



10-1981

FERC v. Mississippi

Lewis F. Powell Jr.

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Note

DC held a major Act of Congress invalid.

Act does intrude ~~severely~~ severely on right of states (& state utility commissions) to regulate electric & gas utilities & their intra-states rates.

But we should review.

PRELIMINARY MEMORANDUM

June 11, 1981, Conference
List 1, Sheet 1

No. 80-1749

FERC & EDWARDS, Sec'y
of Energy

Appeal from USDC for SD Miss
(Cox)

v.

MISSISSIPPI, et al. *

Federal/Civil

Timely

1. SUMMARY. The DC held unconstitutional a variety of provisions in the Public Utility Regulatory Policies Act of 1978 (PURPA), 92 Stat. 3117, that required state utility authorities to consider certain energy-conservation measures and to adopt certain others. The DC based its decision on the Commerce Clause, the Tenth Amendment, the Supreme^{acy} Clause, and the guarantee of a republican form of government.

* no
problem

I do not think the Court should
affirm the decision below. Note.

GM

2. FACTS & HOLDING BELOW. PURPA was one of a quintet of statutes adopted in November 1978 to counter national energy problems.¹ This particular statute addresses problems of electrical generation and their impact on nationwide consumption of oil and natural gas.

Titles I and III. Titles I and III, administered primarily by the Sec'y of Energy, require state agencies that regulate utilities to consider the adoption of specific rate designs and standards. These titles have three common goals: (1) promotion of conservation; (2) optimization of the efficient use of facilities and resources; and (3) equitable rates for consumers. ?
15 U.S.C. § 3201; 16 U.S.C. § 3201.

More specifically, § 111, 16 U.S.C. § 2621, requires state authorities to "consider including in rate schedules various certain provisions that would pass through to each consumer the true cost of service to that consumer; e.g., adjusting rates by season and by time of day and lowered rates for consumers consenting to interruption of service during peak demand periods. Consideration must have commenced by November 8, 1980, and be completed by November 8, 1981. In addition, § 113, 16 U.S.C. § 2623, requires consideration of regulations that would mandate various other conservation techniques; e.g., unit-by-unit metering in new buildings, restricting automatic pass-through of cost increases, and prohibiting pass-through of advertising costs

¹The other statutes were the National Gas Policy Act of 1978 (NGPA), 92 Stat. 3350; the National Energy Conservation Policy Act, 92 Stat. 3206; the Energy Tax Act of 1978, 92 Stat. 3174; and the Powerplant and Industrial Fuel Use Act of 1978, 92 Stat. 3289.

to consumers. Title III, through § 303, 15 U.S.C. § 3203, mandates consideration of the § 113 regulations for natural gas utilities, and § 114 in Title I, 16 U.S.C. § 2624, of whether rates should be reduced for essential uses by residential consumers. A decision on § 113 regulations and related measures was due by November 8, 1980.

The statute imposed no direct penalties for failure to meet these deadlines. PURPA does, however, mandate procedures for consideration of these regulations. There must be a public hearing, with notice. If the regulatory authority does not adopt the PURPA regulations, it must issue a written statement of its reasons. "Any person" may bring an action to compel the hearing and decision. The Secretary, affected utilities, and consumers may intervene in Title I standards; only the Secretary has a right to intervene in natural-gas cases under Title III. These intervenors may seek judicial review in state courts of the agency decision on Title I matters; the Secretary may participate as an amicus curiae in Title III judicial review. Title I and III also incorporate reporting requirements regarding Title I.

Title II, § 210. This provision is designed to encourage "cogeneration" (i.e., joint production of electricity and thermal energy, such as heat or steam) and "small power production facilities" (i.e., facilities generating no more than 80 megawatts through the use of biomass, waste, or renewable resources such as wind, water, or solar power). FERC is required to promulgate, after consultation with state regulatory agencies, rules to encourage these two activities, including rules requiring purchase of electricity from these sources. 16 U.S.C. § 824a-3. This section also requires state agencies to implement

the rules, and authorizes FERC to enforce such requirements against state agencies in federal courts. FERC has adopted implementing rules.

PURPA also authorizes the Secretary to make grants to state agencies to defray the costs of compliance.

Proceedings Below. In April 1979, Appellees State of Mississippi and Miss Public Service Commission filed this action in the USDC for SD Miss against the appellants (FERC and the Sec'y of Energy) challenging the constitutionality of Titles I and III and § 210. The third appellee, the Miss Power & Light Co., was allowed to intervene on behalf of the State and the Public Service Commission.

On cross-motions for summary judgment, Judge Cox held these provisions unconstitutional. In an opinion filed February 19, 1981, he stated that these provisions exceed Congress' power under the Commerce Clause: the Framers could not have envisioned federal regulation of the rates of utilities such as telephones, electricity, and natural gas. They also usurp state authority over purely intrastate consumers. In a judgment order filed February 27, Judge Cox stated that Titles I and III and § 210

"are unconstitutional and void in that they constitute a direct intrusion on integral and traditional functions of the State of Mississippi and violate the Constitution of the United States, especially the Tenth Amendment, the Supremacy Clause [Art. VI, § 2], and a republican form of government as guaranteed by Article IV, Section 4" App to Juris Statement at 9a.²

²For a discussion of the arguments regarding the Supremacy Clause and the guarantee of a republic form of government, see infra, at 6.

