]here is no FERC regulation or PURPA provision specifically addressing [this issue]."[73] This is a similar inquiry to the determination of ambiguity that is the first step of *Chevron*.[74]

Further, according to the majority, Fifth Circuit precedent dictated that PUCT is allowed to make these sorts of judgments.[75] The majority referred to *Power Resource Group v. Public Utility Commission of Texas*,[76] in which a power producer challenged a different PUCT rule that limited their ability to enter an LEO.[77] In *Power Resource*, Power Resource Group, or PRG, owned a QF and challenged PUCT's "90-day rule."[78] The 90-day rule allowed utilities to decline to form LEOs with generators that were unable to produce power within 90 days.[79] PRG argued that unbuilt QFs needed to be able to enter LEOs in order to obtain financing.[80] The Fifth Circuit, however, deferred to PUCT[81] and upheld the 90-day rule.[82] The court held that while states must "provide for" LEOs,[83] "defining the parameters for creating a[n] LEO is left to states and their regulatory agencies."[84] In *Exelon Wind*, the court relied on this language to deny the assertion that FERC's regulation had "directly spoken to the precise question at issue"[85] and foreclosed PUCT's limitation on LEOs.[86]

After concluding that PUCT was able to determine limits to LEOs (i.e., after determining that FERC's regulation had not foreclosed the issue), the Fifth Circuit considered whether PUCT's firm-power requirement was sensible.[87] Again, this mirrors the steps of *Chevron* deference: if Congress (or here the agency) is silent on the specific issue, the next question is "whether the agency's [or here the state agency's] answer is based on a permissible construction of the statute [or here the federal regulation]."[88] The court determined that the PUCT regulation was a reasonable interpretation essentially because Exelon's alternative interpretation would mean that any QF could enter an LEO, and such a result would render the other sales option—"as available" sales of power on the spot market—superfluous.[89] In other words, if every QF could force utilities into long-term contracts, why would any QF choose not to, and then why would FERC's regulations provide for two options?

There are several problems with the Fifth Circuit's reasoning,[90] but my focus here is on deference. The Fifth

60. *Id.*
61. *Id.*
62. *Id.* Exelon also brought suit in state court but ultimately declined to pursue that action. *Id.*
63. *Id.*
64. *See* 16 U.S.C. §824a-3(h)(2)(A).
65. As Exelon Wind did here. *See Exelon Wind*, 766 F.3d at 387; *see also* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 769, 12 ELR 20896 (1982) (citing Testa v. Katt, 330 U.S. 386 (1947)).
66. 16 U.S.C. §824a-3(h)(2)(B).
67. *Id.*
68. *See*, *e.g.*, FLS Energy, Inc., Notice of Intent Not to Act and Declaratory Order, 157 FERC ¶ 61211 (Dec. 15, 2016).
69. *Exelon Wind*, 766 F.3d at 387 ("[FERC] issued an informal declaratory order . . . stating that the PUC[T] Order was inconsistent with FERC's Regulation.").
70. *Id.*
71. *See id.* at 395-400.
72. *See* Chevron v. Natural Res. Def. Council, 467 U.S. 837, 842-43, 14 ELR 20507 (1984).
73. *Exelon Wind*, 766 F.3d at 395.
74. *Cf. Chevron*, 467 U.S. at 842 ("First, always, is the question of whether Congress has directly spoken to the precise question at issue.").
75. *Exelon Wind*, 766 F.3d at 396-97.
76. 422 F.3d 231 (5th Cir. 2005).
77. *Exelon Wind*, 766 F.3d at 395 (citing *Power Res. Group*, 422 F.3d at 234).
78. *Power Res. Group*, 422 F.3d at 234.
79. *Id.*
80. *See id.* at 238.
81. *Id.* at 236.
82. *Id.* at 240.
83. *Id.* at 238.
84. *Id.* at 239.
85. Chevron v. Natural Res. Def. Council, 467 U.S. 837, 842, 14 ELR 20507 (1984).
86. *See* Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 396, 44 ELR 20202 (5th Cir. 2014).
87. *See id.* at 399-400.
88. *Chevron*, 467 U.S. at 842.
89. *Exelon Wind*, 766 F.3d at 399-400.
90. For instance, FERC *did* seem to address this issue in their regulations that state "[*e*]*ach* qualifying facility *shall* have the option" to sell power as-

Circuit majority's discussion of deference is actually quite short. The court spills some ink on why FERC's interpretation is not persuasive,[91] and why they favor PUCT's interpretation,[92] but they quickly dismiss the notion that FERC should be given anything akin to *Chevron* deference.[93] According to the majority, Exelon "conceded at oral argument that FERC's letter is not entitled to deference under either *Chevron* or *Auer v. Robbins*."[94]

The court's use of the word "deference" may be slightly confusing. Exelon *did* argue that FERC's order is persuasive, though they conceded in the briefs that the order is not "binding."[95] Critics, or supporters, may assert that *Chevron* is a "password" that automatically requires courts to uphold agency interpretations,[96] but the fact remains that federal courts are never "bound" by agency interpretations. Rather, *Chevron* and *Auer* are really burden-shifting mechanisms that crystallize generally held presumptions about institutional competence and congressional intent.[97] FERC's order may have been "of no legal moment" because they did not claim that it was a binding interpretation of their regulations,[98] but the majority still deferred to PUCT's interpretation of a FERC rule in the face of an order from FERC declaring that interpretation to be incorrect.

Regardless, the Fifth Circuit maintained that FERC's interpretation was "trump[ed]" by precedent according to the principles laid out in *Brand X*.[99] *Brand X* stands for the proposition that agencies should not be given deference for an interpretation of a statute that has already been foreclosed by a prior court ruling.[100] Thus, because *Power Resource* left the task of determining the parameters of LEOs to "states and their regulatory agencies,"[101] FERC, according to the Fifth Circuit, is foreclosed from proffering a contrary interpretation.[102] According to the majority in *Exelon Wind*, it is "this *essential* holding [from *Power Resource*] which binds [the court] here: under the cooperative federalism scheme created by PURPA, it is the PUC, rather than FERC, that defines the parameters of when a Qualified Facility may form a Legally Enforceable Obligation."[103]

This may be the only time that the majority invokes the magical words of "cooperative federalism," but it is nevertheless extremely important to the outcome of the case. Earlier in the opinion, the majority discusses the basic function of PURPA's §210 with regard to federalism and states' rights, noting that "PURPA's directive to states [to implement FERC's regulations] raises 'troublesome' Tenth Amendment concerns."[104] The majority's background discussion suggests that they were wary of federal control in this "cooperative federalism scheme," and that an implied goal of this scheme was differentiation among jurisdictions.[105] Of the roughly 19 pages of explanation that FERC published in the *Federal Register* when they published their final rule implementing §210, the majority quotes from one sentence, which highlights the "great latitude" given to state regulatory authorities to implement the commission's rules.[106]

While this statement from the agency is essentially the sum of the evidence provided that Congress wanted any differentiation under this supposed cooperative federalism scheme, even the dissenting judge felt the need to defend his contrary holding in the face of PURPA's cooperative federalism.[107] Further, the cooperative federalism structure of PURPA and Tenth Amendment concerns were clearly on the judges' minds. PUCT strongly voiced a novel Tenth Amendment argument in their briefs, and the "trouble-

available or through an LEO. 18 C.F.R. §292.304(d). That is not easily interpreted as "*some* QFs *may* have the option," which is effectively the result of PUCT's implementation. *See Exelon Wind*, 766 F.3d at 403-04 (Prado, J., dissenting). Furthermore, providing every QF with the ability to form an LEO does not necessarily mean no QFs will opt for as-available sales. As noted above, LEOs are self-binding, and some small power producers may not want to commit to certain contracts. Other QFs might determine that the rates offered by utilities in proffered LEOs would lock the QF into lower rates than they would be able to charge on the spot market. Lastly, even if virtually all QFs *do* opt for LEOs over as-available sales—something that would require research beyond the scope of this Article to determine—that fact alone would simply mean that one of the two mandatory options provided by FERC turned out to be more popular, not that FERC clearly envisioned a different scheme when they issued the regulations in 1982.