3. CONTENTIONS. The SG believes the contested provisions of PURPA are clearly within the Commerce Clause and do not intrude into state sovereignty. The Federal Govt may regulate intrastate activities that affect interstate commerce, and regulation of the supply of electricity and natural gas to consumers falls within this authority. Intrusiveness into state affairs is a closer question, but this statute does not exceed the limits imposed by the Tenth Amendment. This is not a case in which Congress has displaced state decisionmaking in an area traditionally governed by the States, National League of Cities v. Usery, 426 U.S. 833 (1976), for federal and state governments have been exercising concurrent jurisdiction over public utilities for over 60 years. Thus, this is not a function traditionally intrusted to the States, such as police and fire protection, public health, and sanitation. In addition, Usery's distinction of Fry v. United States, 421 U.S. 542 (1975), indicates that federal regulation of state matters is permitted when necessary to counter a serious nationwide problem that can only be addressed through a single national program and, in such cases, when the interference with ultimate state decisionmaking. The energy crisis, like inflation, is a serious concern that can be attacked only through a unified national program. Title I and III let the States make the ultimate decisions, and the regulation stops short of wholly preempting state authority in this area. These issues are substantial enough to merit the Court's attention.

The appellees have filed two motions to affirm, one jointly from the State and the State Commission and the other from the

Miss Power & Light Co.³ All three believe the SG's arguments are insubstantial. PURPA interferes greatly with matters under the sovereign power of the States. It also structures the internal operation of state utility regulation through its procedural provisions. PURPA does not address a serious national problem, for the Dept of Energy has acknowledged PURPA may save only 160,000 barrels of oil a day, a figure the Sec'y has independently indicated will have only a slight effect on imports. This is not a limited regulation of a short duration, as Usery characterized the wage freeze in Fry; rather, it is a long term matter.

Miss Power & Light Co. add that PURPA really does not regulate commerce; it regulates state governments' regulation of commerce. Thus, it exceeds the Commerce Clause. In addition, by establishing federal law as state law, it confuses the ranking of law under the Supremacy Clause. Finally, by imposing rules and regulation on States that they did not adopt through their elected representatives, PURPA fails to ensure the State a republican form of government.

4. DISCUSSION. Obviously, the issue is substantial. The statute clearly is authorized by the Commerce Clause. In general, it probably does not violate the Tenth Amendment, although I am troubled by the provisions that establish state agency--and court--procedures. The DC's reliance on the

³There also are three amicus briefs, two urging affirmance (Louisiana State Public Service Commission and Southeastern Legal Foundation) and one urging reversal (Windfarms, Ltd., a company involved in generating electricity through wind and governed by § 210).

Supremacy Clause and the guarantee of a republican form of government, if based on Miss Power & Light's theory, is wholly meritless.

Nos. 79-1538, 79-1596, and 80-231, the Surface Mining Cases, address the application of Usery in other areas of state authority. One possible solution here is to hold for those cases and then vacate and remand. Nevertheless, the statutory scheme here is substantially different, and I doubt a remand would do anything but delay this Court's consideration of the case. I therefore recommend that probable jurisdiction be noted.

There are two motions to affirm.

06/03/81

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Opinion & order
in Juris Statement

Court
Argued, 19...
Submitted, 19...

Voted on....., 19...
Assigned , 19... No. 80-1749
Announced , 19...

vs.

MISSISSIPPI

Also motion of Louisiana Public Service Commission for leave to file a brief as amicus curiae.

Note

[illegible]

*Reviewed 1/11/82 - fine memo.
See my yellow notes*

jsw 01/10/82

BENCH MEMORANDUM

To: Mr. Justice Powell
From: John Wiley

January 10, 1982

No. 80-1749: FERC v. Mississippi

Questions Presented

1. Whether Congress exceeded its Commerce Clause power when it passed the Public Utilities Regulatory Policies Act of 1978 (PURPA).

2. Whether PURPA transgresses federalism limits on national power, as articulated by National League of Cities.

I. Background

PURPA is set forth in the Jurisdictional Statement at pages 12a-67a. I will sketch the key provisions of this lengthy statute.

By way of overview, PURPA basically is an energy con-

servation measure.¹ First, it seeks to cut back on electricity consumption by stimulating reform of traditional electrical pricing policies. Such pricing policies often created incentives for increased electrical consumption at the same time that they failed to reflect the economic cost of peak consumption.² An accompanying and, to some extent, inconsistent objective of PURPA's economic reform is distributional: assuring that low income groups do not suffer "excessively" from this attempted reformation of utility rate structures.

Second, PURPA seeks to supplement and improve traditional fossil fuel usage by encouraging "cogeneration"--combining energy use facilities in ways that permit waste energy to be utilized--and smaller scale producers that employ new

¹At the outset, I should confess that I was the staff author of a California Energy Commission report that advocated energy policy options similar to some of those eventually adopted by PURPA. The California Energy Commission, for which I worked, first considered these matter in 1975-76, and since has taken steps to implement many of these policies at the state level. The PURPA was passed in 1978 and was modelled in some measure after the experience of various states (including California) with these programs.