91. *See Exelon Wind*, 766 F.3d at 397-99.
92. *See supra* notes 56-74 and accompanying text.
93. *See Exelon Wind*, 766 F.3d at 379.
94. *Id.* (internal citations omitted); *see also* Oral Argument at 49:40, Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 44 ELR 20202 (5th Cir. 2014) (No. 12-51228), http://www.ca5.uscourts.gov/oral-argument-information/oral-argument-recordings. *Auer* is to interpretations of agency regulations what *Chevron* is to statutory interpretations. That is, *Auer* stands for the proposition that agencies should receive deference when they are interpreting their own regulations. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997); *infra* notes 148-50.
95. *See* Plaintiffs' Summary Judgment Reply, JD Wind 1, LLC v. Smitherman, No. A-09-CA-917-SS (2010), 2010 WL 2006103, at ¶¶ 6-9.
96. *See* Peter Strauss et al., Gellhorn and Byse's Administrative Law 1021 (11th ed. 2011) (quoting Judge Patricia Wald, Advocacy From the Viewpoint of an Appellate Judge, Address at the Fourth Annual Appellate Advocacy Program (Oct. 28, 1994), at 9 ("Now for you agency case lawyers. Chevron is the password.")).
97. *See* Chevron v. Natural Res. Def. Council, 467 U.S. 837, 865-66, 14 ELR 20507 (1984); Weiser, *supra* note 9, at 9 (outlining the rationales for *Chevron* deference).
98. *See* Appellants Brief for Chairman and Commissioners of the Public Utility Commission of Texas at 25, Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 44 ELR 20202 (5th Cir. 2014) (No. 12-51228), 2013 WL 2154278, at *25 (citing Industrial Cogenerators v. Federal Energy Regulatory Comm'n, 47 F.3d 1231, 1235 (D.C. Cir. 1995)).
99. *See Exelon Wind*, 766 F.3d at 397-98 (citing National Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005)).
100. *See Brand X*, 545 U.S. at 982.
101. *See supra* note 84 and accompanying text.
102. *Exelon Wind*, 766 F.3d at 397-98. There is much to say about whether the majority's reasoning simply misunderstands *Power Resources* and *Brand X*, but that discussion is beyond the scope of this Article. Essentially, *Power Resources* did not address a situation where FERC had issued an interpretation contrary to a state PUC, and *Brand X* does not clearly apply to an earlier court's determination of deference. In other words, if a prior court finds that a statute is clear and unambiguous, then *Brand X* suggests that a federal agency cannot interpret the statute in a contrary way. But if a prior court finds that a state agency deserves deference, *Brand X* does not suggest courts should not grant deference to a federal agency in the future.
103. *Id.* at 396.
104. *Id.* at 385 (quoting Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 759, 12 ELR 20896 (1982)).
105. *Id.* at 384-85.
106. *Id.* at 385 (quoting Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12214, 12230-31 (Feb. 25, 1980)).
107. *See id.* at 405-09 (Prado, J., dissenting).

some" nature of PURPA §210 was discussed throughout oral argument.[108]

Ultimately, the Fifth Circuit declined to give deference to FERC's interpretation of its own regulation, and instead upheld PUCT's interpretation. The majority did appear to defer to the state agency, as their analysis mirrors the two steps of *Chevron*, and while relatively little ink is spilt explaining it, federalism appears to be a primary reason why. Although the exact facts of *Exelon Wind* are somewhat unique, there have been several other cases involving PUC regulations that limit or frustrate LEO formation generally. These cases demonstrate that the question of deference, and the interpretation of PURPA's ostensible cooperative federalism, has ramifications beyond the Lone Star State.

2. Beyond Texas: Other Problems With LEOs

Similar attempts to constrain LEOs have been met with different results in different jurisdictions, though these other cases all reflect two common themes. First, the tension between QFs looking to force their way into long-term contracts on the one hand, and utilities looking to avoid those contracts on the other, is a tension that is not unique to Texas. Second, these cases all implicate the question of whether a reviewing court should defer to a state PUC, and to what degree.

As for the first common issue, utilities from New England to the Pacific Northwest are often finding novel ways to get out of LEOs. In 2011, National Grid, a utility operating in Massachusetts, agreed to enter an LEO with Allco, a solar generating company, but refused to agree on a price that differed from the spot market.[109] In other words, instead of refusing a QF the option of entering an LEO at all, as was the case with Southwestern and non-firm wind power providers, National Grid refused a QF the *pricing* option of calculating costs at the time the obligation is incurred, which would effectively make an LEO the equivalent of just selling power on the spot market.[110]

A similar situation developed in Idaho in 2010. Idaho Power, a utility operating in Idaho, agreed to enter into an LEO with two wind farms, Grouse Creek I and Grouse Creek II.[111] While negotiations were ongoing, the Idaho PUC (IPUC) changed their regulations such that Grouse Creek I and II could not enter into an LEO with Idaho Power at the rates that Grouse Creek had proposed.[112] This regulatory change was inspired in part by petitions from Idaho Power and other utilities.[113] After IPUC issued their order, Idaho Power petitioned IPUC to determine whether the agreement that Idaho Power had with Grouse Creek was valid.[114] IPUC issued an opinion that the agreement was voidable because of the intervening regulations,[115] and, in response to complaints by Grouse Creek, further stated that Grouse Creek and Idaho Power had not formed an LEO.[116] Unlike the utilities in *Exelon Wind* or *Allco*, Idaho Power did not categorically or functionally bar QFs from entering LEOs, but they did petition IPUC to make it virtually impossible for certain QFs to do so, and managed to back out of agreements after IPUC changed their regulations. As *Exelon Wind* and these other cases show, utilities are keen on finding ways to avoid LEOs.

If utilities are keen on finding ways to avoid LEOs, PUCs seem generally willing to oblige, even through fairly drastic measures. In Montana, the Montana Public Service Commission (MPSC) approved QF tariff rates in 2013.[117] According to the local utility, NorthWestern, these rates were far too generous to solar QFs.[118] NorthWestern was likely worried about the number of solar QFs piling up in the queue, eagerly awaiting their chance to take advantage of these allegedly generous rates.[119] Acting on their concern, NorthWestern petitioned MPSC in 2016 for an "emergency" suspension of the already approved 2013 rates, asking the Commission to instead negotiate fairer prices.[120]

This was not exactly an "emergency." NorthWestern may well have been concerned about the rates, just as utilities from Massachusetts to Idaho are concerned about being forced to pay for more expensive electricity. But these were rates set just three years earlier after full opportunity for comment. There is plenty of innovation in the

108. *See* Appellants Brief for Chairman and Commissioners of the Public Utility Commission of Texas at 14-21, Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 44 ELR 20202 (5th Cir. 2014) (No. 12-51228), 2013 WL 2154278, at **14-21; *see, e.g.*, Oral Argument at 3:00-9:00, *Exelon Wind*, 766 F.3d 380, http://www.ca5.uscourts.gov/oral-argument-information/oral-argument-recordings.

109. Allco Renewable Energy Ltd. v. Massachusetts Elec. Co., 208 F. Supp. 3d 390, 394 (D. Mass. 2016).

110. See *supra* notes 41-48 and accompanying text, for explanation of QF pricing/contract options. Yet another way of explaining the issue in *Allco*: where *Exelon Wind* was a restriction between §292.304(d)(1) and (2) choices, *Allco* was a restriction between §292.304(d)(2)(i) and (ii) choices.

111. *See* Grouse Creek Wind Park, LLC, 142 FERC ¶¶ 61187, 61888 (Mar. 15, 2013).

112. *Id.* (¶ 5). The regulations at issue involved the published rates for QFs that fall under the "eligibility cap." Essentially, pursuant to FERC regulations, IPUC had published certain rates for wind and solar QFs that produced under a certain amount of electricity. If solar and wind QFs produced less than 10 average megawatts (10 aMW) per month, they would be eligible for the published rates, hence the term "eligibility cap." While Grouse Creek and Idaho Power were negotiating, the eligibility cap was 10 aMW, and the two parties had reached an agreement in early December 2010 operating under the understanding that Grouse Creek would produce less than 10 aMW and thus could receive the published rates. In February 2011, IPUC released an order lowering the eligibility cap to less than 100 kilowatts. IPUC made the order retroactively effective from December 14, 2011, thus making Grouse Creek's agreement, which was arguably unexecuted prior to December 14, 2011, invalid because it allowed Grouse Creek's wind farms to charge the published rates even though they were not within the eligibility cap.

113. *Id.* at 61887-88 (¶ 2).

114. Idaho Power Co. v. Idaho Pub. Utils. Comm'n, 316 P.3d 1278, 1282-83 (Idaho 2013).

115. *Id.* at 1283 (the June 8, 2011, order).

116. *Id.* (Sept. 7, 2012, order).

117. Complaint of Vote Solar, *supra* note 4, at 6.

118. *See* Corin Cates-Carney, *Utility Rate Changes Mean Cloudy Future for Montana Solar Power*, Mont. Pub. Radio, June 16, 2016, http://mtpr.org/post/utility-rate-changes-mean-cloudy-future-montana-solar-power.

119. Complaint of Vote Solar, *supra* note 4, at 14. NorthWestern believed there was roughly 155 MW of solar power in the queue that would qualify for these rates; MPSC thought the number was closer to 130 MW. *Id.*

120. Cates-Carney, *supra* note 118.

solar market, but it is not as though regulators in 2013 were completely blindsided by changes in the industry in 2016. Nevertheless, after a suspiciously short hearing on the matter,[121] MPSC sided with NorthWestern and suspended the rates.[122]

The Commission bought the utility's argument that too many solar QFs were waiting to take advantage of the low rates. As Commissioner Roger Koopman phrased it, solar projects "kind of flood in here thinking [they] can cut a really fat hog with this [low] rate."[123] Vote Solar, a nongovernmental organization, petitioned FERC to intervene.[124] FERC ultimately declined to act, but on jurisdictional and prudential grounds.[125] An earlier FERC decision in this case squarely explained that they agreed with the merits of Vote Solar's complaint.[126] That is, yet again FERC believed that the state PUC had gotten PURPA wrong.[127]

In addition to demonstrating the first common theme among these cases—that utilities are often searching for ways to avoid LEOs, or at least their rates—this case also suggests that state PUCs may be more susceptible to capture than federal regulators, at least when it comes to regulating local utilities. The question of whether state PUCs are more easily captured is worth keeping in mind, as it has some bearing on whether deference to FERC is preferable to deference to state PUCs, if only on a normative level.

The second common issue in these cases is the question of deference. When utilities look to avoid entering LEOs, they look to regulations promulgated by state PUCs.[128] Thus, reviewing federal courts must consider how much, if any, deference to grant state PUCs in their interpretation of PURPA, and specifically of FERC's regulations. In *Allco*, FERC had not substantively weighed in on that particular matter and thus the question was how much deference was owed to the state agency, not whether to grant deference to the state agency over the federal agency. FERC had only issued a notice of intent not to act after Allco had petitioned them to bring an enforcement action against the Massachusetts PUC (MPDU).[129] This had procedurally allowed Allco to bring a suit against MPDU in federal court, but it did not clearly demonstrate whether FERC was opposed to the MPDU regulations that allowed National Grid to refuse to enter into an LEO with Allco at a pre-ordained rate.[130]

The federal district court admitted that state PUCs are entitled to some deference in their interpretation of PURPA and FERC's regulations.[131] In fact, it seems that MPDU had relied on *Exelon Wind* to argue for greater deference—an argument based, it seems, on the same assumptions that states' "latitude" in implementation should affect the deference calculus.[132] Similar to the court in *Exelon Wind*, the court's deference calculus in *Allco* can be put in the framework of *Chevron*. Essentially, the MPDU regulations failed at step one: "[W]hatever latitude the MDPU is given to implement FERC's PURPA rules does not justify an implementation that plainly conflicts with those rules."[133] Considering how rarely interpretations fail at step one generally,[134] and how complicated these regulations are, it would seem that while the court gave lip service to the deference owed to the state agency, they in fact gave none.[135]

In *Exelon Wind* and *Idaho Power*, FERC had issued orders or opinions that were contrary to the state PUCs,[136] further confusing the issue of deference. In *Idaho Power*, FERC had issued two relevant opinions. Cedar Creek Wind, LLC dealt with a wind farm in virtually the same position as the wind farm in *Idaho Power*.[137] IPUC claimed, just as they did in *Idaho Power*, that an LEO had never been formed because both parties had not signed a formal agreement.[138] FERC disagreed, stating that "the requirement . . . that a[n LEO] agreement must be executed by both parties to the agreement before a legally enforceable obligation arises, is inconsistent with PURPA and our regulations implementing PURPA."[139] Then, in Grouse Creek Wind Park, LLC, FERC issued an opinion on the specific wind farm at issue in the *Idaho Power* case.[140] FERC stated definitively that IPUC's regulations stating that LEOs can be formed only by signed, executed agreements or by meri-

121. Complaint of Vote Solar, *supra* note 4, at 11-13.
122. Cates-Carney, *supra* note 118. After a long reconsideration process, the MPSC essentially affirmed this decision, though based more on the grounds that some of FERC's orders had been "inconsistent," and MPSC left open the possibility that NorthWestern had not been acting properly. *See* Public Service Commission of the State of Montana, Final Order No. 7500c, Docket No. D2016.5.39 ¶¶ 86-92 (July 21, 2017).
123. *See id*.
124. *See generally* Complaint of Vote Solar, *supra* note 4.
125. Vote Solar Initiative v. Montana Pub. Serv. Comm'n, 158 FERC ¶ 61032 (Jan. 19, 2017).
126. FLS Energy, Inc., Notice of Intent Not to Act and Declaratory Order, 157 FERC ¶ 61211 (Dec. 15, 2016).
127. *Id*. ¶¶ 20-27; *see also* Cheryl Kaften, *FERC Squelches MPSC Decision to Stop Guaranteeing Small-Scale Solar Rates*, Energy Manager Today, Dec. 19, 2016, https://www.energymanagertoday.com/ferc-frowns-on-mpsc-decision-to-stop-guaranteeing-small-solar-rates-0129189/.
128. In *Allco*, the QF was directly challenging the actions of utilities, but those actions were pursuant to regulations promulgated by state PUCs. In *Exelon Wind* and *Idaho Power*, the QF challenged a ruling of the state PUC directly. *See* Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 384, 44 ELR 20202 (5th Cir. 2014); Idaho Power Co. v. Idaho Pub. Utils. Comm'n, 316 P.3d 1278, 1283 (Idaho 2013).
129. Allco Renewable Energy Ltd. Ecos Energy, LLC, 148 FERC ¶ 61233 (Sept. 26, 2014).
130. One could perhaps infer that FERC's decision not to act that allowed Allco to bring suit, as opposed to file an opinion against Allco, suggests FERC largely agreed with Allco. But there are other reasons FERC may have decided not to act. *See supra* notes 64-67 and accompanying text.
131. *See* Allco Renewable Energy Ltd. v. Massachusetts Elec. Co., No., 208 F. Supp. 3d 390, 399 (D. Mass. 2016).
132. *See id*. at *7 ("The MPDU points out, correctly, that it is entitled to some deference on its interpretation of the FERC regulations." (citing *Exelon Wind*, 766 F.3d at 394)).
133. *Id*.
134. *See* Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253, 1261 (1997) (part of a symposium).
135. In other words, regulations are only supposed to fail at step one when the interpretation is clearly foreclosed, and that will theoretically happen less with interpretations of more confusing statutes, because those statutes will less often have a "clear" interpretation.
136. *See Exelon Wind*, 766 F.3d at 387; Idaho Power Co. v. Idaho Pub. Utils. Comm'n, 316 P.3d 1278, 1283 (Idaho 2013).
137. Cedar Creek Wind, LLC, 137 FERC ¶ 61006, 2011 WL 4710848 (Oct. 4, 2011).
138. *Id*.
139. *Id*. at *7.
140. Grouse Creek Wind Park, LLC, 142 FERC ¶ 61187, 2013 WL 1114898 (Mar. 15, 2013).

torious complaints by the QF are not proper interpretations of FERC's regulations.[141]

FERC, in other words, had definitively stated that IPUC's regulations requiring a signed contract as a condition precedent to forming an LEO,[142] and their regulations requiring a meritorious complaint in the alternative,[143] were inconsistent with FERC's own regulations implementing PURPA. Yet, after FERC issued these orders, IPUC maintained its position, and that position was upheld by the Supreme Court of Idaho.[144]

The Idaho Supreme Court followed a similar approach to deference as the court in *Exelon Wind*; they even relied on the same Fifth Circuit case, *Power Resource*.[145] The Idaho Supreme Court agreed with the Fifth Circuit in *Power Resource*, holding that "[s]tates must provide for legally enforceable obligations," but that it is "up to the States, not [FERC], to determine the specific parameters [of LEOs]."[146] The Idaho Supreme Court and the Fifth Circuit seem to agree: state PUCs have to provide *some* way for QFs to enter into LEOs, but state PUCs are to be given a wide berth when it comes to determining in *what* ways QFs can enter into LEOs.

Perhaps this could be stated as a different two-step approach to deference. Do the state PUC regulations fully and categorically exclude a class of QFs from forming LEOs? If so, they are impermissible. If not, the state PUC is given deference when forming "the specific parameters" of how QFs enter into LEOs. This "LEO two-step" might be reasonable in the absence of contrary FERC orders. But where FERC has addressed the issue, as was the case in *Exelon Wind* and *Idaho Power*, giving deference to state PUCs when their regulations are contrary to FERC's order only makes sense if one wants variation between jurisdictions in terms of which QFs get to have unconditional options to enter into LEOs.

Was the federal district court in *Allco* correct in finding that FERC's regulations spoke clearly on the issue and refusing to grant traditional *Chevron* deference to the state PUC?[147] Or were the Idaho Supreme Court and the Fifth Circuit correct in deferring to state PUCs' interpretations even when they were contradicted by FERC's orders? And should MPSC be concerned about *their* disagreement with FERC's orders? One possible answer to these questions comes from the U.S. Supreme Court's decision in *Auer v. Robbins*.[148]

In *Auer*, the Court held that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation."[149] *Auer* deference and *Chevron* deference are generally considered "equally strong."[150] So, while *Auer* may not have dealt directly with the question of whether to prefer a federal agency's interpretation of its regulations over a state agency's interpretation, it would seem to at least put a finger on the scale in favor of deference to the federal agency that wrote the regulation.

The Fifth Circuit dispatched the argument that FERC should be given *Auer* deference in the same manner it dispatched the argument in favor of *Chevron* deference: any deference, they wrote, is trumped by *Brand X*.[151] Fifth Circuit precedent, they claimed, foreclosed *any* contrary interpretation of FERC's regulations, and thus the question of whether FERC should now be given deference was moot.[152] Even if the majority's *Brand X* analysis is correct,[153] *Power Resource*, the case that apparently forecloses FERC's interpretation, is a Fifth Circuit case, and would not necessarily foreclose FERC's current interpretation in Idaho or elsewhere.[154]

Another possible answer to this question—whether the district court in *Allco* was correct in holding in favor of FERC's interpretation—comes from the intention behind the federalism scheme of PURPA's §210 QF regulations. This Article suggests that PURPA §210 was not intended to serve an experimentalist goal allowing for variation among different jurisdictions. Instead, PURPA's QF regulations are a better example of federalism as decentralization, where Congress, through FERC, farmed out the managerial responsibilities to state agencies, but did not envision variation. As such, deference on interpretative questions of PURPA's QF regulations should be granted to FERC and not to implementing state PUCs. The next section will explain the different approaches to deference currently used when states implement federal law as well as why "federalism" schemes are often properly understood as examples of decentralization.