²High energy consumption at peak demand periods is undesirable because it causes the inefficient use of power generation facilities. For instance, suppose 24 people own electric clothes dryers that each require one watt-hour to dry clothes. It would require a 24 watt generator to supply enough electricity if all of these individuals dried their clothes at the same time. The generator then would sit idle for the remaining 23 hours in the day--an inefficient use of a capital-intensive investment. A one watt generator, however, would be sufficient to supply all of these 24 different people if each one dried clothes during a different hour. Then the generator would operate continuously with no idle time--an efficient use of the capital investment.

and alternative technologies (such as solar, wind, small scale hydro power, biomass, etc.). PURPA attempts to facilitate development of these technologies by two means. The first is to require electric utilities to tie such facilities into their power grids, so that small producers can sell excess energy and buy back-up energy during their own times of peak demand. (Utilities, at least in California, historically have not been anxious to make such accommodations.) PURPA's second means is to exempt such small facilities from the burdens of public utilities regulation.

These reforms are directed at changing utility practices. Today, of course, such practices usually are the subject of state regulation. The PURPA therefore addresses existing state utility regulation, in three general ways: (1) by requiring state utility regulators (and unregulated utilities) to consider federal reform proposals ("hortatory standards"); (2) by requiring state regulators (and unregulated utilities) to implement substantive FERC rules about utility power sales and purchases from cogenerators and small alternative energy producers ("implementation standards"); and (3) by exempting cogenerators and small alternative energy producers from all utility regulation--federal as well as state ("preemption standards").

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A. Hortatory standards

This type of regulation constitutes the bulk of

PURPA's text. On a general plane, this portion of PURPA contains no mandatory substantive federal policies. It aims at producing substantive changes in utility practices instead by stating substantive federal policies and by applying mandatory federal procedural policies to state utility regulation. This part of PURPA thus tries to "talk" state regulators into policy changes by means of federal procedural requirements. I am not familiar with another federal statute that takes this unusual approach.

Examining the hortatory portions of the statute at a more detailed level, Title I proposes a number of federal standards that state regulatory commissions and unregulated electrical utilities are to consider. These standards come in three batches: §§ 2621, 2623, and 2624. But all three groups of standards relate primarily to structuring the terms, conditions, and practices of electricity sales.³ *Subjects*

³Section 2621 proposes standards in six subject areas: (1) class costs of service (In the past, utilities have recovered different contributions towards total costs from different classes of users. California traditionally had lowered the burden for residential and large industrial and raised the burden for small to medium commercial consumers.); (2) declining block (or quantity discount) rates; (3) time-of-day rates (a form of peak load pricing); (4) seasonal rates (a different form of peak load pricing); and (5) interruptible rates (same); and load management techniques (same).

Section 2623 proposes standards in five different subject areas: (1) master metering (aimed at eliminating average cost pricing for apartment dwellers, where one pays only the per capita energy cost for the building even though individually one may use more than the average amount of energy); (2) automatic adjustment clauses (aimed at forcing utilities to reexamine their rate structures and practices every time they increase their rate levels); (3) information to consumers (designed to inform consumers about often

Footnote continued on next page.

State regulatory commissions and unregulated utilities are required to "consider"--but not necessarily to adopt--these standards. §2622. "Consideration" entails a number of mandatory procedural steps: notice, hearing, and written decision (§2621(b)); broad participation rights by "any electric consumer" (§2631); and judicial review in state court of any determination by any participant in the original proceeding. §2633(c). Utilities are made liable for reasonable costs and attorney's fees of consumers whose positions are adopted. §2632. State authorities and unregulated utilities must report annually to DOE regarding their considerations. §2626.

*yes -
quite
intrusive*

Wrong

The state regulators (and unregulated utilities) are to determine, regarding the standards in §2621, "whether or not it is appropriate to implement such standard to carry out the purposes of this chapter" (emphasis added). This directive is qualified, however: "Nothing in this subsection prohibits any State regulatory authority or nonregulated electric utility from making any determination that it is not appropriate to

complex electrical pricing systems so that they are aware of how to alter their consumption to save money and increase utility efficiency); (4) procedures for electrical termination (a consumer "due process" concern rather than a utility efficiency or energy conservation measure); and (5) prohibition on consumer reimbursement of utility promotional and political advertising (obviously a provision that predates your Central Hudson and Consolidated Edison opinions!).

Section 2624 proposes a standard for "lifeline" rates--an equity rather than efficiency measure aimed at reducing the cost of small amounts of consumption that are thought to represent the energy needed for "essentials."

implement any such standard, pursuant to its authority under otherwise applicable State law" (emphasis added).

Regarding the standards in §2623, state regulators and utilities are to determine whether adoption of the proposed federal standards "is appropriate to carry out the purposes of this chapter, is otherwise appropriate, and is consistent with otherwise applicable state law" §2623(a)(1) (emphasis added). And regarding the lifeline rates proposed in §2624, state regulators and utilities are to decide "whether such a [lifeline] rate should be implemented by such utility" (emphasis added).

Title III of the statute adopts a similar approach respecting two natural gas utility standards: procedures for terminating natural gas service; and a prohibition on recovery of utility advertising costs from consumers (another pre-Central Hudson and Consolidated Edison provision). §§ 3201 - 11.

B. Mandatory rules

Worisonel

The second type of PURPA regulation does require state regulators and unregulated utilities to implement substantive federal rules. Sections 210(a) & (f) require FERC to promulgate rules after consultation with state authorities and after notice and hearing. These rules essentially are to require electric utilities to hook "cogenerators" and "small alternative energy facilities" into their grids at fair rates. This portion

of PURPA also provides for judicial review of state regulators' and unregulated utilities' actions, §210(g)(1), and for enforcement by "any person" of "any requirement" adopted by regulators or utilities pursuant to §210(f). §210(g)(2). FERC also is empowered to enforce the requirement that state regulators and utilities implement the FERC rules. §210(h)(2).

C. Preemptive provisions

Section 210(e) directs that the FERC is to prescribe rules under which cogenerators and small power producers are exempted from federal and/or state utility regulation. Again, FERC is only to adopt these rules after "consultation with representatives of State regulatory authorities" and others.

II. Discussion

Resps State of Mississippi and Miss. Public Service Comm'n state that there are two issues: (1) whether Congress exceeded its Commerce Clause power; and (2) whether PURPA infringes on National League of Cities states' rights. Resp Miss. Power & Light Co. raises additional issues based on the Republican Form of Government Clause; the Supremacy Clause; and the Takings Clause of the Fifth Amendment. The SG does not address any of the latter issues. I think this is sound, because none are serious arguments in my opinion. The Republican Form of Government Clause long has been regarded as nonjusticiable; it is extremely peculiar to attack a federal

statute on the basis of the Supremacy Clause; and any conceivable takings problems would have to be resolved on a case by case basis--not in a facial attack of this type. See Hodel v. Virginia Surface Mining. Therefore I will not discuss this last group of issues unless you so request.

A. Whether Congress exceeded its Commerce Clause power No

This is not a substantial issue. Congress explicitly found, inter alia, that proper regulation of interstate commerce requires increased electrical and natural gas conservation and equitable retail rates for electrical consumers. See Jur. Stmt. 13a. The Virginia Surface Mining opinion from last Term devoted considerable time explaining that the test here is whether there is a rational basis for Congress' finding that the regulated activity substantially affects interstate commerce. See 101 S.Ct. 2359-64.

Congress did have such a rational basis. As previously stated, PURPA essentially is an energy conservation measure. It takes a brave advocate to argue with a straight face that energy conservation--of any type--does not affect interstate commerce, in these post-Arab embargo days of foreign oil dependency.

The PURPA does contain ancillary "equity" measures that are rationalized as attempts to soften the impact of higher and restructured energy prices for consumers. These measures primarily are the "lifeline" electrical rate proposals

and the "due process" provisions for termination of residential utility service. These provisions are rationally related to the overall PURPA regulatory package. These provisions also can be independently justified by their own impact on interstate commerce: retaining the national purchasing power of marginal families upon whom increasing energy rates fall the hardest. One may differ with the soundness of the policies, but it is difficult to say that there is not a rational basis for concluding that the measures substantially affect interstate commerce.

Resps argue that PURPA seeks to regulate State regulatory processes rather than "commerce." This point does not convince me. Congress plainly was concerned with combatting the national energy crisis via reform of electrical and gas utility practices and rate design. PURPA attempts to introduce these reforms directly upon nonregulated utilities. Where these matters are the subject of state regulation, PURPA addresses that regulation as a means of affecting those same utility practices.

I might agree with resps' argument if the situation were one in which Congress sought simply to displace state activities without any ultimate interstate commerce goal. In this case, however, I think resps would like the Court to focus on the regulatory means and to ignore the interstate commerce ends of PURPA. This argument should fail, however, because the Commerce Clause power inquiry traditionally has been very con-

cerned with the intended ends of congressional action.

B. Whether PURPA transgresses National League of Cities

The serious issue

This is the serious issue in this case. This case, as well as the Long Island R.R. case that also is being argued this month, provides the Court with the opportunity to shape the protean doctrine that National League of Cities launched and that so far has been elaborated only in Virginia Surface Mining.

Virginia Surface Mining stated that the National League of Cities test has four elements: (1) whether a federal statute regulates "States as States;" (2) whether the federal regulation addresses indisputable "attributes of state sovereignty;" (3) whether the federal law directly impairs state ability "to structure integral operations in areas of traditional functions;" and (4) whether, if a federal law offends all three of the foregoing principles of state independence, the nature of the federal interest is such as to justify state submission. (The first three requirements were listed together in text, while the fourth was added in a footnote.) 101 S.Ct. at 2366 & n.29.

The Virginia Surface Mining case was decided on the first ground: that the strip mining regulations concerned private activity rather than "States as States." See, e.g., 101 S.Ct. at 2369. The federal program there intruded considerably on state sovereignty by requiring federal administrative ap-

proval of state legislative activity. Id. at 2357. This federal/state interaction was entirely optional, however, because the federal program directed that a state could do nothing--in which case the federal agency would undertake complete implementation of the federal scheme. Id. at 2357-58.

PURPA offers states a similar but less explicit option. PURPA directs that states undertake procedures and implement substantive policies only if they have ratemaking authority over utilities. See PURPA, §2602(18) (definition of "State regulated electric utility"); §2621(a); §2623(a); §210(f)(1); §3202(c). States therefore could shift all PURPA obligations to private utilities by withdrawing from utility rate regulation entirely. This option resembles Virginia Surface Mining in that it permits the states to avoid any federal obligations if they are willing to cede this regulatory realm to the federal government. This option differs, however, in a crucial regard.