II. Federalism, Decentralization, and Deference

The previous section presented a problem that remains impactful and unresolved in important respects: whether

141. *See id*. at *10.
142. Cedar Creek Wind, LLC, 137 FERC ¶ 61006, 2011 WL 4710848, at *7 (Oct. 4, 2011).
143. Grouse Creek Wind Park, LLC, 142 FERC ¶ 61187, 2013 WL 1114898, at *10 (Mar. 15, 2013).
144. *See* Idaho Power Co. v. Idaho Pub. Utils. Comm'n, 316 P.3d 1278, 1285 (Idaho 2013).
145. *See id*. at 1284 (quoting Power Res. Group v. Public Util. Comm'n of Tex., 422 F.3d 231, 238 (5th Cir. 2005)); Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 394-96, 44 ELR 20202 (5th Cir. 2014) (discussing *Power Resource Group*).
146. *Idaho Power*, 316 P.3d at 1284 (quoting *Power Res. Group*, 422 F.3d at 238).
147. To reiterate, the court in *Allco* did not explicitly reject the possibility of granting MPDU *Chevron* deference. Rather, they briefly admitted that MPDU should be given some deference but then found that their interpretation was contrary to the plain language of FERC's regulations, effectively finding that MPDU's regulations failed at *Chevron* step one. *See supra* notes 131-35 and accompanying text.
148. 519 U.S. 452 (1997); *see also supra* note 94.
149. Auer v. Robbins, 519 U.S. 452, 461 (1997) (quotations and citations omitted).
150. Erica J. Shell, *The Final* Auer: *How Weakening the Deference Doctrine May Impact Environmental Law*, 45 ELR 10954, 10959 (Oct. 2015).
151. *See* Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 397, 44 ELR 20202 (5th Cir. 2014).
152. *Id*.
153. *Cf. supra* note 103.
154. Though *Idaho Power*, and an earlier case cited by the Supreme Court in *Idaho Power*, *A.W. Brown Co., Inc. v. Idaho Power Co.*, 828 P.2d 841 (Idaho 1992), could perhaps trump any deference to the state agency under the Fifth Circuit's reading of *Brand X*.

state or federal agencies should get deference when interpreting federal regulations that are meant to be implemented by states. This question is particularly important in the renewable energy context because of the "unusual" cooperative federalism scheme of PURPA.[155] PURPA's tiered implementation structure, however, is not so unusual. Many other major federal statutes require dual implementation by federal and state agencies,[156] and several other statutes mirror PURPA's tiered delegation structure, where Congress delegates to a federal agency to promulgate regulations that are then implemented by a state agency.[157]

I contend that this structure of dual implementation by state and federal agencies is not necessarily "cooperative federalism" in the traditional sense, and that such structures, and PURPA §210 in particular, may be better thought of as "decentralization." The traditional conception is that Congress seeks to employ federalism for the purpose of encouraging experimentation and tailoring national programs to local needs.[158] There are other reasons, however, for relying on this type of "cooperative federalism," including managerial concerns, and when the reason for such a scheme is managerial rather than experimental, the deference calculus should logically change.

This section will first explain general approaches to deference in contexts similar to PURPA §210, such as Medicaid implementation and Section 8 housing. Then, the section will distinguish "managerial" decentralization, and explain why managerial decentralization requires different targets of deference. Finally, the section will present a counterexample of "experimental" decentralization by means of exploring a statute that is similar to PURPA, the Telecommunications Act of 1996.

A. Different Approaches to Deference

Chevron itself dealt with the question of statutory interpretation by a federal agency, but it took just a few years before the question of statutory interpretation by state agencies was presented to lower courts.[159] The U.S. Supreme Court has yet to definitively address the issue of whether state agencies are afforded *Chevron*, or similar, deference. The general consensus among lower courts is that state agencies should not receive *Chevron* deference, though recent decisions such as *Exelon Wind* push back on that assumption, and a pre-*Chevron* decision by the Supreme Court as well as some scholarship have laid the groundwork in support of deference to state agencies.

In 1989, five years after the Supreme Court handed down *Chevron*, the U.S. Court of Appeals for the Second Circuit briefly grappled with the question of deference to state agencies in *Turner v. Perales*.[160] *Turner* dealt with state agency interpretation of the Section 8 Existing Housing Program.[161] Under the United States Housing Act of 1937 and the Housing and Community Development Act of 1974, Congress established a program for subsidizing housing for low-income families.[162] That program, commonly known as "Section 8," was administered by the Department of Housing and Urban Development (HUD), a federal agency, and local public housing agencies (PHAs), which operate under the direction of a state agency, such as the New York State Department of Social Services (DSS).[163]

Wanda Turner, a tenant in Section 8 housing, challenged the manner in which her subsidies were calculated by New York's DSS, claiming that the state agency's regulations conflicted with the federal law.[164] At issue was whether state agencies implementing Section 8 were required "to take into account a 'utility allowance' when making calculations."[165] Regulations promulgated by HUD required HUD to establish a "utility allowance," but there were no federal regulations that required state agencies, through their PHAs, to do so.[166] Still, Turner claimed that New York's DSS regulations conflicted with federal law because they did not consider a utility allowance in their calculations. Put differently, Turner's challenge was premised on the assumption that federal agency interpretation was definitive: HUD, a federal agency, had interpreted Section 8, a federal law, one way; New York's DSS, a state agency, had interpreted Section 8 a different way; therefore New York's DSS regulations were in conflict with federal law.

The district court found that the New York state agency's regulations did not conflict with HUD's regulations, and thus they did not violate the Supremacy Clause,[167] a conclusion that was affirmed by the Second Circuit in a very brief per curiam opinion.[168] The Second Circuit, however, disagreed with the district court's exposition of their standard of review.[169] The district court had applied *Chevron* deference to New York's DSS regulations.[170] *Chevron*

155. *Cf. Exelon Wind*, 766 F.3d at 384 (discussing PURPA's "unusual mandate" that states implement federal law).
156. *See, e.g.*, Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (1970); Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972).
157. *See, e.g.*, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 782 (2010); Title XIX of the Social Security Act (the Medicaid Act), 42 U.S.C. §§1396a-1396v; Housing and Community Act of 1974, 42 U.S.C. §§1437 et seq.; *see generally* Stabile, *supra* note 9.
158. *See infra* note 202 and accompanying text.
159. *See, e.g.*, Turner v. Perales, 869 F.2d 140 (2d Cir. 1989) (state agency interpretation of Section 8 housing regulations).
160. *Id.*
161. *See* Turner v. Perales, 708 F. Supp. 512, 513-15 (W.D.N.Y. 1988).
162. *Id.* at 513.
163. *Id.* at 513-14.
164. *Id.* at 514-15. Essentially, HUD had promulgated regulations for calculating subsidies when the tenant pays rent and utilities separately, and New York's DSS had adopted different regulations for calculating those subsidies. *Id.* at 514.
165. *Id.* at 516.
166. *Id.*
167. *Id.* at 519.
168. *See* Turner v. Perales, 869 F.2d 140 (2d Cir. 1989).
169. *Id.* at 141.
170. *Turner*, 708 F. Supp. at 515. To be clear, the district court did state that *Chevron* provided the appropriate standard of review, but they were not as deferential as *Chevron* requires. The court still "carefully analyzed the substantive constitutional issues" to determine that New York's DSS regulation was not inconsistent with federal law. *Turner*, 869 F.2d at 142; *Turner*, 708 F. Supp. at 515-19. In other words, "the district court's application of *Chevron* had no effect on the determination it made." *Turner*, 869 F.2d at 142.

deference, according to the Second Circuit, was reserved for federal agencies interpreting federal law.[171] Their reasoning was that the "underpinnings" of *Chevron*, namely the "expertise and familiarity of the federal agency with the subject matter [and] the need for coherent and uniform construction of federal law nationwide," did not apply when judging state agency interpretation of federal law.[172]

While the *Turner* court did not waste much ink on the first issue of institutional competence, they did elaborate somewhat on the second issue of uniformity.[173] The court stated that while "Congress may have designed this plan as one of 'cooperative federalism,' . . . the federal scheme does not envision any unitary or uniform application from state to state," and therefore *Chevron* deference was inappropriate.[174] One could reasonably question whether this observation lends itself to the opposite conclusion. If Congress envisioned different regulations state-by-state, then perhaps the implied delegation foundation of *Chevron* would favor deference to state agencies.[175] Nevertheless, *Turner* was understood to stand for the proposition that even when Congress envisioned a cooperative federalism scheme whereby state agencies interpret federal law, those state agencies are not afforded *Chevron* deference.[176]

Seven years after *Turner*, the Ninth Circuit followed the same basic reasoning in denying *Chevron* deference to a state agency interpreting federal law. In *Orthopaedic Hospital v. Belshe*, the Ninth Circuit was confronted with a challenge to a California state agency's implementation of Medicaid.[177] They declined to afford the agency *Chevron* deference, citing, inter alia, *Turner*,[178] and their reasoning was wholly borrowed from *Turner*. In addition to quoting *Turner*'s language regarding the inapplicability of *Chevron*'s "underpinnings" to the issue of state agency interpretation of federal law, *Belshe* further distilled the logic of *Turner*: "What concerns us is whether the state law and regulations are consistent with federal law. Neither the district court nor we defer to the state to answer that question."[179] According to the Ninth Circuit, federal courts are better than state agencies when it comes to determining whether those agencies are following federal law, but, under *Chevron*, federal courts are worse than federal agencies at determining the same thing.