Because PURPA does not provide for federal utility rate regulation, the federal program offers states no assurance that the federal government will perform the entire regulatory function at issue if the states withdraw. The Surface Mining Act, by contrast, did provide for federal surface mining regulation. A state could withdraw from or decide not to comply with the Surface Mining Act to avoid the federal intrusion with the knowledge that the federal government was undertaking responsibility for the entire regulatory activity. In this case,

a state can avoid federal intrusion only by withdrawing from all utility rate regulation, knowing that that regulatory responsibility has been abandoned completely.

This fact illustrates that the cost of the state avoidance of federal intrusion is high: abandonment of a regulatory activity judged by most states to be important enough to conduct. The option of avoiding the federal intrusion thus is considerably less realistic, and itself more intrusive, than in Virginia Surface Mining. / ye

The Court could analogize PURPA to the Surface Mining Act in this manner so as to find National League of Cities inapplicable. But my feeling is that PURPA must be regarded as regulating "States as States" if a pragmatic meaning is to be attached to that phrase. If you agree, then PURPA thus satisfies the first prong of National League of Cities. This factor then distinguishes this case from Virginia Surface Mining. |

The second (indisputable attributes of state sovereignty) and third (displacement of state ability to structure integral operations in areas of traditional functions) elements of the National League of Cities test are difficult for me to differentiate. For purposes of this memo, I will assume that the second test does not have additional content that is material in this case.

As an initial matter, it is important to note an ambiguity in the third element (displacement of state ability to structure integral operations in areas of traditional func-

tions). This third step might in fact represent a single inquiry, or it could be two distinct sub-tests. The difference is important. It depends on whether "integral operations" and "traditional functions" represent rephrasings of the same notion, or whether the two phrases are additive requirements, both of which must be satisfied before the Tenth Amendment protects a given state action from federal invasion.

The difference can be illustrated with a hypothetical. Suppose California decides to undertake an activity that is completely untraditional for a state. For instance, suppose it embarks on a space exploration program. (Don't laugh too soon--Jerry Brown at one point had proposed this!) Suppose also that Congress passes a minimum wage law similar to that in National League of Cities, except that the law applies only to federal and state government space exploration programs. Would the Tenth Amendment prohibit the application of this law to California?

Yes, if the third test is a single inquiry. National League of Cities makes clear that wage determination is an integral state activity. With only slight semantic difference one can also say that it is traditional for states to determine their own wage policy.

But if the third test is a double inquiry, the Tenth Amendment would not constrain the application of this federal law. As before, National League of Cities establishes that wage determination is integral. But this federal usurpation of

an integral state operation would not displace the state in an area of traditional functions, because traditionally states do not explore space.

My sense is that the third inquiry should ^{be} a two-pronged test. I am led to this conclusion by the language of National League of Cities. See 426 U.S. at 851:

[The 1974 amendments to the wage act will] significantly alter or displace the States' abilities to structure employee-employer relationships in such areas as fire prevention, police protection, sanitation, public health, parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens (emphasis added).

I also think this is wiser of the two possible interpretations. To hold otherwise would permit states to insulate themselves from federal regulation in fields that traditionally have been national matters, simply by establishing programs in those fields. A contrary decision also could cut the National League of Cities doctrine off from its concern with preserving historic state roles. The doctrine instead would focus on the general need for protecting state autonomy in any area in which a state might chose to become involved. This idea seems to accord more with the concept of states in the Articles of Confederation than with the notion of states in the present Constitution.

If you accept the idea of a two part test for the

third step of the National League of Cities inquiry, the next problem is to apply each of these two parts to the present problem. Starting first with the "traditional functions" part, the main argument in favor of holding electrical utility regulation to be a "traditional function" for states is the widespread nature of such activity. Virtually every state does it.

yes

I discern two arguments to the contrary. First, although virtually every state does engage in such activity, this is a relatively recent development in the constitutional scheme of things. As the SG points out at 30 n.35, Mississippi only began such regulation in 1956. I know from the papers that Texas--one of the last states to avoid the practice--only began such regulation in the late 1970's.

I doubt this, most states have regulated rates & service for half century & more

More importantly, "energy regulation has been a shared state and federal responsibility for the better part of this century. Congress passed the Federal Water Power Act in 1920. Partly in response to this Court decision in Pulic Utility Comm'n v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927), Congress augmented this regulation with the Federal Power Act in 1935. (As you recall, the history of this regulation is recounted in part by the briefing in New England Power Co. v. New Hampshire, which was argued in December.) Federal energy regulation has steadily increased since that time.

My inclination is to think that electrical and natural gas utility regulation is not a "traditional function" of state government. If you agree, then this ends the case. Virginia

query

not necessarily on this ground

Surface Mining emphasized that "a claim that congressional commerce power legislation is invalid under the reasoning of National League of Cities must satisfy each of three requirements." 101 S.Ct. 2366 (emphasis in original). Consequently reversal would be appropriate.

If you do regard utility regulation as a traditional state function, then the next step is to decide whether PURPA displaces "integral operations" in this function. The three different categories of PURPA regulation, see pages 3-7 supra, must be analyzed separately in this inquiry.

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A. Preemptive provisions

Taking these categories out of order, the least intrusive type of federal regulation is the preemptive provision (described on page 7, supra). This type of regulation simply tells state regulators to leave cogenerators and small energy producers alone. This type of provision does not intrude excessively into the integral mechanics of utility regulation. States are bypassed altogether. They are not told how to run their own affairs or transformed into administrative arms of the federal government. Of the three types of PURPA regulation, this provision is the most analogous to typical and accepted exercises of federal preemptive power.

yes.
OK
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B. Hortatory provisions

More intrusive are the hortatory provisions. See

pages 3-6 supra. Although these sections contain no mandatory substantive requirements, they do dictate to states how states are to run certain state procedures. I do not perceive of anything "integral," however, about a state's ability to refuse to consider policies that the federal government considers to be important and of national import. Therefore the notice-and-hearing and written decision requirements seem innocuous. The associated timing provisions also seem unobjectionable; they appear reasonable and unlikely to place great strains on state regulators. And the broad standing provisions, although somewhat more sensitive, still does not seem to displace any "integral" state operation. The ultimate decision on the merits remains in the hands of the state.

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The judicial review provisions initially concerned me, but my concern has subsided upon reflection. The sections providing that "any person" can bring an action to enforce the PURPA requirement to hold hearings and make determinations are but offshoots of the basic state obligation under PURPA to consider the federal proposals. So I do not think these portions amount to unconstitutional invasions by the federal government. Section 2633 (c) (1) also authorizes "any person" to seek "review of any determination . . . with respect to any electric utility . . . in the appropriate State court if such person . . . intervened . . . in the original proceeding or if State law permits such review." The standard for this judicial review is not stated, and so I presume that a state court would apply its

What
about
Art III

own standard of agency review--probably along the lines of a substantial evidence review. Because the key sections of this portion of PURPA essentially leave these determinations to the discretion of the state regulatory authority, see pages 5-6 supra, this provision for judicial review does not add much more of an intrusion than does the initial consideration requirement. Again, ultimate decision authority rests with the state.

C. Implementation provisions

The implementation provision is the most intrusive federal requirement because it combines the procedural requirements of the hortatory section with ¹¹ substantive federal rules that state regulators must adopt. These substantive federal rules are to be determined by the FERC after consultation with state authorities. The ^{2nd} rules are

to require electric utilities to offer to--

(1) sell electric power to qualifying cogeneration facilities and qualifying small power production facilities and

(2) purchase electric energy from such facilities.

* * * *

Such rules may not authorize . . . any sale for purposes other than resale.

§210(a)

State regulators are required to "implement such rule[s] . . . for each electric utility for which [the regulator] has ratemaking authority." §210(f)(1).

"Implementation" is defined by regulation. State im-

plementation "may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities . . . , or any other action reasonably designed to implement [the FERC rules]." 18 C.F.R. 292.401(a).

These provisions, with their associated judicial review and enforcement specifications, are the portion of PURPA most vulnerable to National League of Cities invalidation. They establish that a federal bureaucracy is to decide upon standards of utility operation that state regulators are then responsible for administering, under pain of judicial review. State sovereignty is infringed because state regulators are essentially reduced to administrative arms of a federal agency.

On the other hand, the federal provision does operate only in a narrow area: wholesale transactions between utilities and small developers of new energy technologies.⁴ And the loose regulation defining "implementation," recited at the top of this page, does permit state regulators some latitude in deciding how to implement even these mandatory rules. My instinct (and I think instinct does have a place with a doctrine as young as that of National League of Cities) is that this is not a sufficient infringement upon state sovereignty to require the invalidation of an act of Congress.

But if this is approved what is to prevent a Fed bureaucracy from regulating all utility operations.

⁴Apparently the FERC rules are to apply only to utility purchases of excess power from cogenerators and small producers. Utility sales of back-up power to cogenerators would be for "purposes other than retail."

If you disagree, then the fourth prong to be considered is whether "the nature of the federal interest . . . [is] such that it justifies State submission." Virginia Surface Mining, 101 S.Ct. at 2366 n.29. The SG attempts to compare this case to Fry v. United States, 421 U.S. 542 (1975) (the price controls case). Fry is easily distinguishable, in that Fry involved only temporary federal intrusions on state sovereignty. PURPA does require only a one-time consideration of federal standards, but the implementation, preemption, and reporting requirements are on-going.

This fourth test could, however, provide a rationale for rescuing the PURPA implementation provision if you feel that provision does displace Mississippi's ability to structure an integral operation in a traditional function but that the federal provision nonetheless is acceptable. This fourth element of the National League of Cities test has only been defined in a single footnote, and the concept certainly could be adapted to fit this situation.

You may ultimately decide that this portion of the statute does transgress National League of Cities. If so, in my opinion the implementation provision is sufficiently severable so that such a finding would require invalidation only of §210 (which includes the preemptive provision analyzed on page 16). See Jur Stmt 48a-56a (text of §210).