Based on *Turner* and *Belshe*, it would seem that the law is generally settled in terms of the question of deference to state agencies in the interpretation of federal law, at least in the Second and Ninth Circuits. But both *Turner* and *Belshe* fail to tackle some of the more apparent problems with this holding: Why are state agencies worse than federal agencies at interpreting federal law? If Congress desired differentiation and experimentation in a cooperative federalism scheme, why would they not want deference to state agency interpretation? Beyond these largely unanswered questions, there is some evidence that the Supreme Court has been skeptical of pure de novo review for state agency interpretations of federal law.[180]

In *Pennhurst State School & Hospital v. Halderman*, a pre-*Chevron* opinion, the Supreme Court "indirectly challenged the presumption of de novo review for state agency interpretation."[181] The Court reasoned that conditional grant schemes, a common form of cooperative federalism,[182] operate like contracts whereby states agree to administer federal programs in consideration for federal funds.[183] If there is ambiguity in the statute, "[t]here can, of course, be no knowing acceptance" of the contract.[184] At least one scholar has interpreted this language to suggest that state agencies should be given some leeway in interpreting ambiguous provisions of federal statutes when those statutes require state implementation in exchange for federal funds.[185]

To be clear, the Court in *Pennhurst* did not make this claim explicitly. Instead, the Court seemed to rely on this contractual theory of cooperative federalism for further support of a clear statement rule in interpretation of cooperative federalism schemes—that if Congress wants to obligate a state to perform certain actions in exchange for federal funds, they must do so explicitly[186]; a sort of "construe the contract against the drafter" rule for federal to state conditional grant schemes. But this reasoning does imply a sort of deference: if Congress *does not* state their requirements explicitly, then states can decide how to implement that provision themselves.[187]

In the post-*Chevron* era, the Supreme Court has been somewhat clearer with regard to state agency deference. In *Wisconsin Department of Health & Family Services v. Blumer*, the Court again dealt with a challenge to state agency implementation of Medicaid.[188] The plaintiff alleged that the Wisconsin state agency's regulations implementing a Medicaid provision were arbitrary and capricious, and not

171. *Turner*, 869 F.2d at 141-42.
172. *Id.* at 141.
173. *See id.* In fact, the court did not discuss the issue of institutional competence at all, and it is somewhat unclear, given their acknowledgement of this statute as a "cooperative federalism" scheme, why a state agency would not be familiar with the "subject matter" of the federal statute.
174. *Id.*
175. *See* Chevron v. Natural Res. Def. Council, 467 U.S. 837, 865-66, 14 ELR 20507 (1984) (suggesting that because Congress delegated to EPA generally to make rules, EPA was better-suited to determine an ambiguity in the statutory text).
176. *See, e.g.*, Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1996).
177. *See id.* at 1493-95.
178. *Id.* at 1495.
179. *Id.* at 1496.
180. *See* Stabile, *supra* note 9, at 247 (discussing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981)).
181. *Id.*
182. *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987) ("Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." (quotations omitted)).
183. *Pennhurst*, 451 U.S. at 17; Stabile, *supra* note 9, at 247.
184. *Pennhurst*, 451 U.S. at 17.
185. *See* Stabile, *supra* note 9, at 247.
186. *See Pennhurst*, 451 U.S. at 27 (noting that the ambiguous language at issue is really "encouragement" of state action, and not "the imposition of binding obligations on the States").
187. *See* Stabile, *supra* note 9, at 247.
188. *See* Wisconsin Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473, 477-78 (2002).

in accordance with the federal law.[189] The challenge was in part based on the fact that other states had interpreted the same provision differently.[190] The Court noted that federal courts have "not been reluctant" to give state agencies some breathing room under "cooperative federalism" schemes.[191]

But there are two important caveats to the Court's pronouncement in *Blumer*, one explicit and one implicit. First, the Court explicitly stated that they have allowed this "latitude" to state agencies "where the superintending federal agency has concluded that such latitude is consistent with the statute's aims."[192] That is not the case with FERC and PURPA §210. Second, this statement implies that there are statutes where such "latitude" is not intended, even in the "cooperative federalism" context. This provision of the Medicaid Act, it appears, permits, or even encourages, some experimentation.[193]

In sum, there is precedent for denying deference to state agencies when they are interpreting federal law, but that precedent is not particularly well-reasoned, and not clearly applicable to situations like the interpretation of FERC regulations at issue in *Exelon Wind*. Further, there is some, albeit limited, language from the Supreme Court suggesting acceptance of some deference for state agencies. It is odd that the standard of review in these situations is not more clearly settled, given that congressional schemes involving joint implementation by state and federal agencies are not altogether uncommon. That this area of the law is unsettled may, however, arise from the surprising fact that federalism theory itself is unsettled, or at least misunderstood. The following section will discuss the possibility that legal schemes such as the ones described above are not necessarily examples of federalism, but could be examples of decentralization.

B. *Management Tool or Sacred Principle? "Decentralization" Versus Federalism*

Federalism is a much written-about but arguably undertheorized concept.[194] One particularly undertheorized aspect of federalism is how it may impact deference in modern administrative law, particularly in the context of cooperative federalism schemes. I have suggested that, at least in the context of PURPA's §210, the "cooperative federalism" envisioned by Congress and affirmed by the courts is at best a case of "managerial federalism" in which Congress opted for a particular mechanism of administration with the flavor of respecting subnational autonomy. Indeed, this Article questions whether the "cooperative federalism" scheme in PURPA §210 is federalism at all, or instead "decentralization."[195] Further, I suggest that in a scheme of managerial decentralization, as opposed to federalism or "experimental decentralization," deference should be granted to the federal[196] agency, and that considerations respecting the autonomy of states are misguided.

Federalism is a hallowed concept in American society, and similarly revered around the world. Some even go so far as to say that it is "ordained by the Almighty."[197] This sacred principle, however, belies the more honest understanding of the United States held by its people and, perhaps more importantly, its judiciary: that when push comes to shove, we conceive of the United States in the singular,[198] and the supremacy of federal law as an even greater inviolate principle than federalism.[199] Whatever the normative value of providing states leeway in developing policy, or of a political culture that at times disfavors national solutions, the supremacy of federal law is one of the most long-standing judicial doctrines.[200]

Regardless of how well-settled the principle of supremacy may be, and regardless of the reality of modern political identity, members of the judiciary continue to invoke the elusive spirit of "federalism" as a way of supporting their legal conclusions.[201] There are two problems with these incantations that are important to note for purposes of this Article. First, judges (and scholars) tend to focus on the benefits of federalism that result from a diversity of policy outcomes, ignoring the "managerial" benefits that arise from simply delegating administration to subnational entities. Second, all of the standard *justifications* for *federalism* are really *benefits* of *decentralization*.

There are four standard justifications of, or really apologies for, federalism: competition, experimentation, political participation, and separation of powers.[202] More efficient management of national goals is conspicuously missing. Decentralization for the sake of increased public participation is occasionally addressed,[203] but decentralization for the sake of management is not. Were it not for the outmoded historical coincidences of our found-

189. *Id.* at 478.
190. *See id.* at 484 (discussing the difference between the "income first" and "resources first" approaches adopted by different states).
191. *Id.* at 495.
192. *Id.*
193. *Cf.* Part II.C. (discussing the Telecommunications Act of 1996).
194. Feeley & Rubin, *supra* note 16, at 2.
195. *See id.* at 20-29.
196. As Feeley and Rubin note, reference to the United States' *central* government as our *federal* government is confusing. *Id.* at 13.
197. *Id.* at 1 (citing Daniel Elazar, Federal Systems of the World xv (2d ed. 1994).
198. *See* Robbie Gonzalez, *When Did "The United States" Become a Singular Noun?*, Gizmodo, July 29, 2013, http://io9.gizmodo.com/when-did-the-united-states-become-a-singular-noun-949771685.
199. *See* Rubin & Feeley, *supra* note 16, at 908 ("When federalism is raised as an argument against some national policy, we generally reject it by whatever means are necessary, including, in one case, killing its proponents." (citing the Civil War)).
200. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).
201. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458-60 (1991); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 772, 12 ELR 20896 (1982) (Powell, J., concurring and dissenting); *see supra* notes 104-08 and accompanying text.
202. *See* Feeley & Rubin, *supra* note 16, at 22-29; Philip J. Weiser, *Cooperative Federalism and Its Challenges*, 2003 Mich. St. DCL L. Rev. 727, 729 (2003); *Gregory*, 501 U.S. at 458; *FERC*, 456 U.S. at 787-90 (Powell, J., concurring and dissenting). The "separation of powers" justification refers to the concept that respecting the autonomy of states will make it harder to conglomerate power in the federal government. *See FERC*, 456 U.S. at 790 (Powell, J., concurring and dissenting).
203. *See Gregory*, 501 U.S. at 458 ("This federalist structure of joint sovereigns . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogen[e]ous society.").

ing, this omission would seem rather odd. When a business decides to organize the country into various regions and appoint managers to those regions, probably the most obvious reason is the administrative efficiency that results.[204] That firm may also try to capture the benefits of competition among different branches, or the benefit of having locals as employees, but the most basic reason for such a division of operations would not be to have differently run franchises with different business cultures, prices, or even products.