III. Summary

PURPA has three types of state regulations: ^① preemptive; ^② hortatory; and ^③ mandatory implementation standards. All three regulate "States as States" as a practical matter. Therefore all three pass the first prong of the National League of Cities test, as articulated by Virginia Surface Mining.

no The second and third prongs of the National League of Cities test should, in my view, be understood as inquiring, first, whether a given activity is a "traditional function" of state government, and second, whether the federal intrusion is so great as to displace an "integral operation." I think a convincing argument can be made that electrical and natural gas regulation is not a traditional state function--because Mississippi only undertook this activity in 1956 and because of the long history of federal involvement in this field. If you agree that utility regulation is not a "traditional function," you should vote to reverse on this basis. no

A contrary decision on this point requires a section by section assessment of PURPA to consider whether the federal interference extends to "integral operations." While I think there clearly is not an invasion of integral functions by the preemptive and hortatory portions of PURPA, the question is closer regarding the "mandatory implementation standards". My judgment is that the entire PURPA should survive this scrutiny and that the case should be reversed. A contrary holding should sever the invalidated implementation standards from the remainder of the PURPA. yes

80-1749 FERC v. Miss

⊗

1/11/82

Q Whether the Pub. Utilities Reg. Policy Act of 1978 (PURPA) exceeds Fed power under Nat. League of Cities?

The Act (PURPA): Three types of Fed Reg.:

1. Hortatory Standards (unique attempt to "persuade" state Reg. Agencies to adopt Fed "standards" as to the sale of electricity).

States are required to "consider" - but not necessarily adopt - Fed Standards.

→ But procedures for consideration are mandatory (& intrusive).

may "intervene"
Jud. review in state court of whether procedures have been followed by "any ~~person~~ electric consumer" - with attys fees if they prevail.

2. Mandatory Rules.

State Agencies (e.g. Utility Comm) & unreg. utilities, must "implement" Fed Rules that require:

Req of water
(a) connection with "cogeneration" & "smallly alternative energy facilities" with state grids at fair rates.

(b) Jud. review & enforcement by "any person" of Fed Regs.

3. Presumptive Provisions - § 210(e) directs that "cogenerators" & small power producers are "exempted" from Fed & State utility regulations. Valid presumption - perhaps. But how distinguished?

Application of Nat. League of Cities as construed in Hodel.

A. Presumptive Provisions - valid as exercise of Commerce Clause power. These producers not traditionally regulated.

B. Hostatutory Provisions - altho not mandatory, they do dictate certain state procedures. May be valid.

The "standing" conferred on "any ^{electric consumer} ~~person~~" to obtain ^{state court} ~~jud. review~~ request pub. hearing & obtain ^{state court} ~~jud. review~~ is intrusive. I could join 4 to invalidate these provisions. Leave "standing" to Courts, as well as procedure.

C. Mandatory Provisions require State State Commissioners to "adopt" Fed Rules & requiring utility cos. (electric) to "sell" power to "cogeneration" & small producers, and to "purchase" energy from them. (Permissive regulation of historic state function as essential to "state police power" as police, fire, health protection)

Am not at
rest.
This
is
close
to Nat.
Cities.

Reviewed 1/17 - Heltzel

SG's Reply relies on "War Power"

jsw 01/15/81

[82]

(nat. defense) as well as Commerce Clause.

SUPPLEMENTAL BENCH MEMORANDUM

To: Mr. Justice Powell

January 15, 1981 [1982]

From: John Wiley

No. 80-1749: FERC v. Mississippi

The SG has filed a reply brief. His reply does not change my basic analysis of this case. He does, however, make two points that warrant comment.

First, the SG argues that the substantive implementation standards of §210, which I thought were the most intrusive portions of the PURPA, are "essentially adjudicative in nature."

The states are not compelled to enact legislation, promulgate regulations, or expend state funds. At most, Section 210 simply establishes federal substantive rules of decision and requires the state commissions to apply those rules in particular settings in which the commissions already exercise jurisdiction.

SG reply brief at 4.

The SG completes this point by citing Testa v. Katt, 330 U.S. 386 (1947) (state courts obligated to enforce federal law).

This is a powerful argument. As noted at pages 18-19 of my bench memo, "implementation" is defined by regulation to mean "the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities . . . , or any other action reasonably designed to implement [the FERC rules]." 18 C.F.R. 292.401(a) (emphasis added). So defined, the duty of "implementation" that PURPA places on state regulators does come to resemble the traditional duty upon state adjudicative bodies to enforce federal law. To my mind, this is a key point that argues strongly in favor of permitting this type of federal/state interaction.

Second, the SG argues that the PURPA was passed under Congress' war power as well as its Commerce Clause power. SG reply brief at 9-11. The PURPA does state that

The Congress finds that the protection of the public health, safety, and welfare, the preservation of the national security, and the proper exercise of the of congressional authority under the Constitution to regulate interstate commerce require [various actions] (emphasis added).

*War
Power
as
well
as
Commerce
Power*

Jur Stmt at 13a.

National League of Cities declined to decide whether its proscription on federal power extended to federal legislation enacted pursuant to grants of power other than the Commerce Clause. 426 U.S. at 852 n.17. That decision also ob-

served that "[n]othing we say in this opinion addresses the scope of Congress' authority under its war power." Id. at 855 n.18.