Popular and judicial conceptions of federalism have created a blind spot. When Congress chooses to employ decentralization in order to increase competition or public participation, we recognize the scheme and judges are willing to play along. When Congress chooses to employ decentralization largely, if not entirely, as a tool for better management of a national program, we ignore their perfectly reasonable choice.

Beyond the fact that judges ignore decentralization for the sake of management, they also engage in regular post hoc rationalization of federalist schemes. The reality of federal supremacy renders all of the traditional justifications for federalism as benefits and not principles. If Congress can act within a sphere, they do not need to allow for a certain degree of competition or experimentation. If they believe that subnational administration will be politically successful, or increase participation, they may choose to design a statute with that purpose in mind, but a failure to garner local participation does not render a statute unconstitutional. When a judge expounds on the justifications for federalism, he or she is expounding on possible benefits of a particular course that Congress has chartered. In this way, the sacred principle of federalism serves to work a funny consequence: judges who are attempting to uphold a principle that separates powers instead substitute their own policy justifications for those of the legislature.

Further, and most important, this misunderstanding of federalism has implications for judicial deference. Rubin and Feeley's central premise is that judges often claim to support "federalism," but in fact support decentralization,[205] and when the purpose of decentralization is managerial in nature, those judges get the deference calculus exactly wrong: they assume more deference must be granted to the state when in fact none may have been intended, and undermine the actual efficiencies of decentralization that they themselves are lauding. Instead, judges should respect the policy mechanism that Congress has chosen. If Congress has chosen managerial decentralization, judges should assume greater deference is due to the federal agency.

I do not make as sweeping a claim as Rubin and Feeley—that federalism amounts to little more than a "national neurosis."[206] I do, however, broadly agree with Rubin and Feeley's analysis that federalism is often better thought of as decentralization. Moreover, this Article suggests that popular conceptions of federalism not only ignore that reality—that federalism is less inviolate principle and more policy choice—but also ignore the obvious managerial benefits that accrue from decentralized administration. Just because Congress desired that a national project be implemented by subnational entities does not mean they desired competition, experimentation, or really any difference in administration. Further, if Congress *did not* desire differences in administration, then invoking "federalism" to grant judicial deference to a state agency in contravention of a federal agency's pronouncements is wrong.

Relying on, or at least considering, congressional intent in regard to what type of "cooperative federalism" scheme they chose—actual cooperative federalism or decentralization—may also return the deference decision to its proper place: Congress. *Chevron* is, at bottom, a theory of statutory interpretation—the decision rests on the premise that Congress would have wanted deference to the agency in these instances. But Peter Strauss, writing soon after *Chevron* was decided, suggested that *Chevron* was in part a managerial tool constructed by the Court.[207] Strauss' argument, essentially, is that *Chevron* is a sort of rule of convenience—one that facilitates legal uniformity by requiring federal courts to defer to a single interpretation: that of the national agency.[208]

In a way, then, considering Congress' choice between traditional federalism and decentralization actually gives the question of deference back to Congress, where it belongs. That is, simply assuming that *Chevron* requires deference to only federal agencies may at times put the judicial branch's managerial concerns ahead of the legislative branch's actual choice. When Congress chooses managerial decentralization, the uniformity logic of *Chevron* is in line with Congress' choice, whether that "logic" rests on a theory of implicit delegation or on simple judicial convenience. But when Congress chooses cooperative federalism for its experimental benefits, using *Chevron* to deny state agencies' interpretations undermines Congress' choice, and possibly for the sake of legal uniformity, which in that case is not even necessary or intended.

So, the experimental benefits of cooperative federalism are not a sacred principle, but rather a policy choice. And Congress does not always make that policy choice. When they do not, and instead employ managerial decentralization, courts should respect that choice and provide deference to the appropriate agency: state agencies in instances when Congress wanted state experimentation, and federal

204. *See* Feeley & Rubin, *supra* note 16, at 21 (using the business firm analogy).

205. *See id.* at 22 ("[T]rue federalism . . . would tend to undermine many of the advantages that are often claimed for federalism but in fact pertain to decentralization. This is not to say that federalism lacks virtue; rather its virtues lie in an entirely different area than many American courts and commentators tend to assume.").

206. *See generally* Rubin & Feeley, *supra* note 16.

207. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093, 1121 (1987) ("Rather than see *Chevron* just as a rule about agency discretion, in other words, it can be seen as a device for managing the courts of appeals that can reduce (although not eliminate) the Supreme Court's need to police their decisions for accuracy.").

208. *Id.*

agencies when Congress did not. With regard to *Exelon Wind* and the other cases discussed in this Article, the question remains: is PURPA §210 properly understood as an example of managerial decentralization? Before answering that question, it is worth exploring a counterexample: what does the opposite choice of *experimental* decentralization look like?

C. Experimental Decentralization and the Telecommunications Act of 1996

Telephone service is much like electricity service: it is an essential good, the provision of which creates natural monopolies.[209] As a result of these shared traits and their implications, telecommunications and electricity have been regulated in similar ways. Both markets are regulated in part by federal statutes that delegate power to a federal agency that in turn issues regulations implemented by state regulatory authorities, often PUCs.[210] Further, Congress attempted in the last quarter of the 20th century to introduce competition into both markets, with PURPA encouraging competition in the electricity market, and the Telecommunications Act in the telecommunications market.[211] These similarities present similar questions regarding deference, but there is a difference that leads to a different answer. That difference is that the cooperative decentralization employed by the Telecommunications Act was designed to facilitate experimentation and competition,[212] whereas the decentralization of PURPA was designed to facilitate better management of national goals.[213]

The division of power between state and federal agencies with regard to communications regulation before the Telecommunications Act was the same as the division of power with regard to electricity regulation before PURPA: intrastate communication was regulated by state authorities, and a federal agency, the Federal Communications Commission (FCC), regulated interstate communication.[214] The telecommunications industry also faced problems similar to the electric power industry regarding a lack of competition among providers.[215] Therefore, in many important ways, the Telecommunications Act and PURPA are very similar. The Telecommunications Act was a "federal regulatory program that relie[d] heavily on state agencies by inviting them to superintend—under federal statutory standards and subject to federal court review—the development of 'interconnection agreements' between incumbent monopolists and new entrants into the local telephone market."[216] Change "telephone" to "power" and that sentence perfectly describes PURPA.

For purposes of this Article, the story of the Telecommunications Act can be condensed considerably. Prior to the 1970s, the telecommunications market was heavily monopolized.[217] After initial attempts by the FCC in the late 1960s to break up the Bell system, which dominated the market, the U.S. Department of Justice's (DOJ's) Antitrust Division filed an action against AT&T in 1974.[218] In 1982, DOJ and AT&T reached a settlement that essentially separated "equipment supply and long-distance transmission" from local monopolies, but left those local monopolies in place.[219] These local monopolies remained because they were natural monopolies—it would be too expensive and wasteful to upset the necessary infrastructure—but a desire to introduce competition into the marketplace remained as well.[220]

Finally, in 1996, Congress passed the Telecommunications Act in order to "provide for *a pro-competitive*, *de-regulatory* national policy framework designed to accelerate [the provision of new technology and services] to all Americans by opening all telecommunications markets to competition."[221] In the Telecommunications Act, Congress wanted to erode the power of established monopolies, and allowed for greater competition both by market entrants and between jurisdictions in order to achieve that goal. In PURPA, on the other hand, Congress wanted to force established monopolies to act in certain ways, a goal that did not require, or benefit from, differentiation between jurisdictions.

In *Iowa Utilities Board v. FCC*,[222] the U.S. Court of Appeals for the Eighth Circuit dealt with an ambiguity in the Telecommunications Act: whether the FCC's statutory mandate to promulgate local competition rules allowed them to regulate all aspects of those rules, including the pricing schemes.[223] The court ultimately struck down FCC's regulations on the grounds that §2(b) of the Telecommunications Act, under which these regulations had been promulgated, "'fenced off' intrastate telephone services from FCC regulation."[224] *Iowa Utilities Board* was

209. *See* Weiser, *supra* note 9, at 15 (citing United States v. AT&T Commc'ns, Inc., 552 F. Supp. 131, 140-42 (D.D.C. 1982)).
210. *Compare* PURPA, Pub. L. No. 95-617, 92 Stat. 3117 (1978), *with* the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.
211. *See generally* Cudahy, *supra* note 21 (electricity market); Weiser, *supra* note 9 (telecommunications market).
212. *See* Weiser, *supra* note 9, at 16.
213. *See infra* Part III.A.
214. *See* Weiser, *supra* note 9, at 14. The Communications Act of 1934 was the foundation for this federalism scheme in communications regulation. For electric power regulation, the interstate/intrastate scheme was set forth in the Federal Power Act Amendments of 1935.
215. *See id.* at 15; *supra* note 33 and accompanying text. The telecommunications industry's competition problem was somewhat more acute than the energy industry: AT&T was found to be in violation of antitrust laws, and the Telecommunications Act was in part a response to restructurings of the industry that had been taking place as a result of the antitrust judgment. Weiser, *supra* note 9, at 15.
216. Weiser, *supra* note 9, at 2.
217. *See* Donald I. Baker, *Government Enforcement of Section Two*, 61 Notre Dame L. Rev. 898, 913-14 (1986).
218. *Id.*
219. *Id.* at 915.
220. *See* Weiser, *supra* note 9, at 15-16 (discussing Judge Harold Greene's opinion in *United States v. American Tel. & Tel. Co.*, 522 F. Supp. 131, 223 (D.D.C. 1982) and Congress' reaction).
221. *Id.* at 16 (quoting H.R. Conf. Rep. No. 104-458, at 113 (1996)); *see also* Iowa Utils. Bd. v. Federal Commc'ns Comm'n, 120 F.3d 753, 791 (8th Cir. 1997) ("Congress passed the Telecommunications Act of 1996 . . . which was designed, in part, to erode the monopolistic nature of the local telephone service industry.").
222. *Iowa Utils. Bd.*, 120 F.3d 753.
223. *See* Weiser, *supra* note 9, at 18 (discussing *Iowa Utils. Bd.*, 120 F.3d at 794-95).
224. *Id.* (quoting *Iowa Utils. Bd.*, 120 F.3d at 796).

ultimately overturned by the Supreme Court, but on different grounds.[225] Therefore, while FCC's regulations were reinstated, the underlying deference question remained: in a statutory scheme such as this, does the federal agency know best what Congress intended?[226] The Eighth Circuit believed that the Telecommunications Act allowed for states to have different interpretations with respect to the implementation of a federal law.

The decision in *Iowa Utilities Board* is different in several ways from the decisions in *Exelon Wind* and *Idaho Power*, just as PURPA and the Telecommunications Act are different in several ways.[227] But they are similar in an important respect: their outcome. In both *Iowa Utilities Board* and *Exelon Wind*, a federal court of appeals was confronted with a challenge in which a state agency interpreted a federal statute differently than the federal agency primarily tasked with implementing that statute. In both cases, the federal appellate court sided with the state agency. This demonstrates the strong desire to read cooperative federalism schemes as permissive with regard to state variation, but it is important to note the clearly experimental goals of the Telecommunications Act and how they may justify the outcome of *Iowa Utilities Board*. If PURPA §210 does not share the same experimental goals, then the outcome should be different.

III. Managerial Decentralization and PURPA §210

There are essentially two arguments why a state agency deserves deference when interpreting PURPA §210. The first is that state agencies know as much as FERC does about the meaning of §210 and even the meaning of FERC's regulations interpreting §210.[228] The second is that PURPA generally, and §210 especially, is a scheme of "cooperative federalism" and under such schemes we allow states some wiggle room.[229] The first argument is weak, at least because of *Auer*.[230] It is worth noting, however, that this institutional competency argument has its most purchase in the case of *Exelon Wind*. Texas is unique in that it "runs its own electric grid," unlike other states that are part of multistate interconnections.[231] Still, just because PUCT has greater experience *adjudicating* disputes and issuing regulations under §210 than other state PUCs does not mean they have as much expertise as FERC when it comes to *interpreting* §210 or FERC's own regulations. Further, even if deference to the state PUC is reasonable in Texas, under this argument, it would *only* be reasonable in Texas.[232] The second argument in favor of deference, that PURPA §210 is an example of "cooperative federalism," does not hold water if §210 is rightly conceived of as managerial decentralization. So, is it?

This section addresses that question in both a positive and normative manner. First, it will discuss why PURPA §210 is an example of managerial decentralization, relying primarily on legislative history and circumstances of its passage. Then, it will discuss why PURPA §210 should be thought of as decentralization, and thus why granting deference to FERC is not only proper, it is the normatively better outcome.

A. PURPA §210: A National Response

On April 18, 1977, President Carter presented his national energy plan to the American public, declaring the energy crisis the "moral equivalent of war."[233] Wars do not call for localized solutions and greater respect for states' rights.[234] They require national mobilization. One month before President Carter's famous speech, he had "submitted legislation to Congress to create the Department of Energy," further federalizing the nation's response to energy shortages and dependency on foreign oil.[235]

Earlier approaches to the energy crisis, even those by Republican President Nixon, had been grounded in the still-pervasive New Deal-inspired belief that large problems required large federal administrative solutions.[236] President Carter's proposal, which would result in the National Energy Act, of which PURPA was a key piece, was even more of a step toward federal control.[237] Even though President Carter himself was more skeptical of

225. *See* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

226. *See* Weiser, *supra* note 9, at 18 n.70 (quoting *Iowa Utils. Bd.*, 525 U.S. at 385 n.10 ("[This] scheme is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well.")).

227. One possibly significant difference is that in the implementation scheme of PURPA, states are given the choice of implementation through adjudication or implementation through rulemaking. *See* Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 385, 44 ELR 20202 (5th Cir. 2014). Under the Telecommunications Act, states are given the option of implementation through regulation, or leaving it to FERC, which is more like the traditional cooperative federalism schemes in, for instance, the Clean Water Act. *See* Weiser, *supra* note 9, at 19; 33 U.S.C. §1342(b) (allowing states to administer pollutant discharge permits instead of EPA). This difference may have implications for deference. One could argue that PURPA *required* state implementation, while the Telecommunications Act only encourages it, and that therefore Congress must have envisioned *more* differentiation among states under PURPA, and thus more deference.

228. *See Exelon Wind*, 766 F.3d at 399.

229. *See id*. at 396 (quoting Power Res. Group v. Public Util. Comm'n of Tex., 422 F.3d 231, 238-39 (5th Cir. 2005)); Idaho Power Co. v. Idaho Pub. Utils. Comm'n, 316 P.3d 1278, 1284 (Idaho 2013).

230. *See supra* notes 148-50 and accompanying text.

231. *Exelon Wind*, 766 F.3d at 399.

232. There are no other electricity interconnections (grids) that are essentially coextensive with a single state, as Electric Reliability Corporation of Texas Interconnection is with Texas. *See* North American Electric Reliability Corp., NERC Interconnections (map of U.S. interconnections), http://www.nerc.com/AboutNERC/keyplayers/Documents/NERC_Interconnections_Color_072512.jpg.

233. Jacobs, *supra* note 19, at 173.

234. *See* 95th Congress and Energy Policy, *supra* note 26, at 7 (describing President Carter's energy plan as envisioning a "leading federal energy policymaking role . . . which, except in times of war, has been deliberately delegated to the private sector").

235. *See* Jacobs, *supra* note 19, at 172.

236. *See generally* Jacobs, *supra* note 19.

237. 95th Congress and Energy Policy, *supra* note 26, at VIII ("The following concepts proposed by the President represented fairly radical departures from earlier policy assumptions. President Carter and his new energy advisors [c]laimed the prerogative of a leading Federal role in determining national energy policy.").

the federal government than most Democrats,[238] and even though Congress fought his energy plan in many respects, "[c]ollectively, the Congressional enactments [of the 95th Congress] quite clearly supported and endorsed the Administration's assertions that [t]he Federal Government should take the leading role in determining national energy policy."[239]

Part of that top-down federal energy policy was encouraging the growth of renewable power and diversifying the nation's energy mix.[240] According to a Congressional Research Service report on energy policy in the 95th Congress (which passed PURPA), among the "principles . . . underlying [Carter's plan]" were that "[t]he United States must reduce its vulnerability to potentially devastating supply interruptions," and that "[t]he use of nonconventional sources of energy—such as solar, wind, biomass, [and] geothermal—must be vigorously expanded."[241] An important part of U.S. Department of Energy head James Schlesinger's ambitious goal of ending U.S. reliance on foreign oil imports by 1985 was increased funding for, and reliance on, alternative fuels.[242] While grants supporting renewables development were an important tool, utility regulatory reform, and particularly PURPA §210, was a key mechanism for achieving more renewable power in the U.S. energy mix.[243] Put simply, the White House wanted a stronger federal role in addressing the energy crisis, which would in part involve more renewable generation, and Congress went along with it in passing PURPA §210.

Immediately after PURPA's passage, it was understood that regulations requiring utilities to purchase power from renewable generators were part of the package.[244] Unlike, for instance, "voluntary standards on rate design," PURPA envisioned FERC rules "favoring industrial cogeneration facilities, *and requiring* utilities to buy or sell power from [them]."[245] This was a different regulatory design than other "cooperative federalism" schemes that Congress had been employing with regularity throughout the 1970s. The Clean Air Act (CAA) and the Clean Water Act (CWA), both archetypal "cooperative federalism" statutes, were passed in 1970 and 1972, respectively, and significant CWA Amendments were passed in 1977, right before PURPA.[246] Both of these statutes set clear regulatory floors at the federal level, which relied on "end-of-pipe" and receiving water/airshed quality standards.[247] States were then allowed to implement plans to meet, or exceed, these floors.[248] The results were statutes that were expressly in favor of experimentation, with differences between states and among industries.

PURPA's §210 is different. Section 210 expressly requires a federal agency to create regulations "which . . . *require* electric utilities to offer" to buy and sell power from QFs.[249] The CAA and the CWA similarly require a federal agency to proscribe certain standards, but expressly allow for state agencies to implement the law in different ways.[250] This was a Congress well-versed in paradigmatic cooperative federalism, or at least more experimental decentralization, yet they chose a different path for PURPA §210. Furthermore, beyond the circumstances of PURPA's passage, there are also normative reasons that judges should grant deference to FERC's interpretation of §210 and their enacting regulations.

B. Certainty, Uniformity, and Renewables

From a theoretical perspective, the holdings in *Exelon Wind* and *Idaho Power* suggest the ability of courts to grant deference to an implementing state agency in contravention of the proscription of the implementing federal agency.[251] From a more practical perspective, these holdings suggest that state PUCs should be the ones to delineate when, how, or even if renewable generators that fit FERC's definition for QFs should be able to enter long-term contracts at avoided costs. This presents a problem for renewables.

The renewable power industry craves certainty. There are certain physical reasons that renewables, like any electricity producers, need certainty: it would be difficult to build a power plant if, for instance, you were unsure about whether the transmission lines would take alternating or direct current, or at what loads. But the primary reason that renewables, more than any other electricity producers, require certainty is investment.[252] Utility-scale renewable projects can cost billions of dollars[253] and thousands of dollars per kilowatt-hour on the front end,[254] while still being

238. *See* Jacobs, *supra* note 19, at 201, 215 (discussing President Carter's desire to deregulate oil prices and the trucking industry, respectively).
239. 95th Congress and Energy Policy, *supra* note 26, at VIII. This is admittedly a simplified view of PURPA, which "may be the paradigmatic example of a federal energy law enacted by Congress with multiple statutory purposes." Jim Rossi & Thomas Hutton, *Federal Preemption and Clean Energy Floors*, 91 N.C. L. Rev. 1283, 1306 (2013). Still, regardless of the various goals of PURPA as a whole, the legislative climate did reflect a move toward greater federal control over the nation's energy supply and consumption.
240. *See* 95th Congress and Energy Policy, *supra* note 26, at 4; Jacobs, *supra* note 19, at 213-14 (discussing President Carter's general support for solar energy).
241. 95th Congress and Energy Policy, *supra* note 26, at 4.
242. *Id.* at 9.
243. *See* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 750-51 (1982); 95th Congress and Energy Policy, *supra* note 26, at 17; Rossi & Hutton, *supra* note 239, at 1304 ("[T]he key provisions of PURPA work to encourage the development of cogeneration and certain renewable power generation projects.").
244. *See* 95th Congress and Energy Policy, *supra* note 26, at 17.
245. *Id.*
246. Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (1970); Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972); Clean Water Act Amendments, Pub. L. No. 95-217, 91 Stat. 1567; *see* Rossi & Hutton, *supra* note 239, at 1294-95 (discussing the CWA and the CAA).
247. *See* 42 U.S.C. §7409 (CAA); 33 U.S.C. §§1311-1312 (CWA).
248. *See* 42 U.S.C. §7410 (CAA); 33 U.S.C. §1313 (CWA).
249. 16 U.S.C. §824a-3(a) (emphasis added).
250. *See* Rossi & Hutton, *supra* note 239, at 1294-95.
251. *See supra* Part I.B.
252. *See* Felix Mormann, *Enhancing the Investor Appeal of Renewable Energy*, 42 Envtl. L. 681, 686-87 (2012).
253. *See, e.g.*, Cassandra Sweet, *Ivanpah Solar Plant May Be Forced to Shut Down*, Wall St. J., Mar. 16, 2016 (Ivanpah, a utility-scale solar-thermal project, cost $2.2 billion), http://www.wsj.com/articles/ivanpah-solar-plant-may-be-forced-to-shut-down-1458170858.
254. *EIA Publishes Construction Cost Information for Electric Power Generators*, U.S. Energy Info. Admin., June 6, 2016, http://www.eia.gov/todayinenergy/detail.php?id=26532.

relatively inexpensive in the long run.[255] This basic economic reality means that encouraging renewables requires encouraging investment, and encouraging investment requires certainty.[256]

PURPA §210 has provided a degree of certainty to the renewable power industry for decades. Creating a guaranteed market makes investment in otherwise risky technologies a much safer bet, and §210 accomplishes this task by requiring utilities to purchase electricity from QFs.[257] The ability to enter into long-term contracts generates even more certainty for investors. Unlike other popular regulatory incentives that promote development, such as tax credits, PURPA §210 is not perennially in danger of being phased out,[258] and the LEO provisions mean that investors do not have to consider the regulatory climate year after year—they can just add up the expected returns based on the price in the contract.[259]

Allowing states greater discretion to determine when QFs can enter LEOs undermines this important benefit of PURPA §210.[260] A patchwork of different LEO requirements across jurisdictions would hinder investment and production in much the same way that current differences between renewable portfolio standards hinder renewable development.[261] It would be akin to asking drivers "to change engines, tire pressure, and fuel mixture every time they crossed state lines."[262] While there may be increased political support for state-level energy policies, even strong states'-rights proponents have no desire for regulatory uncertainty.[263] Granting deference to state agencies in furtherance of some conception of "federalism" or "states' rights," at least in the context of PURPA §210 implementation, is the equivalent of swimming halfway across a river. Or, put differently, dislike of a national solution does not necessitate endorsement of a confusing mix of subnational approaches.

255. *See* Derek Markham, *Solar Energy Price at All-Time Low: Average Price of Solar in U.S. Falls to 5¢/kWh*, Cost Solar, Sept. 30, 2015, http://costofsolar.com/average-price-of-solar-energy-u-s-falls-5%C2%A2kwh/.

256. *See* Exelon Wind 1, LLC v. Nelson, 766 F.3d 380, 404-05, 44 ELR 20202 (5th Cir. 2014) (Prado, J., dissenting) (citing 45 Fed. Reg. 12224 (Feb. 25, 1980)); Erin Dewey, *Sundown and You Better Take Care: Why Sunset Provisions Harm the Renewable Energy Industry and Violate Tax Principles*, 52 B.C. L. Rev. 1105, 1111-14 (2011).

257. *See* Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 44 Fed. Reg. 12214, 12218 (Feb. 25, 1980) (codified at 18 C.F.R. pt. 292) ("[A]n investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility.").

258. *See* Dewey, *supra* note 256, at 1125-28.

259. *Cf.* Mormann, *supra* note 252, at 712-13 (discussing how feed-in tariffs "offer the highest overall level of certainty to investors in renewable energy technologies." PURPA §210 is similar to a feed-in tariff in that it provides a definite buyer for renewable power).

260. *See Exelon Wind*, 766 F.3d at 404 (Prado, J., dissenting).

261. *See* Benjamin K. Sovacool & Christopher Cooper, *Congress Got It Wrong: The Case for a National Renewable Portfolio Standard and Implications for Policy*, 3 Envtl. & Energy L. & Pol'y J. 85, 92 (2008).

262. *Id.*

263. *See* Senator Chuck Grassley, Renewable Energy Industry Needs Policy Certainty From Government, Remarks at the American Council on Renewable Energy Policy Forum (Apr. 23, 2015), https://www.grassley.senate.gov/news/news-releases/grassley-renewable-energy-industry-needs-policy-certainty-government.

IV. Conclusion

There may be several reasons why the Fifth Circuit brushed aside FERC's declaratory order as "informal" and upheld a Texas utility's interpretation of FERC's regulation as reasonable. One of those reasons may be a misunderstanding of federalism that infects the court's understanding of deference. *Chevron* deference is about agency expertise as well as delegation, and yet in search of some elusive principle that underlies "cooperative federalism," a court may be willing to ignore expertise in favor of a determination of which agency was given which task—a determination that is often incorrect because of blinders that only allow us to see these schemes in a certain light. Courts assume that "cooperative federalism" must call for differentiation in the name of experimentation, local differences, or even state sovereignty and separation of powers.

In fact, FERC was the agency tasked with proscribing these standards under PURPA §210—it is both the more expert body to interpret this statute and these regulations, and the body that Congress intended to do just that. PURPA §210 is better thought of as decentralization, and managerial decentralization in particular. The enacting Congress simply chose to delegate administrative tasks to local organizations, not allow those organizations to alter the fundamental purpose of the statute.

While the energy crisis of the 1970s may in many ways be behind us, the continuing realities of unrest in the Middle East, pollution from extraction and burning of fossil fuels, and a new awareness of climate change mean that our national energy crisis has not ended. The goal of PURPA—to diversify our energy supply by requiring utilities to buy from QFs—remains vital, and the renewable energy industry remains largely dependent on statutory certainty. We should not let misconceptions about federalism and deference, or simply a lack of legal theory, impede such an important goal.