Despite these disclaimers, I have a hard time understanding why the National League of Cities test should be inapplicable outside the realm of the Commerce Clause. Your memos to file in our National League of Cities file show that you believe federalism limits to be a fundamental tenet of the constitutional order, irrespective of whether those limits are drawn from the Tenth Amendment or from the form of the Constitution as a whole. As restated by Virginia Surface Mining, the fourth element of the National League of Cities test takes into account the objection to applying federal limits to non-Commerce Clause legislation: that such federal legislation might be too pressing to be subject to federalism limits.

My present thinking is that the source of congressional power for a particular statute might be material in how the statute is analyzed under the National League of Cities test. For instance, war power legislation may have a stronger claim to legitimacy under the fourth prong of the test. But the source of Congress' power does not seem material to whether a particular statute must accord with National League of Cities. As I understand it, your view is that federalism limits are of a broad importance that transcends such limitations. ?

The SG does not introduce any new substantive considerations in his war power discussion. The PURPA was designed

to cope with the energy crisis. That crisis is serious, irrespective of whether it is analyzed for Commerce Clause or war power purposes. I conclude this part of the SG's discussion adds nothing to the analysis in my bench memo.

80-1749 FERC v. MISSISSIPPI

Argued 1/19/82

Lee (Solicitor Gen)

Title II § 210 - most controversial.
Act of Compromise

Regs have been adopted that leave ~~leave~~
great latitude to State Comms. These
are "extremely deferential to states".

Relies on Model

Commerce and War Clauses apply
League of Cities is not applicable.

Only reason States have authority
at all is that Congress has not
preempted - as it could - the entire
area.

all that § 210 does is provide
a fed. "rule of decision" in the situations
at issue. See Testa v Katt 330 U.S. 386

Alston (appellee)

Power to preempt this entire area,
doesn't ~~include~~ include power - in
view of 10th amend - to direct State
Comm. ~~to~~ to follow Fed procedures,
rules & regs. ?.

BRW suggests "middle ground" bet,
"preemption" & "state regulation" is valid.

Discussed with John
jsw 01/21/82

SUPPLEMENTAL BENCH MEMORANDUM

To: Mr. Justice Powell
From: John Wiley
No. 80-1749: FERC v. Mississippi

January 21, 1982

This memo responds to your request that I consider in more depth the constitutionality of the PURPA's broad standing provisions.

A. Description of PURPA's standing provisions

There are actually four types of standing provisions in PURPA. The four types of provisions grant: ① state regulatory intervention rights; ② rights to judicially enforce those intervention rights; rights to judicial review of state regulatory decisions; and rights to judicial enforcement of PURPA requirements. I summarize these four types of provisions in turn.

1. Regulatory intervention rights

Section 2631 (page 36a of the Jur Stmt) grants the right to ¹⁾intervene¹⁾ and participate in state regulatory proceedings to "the Secretary, any affected utility, or any electric consumer of an affected electrical utility" The Title III (natural gas) counterpart to this provision is §3205 (page 62a of the Jur Stmt). This section permits the Secretary (but only the Secretary) to intervene as a matter of right "solely for the purpose of advocating policies or methods which carry out the purposes set forth in section 3201 [equitable and efficient use of natural gas]" This more limited intervention right in natural gas proceedings presumably reflects the larger political muscle of the natural gas interests. Significantly, PURPA conveys no right of intervention and participation for the "mandatory implementation" provisions of §210.

2. Judicial enforcement of regulatory intervention rights

Second, §2633(b) (page 40a-41a of the Jur Stmt) grants standing in the federal courts to enforce §2631 intervention and participation rights to the Secretary, as well as to "any electric utility or electric consumer having a right to intervene under section 2631(a)" The Secretary is treated somewhat differently than the utilities and the consumers. The Secretary may bring an action in federal court to "enforce his right to intervene and participate under section 2631(a)," while consumers and utilities may only bring an action in fed-

3.

eral court if their intervention rights are denied by any state court. This difference presumably means that consumers and utilities--but not the Secretary--first must try to enforce their intervention rights in state court.

The Title III counterpart to this intervention enforcement right is given by §3207(a)(2) (page 65a of the Jur Stmt). This section grants the Secretary a right to bring an action in federal court "to enforce his right to intervene under section 3205" Once again, no counterpart to these provisions exists for the "mandatory implementation" provisions of §210.

3. Judicial review of state regulatory decisions

The right to obtain judicial review of "any determination made under [the sections authorizing state regulatory consideration] with respect to any electric utility" is granted by §2633(c) (pages 41a-42a of the Jur Stmt). Such judicial review may be brought in state court if the electric utility is other than a federal agency. In this case, the right of review is conferred to "[a]ny person . . . if such person (or the Secretary) intervened or otherwise participated in the original proceedings or if State law otherwise permits such review." §2633(c)(1)(first sentence) (page 41a of the Jur Stmt).

If the utility is a federal agency, on the other hand, the judicial review is to be had in federal court, and the right is conferred "[a]ny person (including the Secretary) . .

. if such person (or the Secretary) intervened or otherwise participated in the original proceedings or if otherwise applicable law permits such review." §2633(c)(2) (page 41a of the Jur Stmt). In every instance, "the Secretary may also participate as an amicus curiae in any review in any court of an action arising under the sections requiring state regulatory consideration. §2633(c)(3) (page 42a of the Jur Stmt).

The Title III counterpart to this judicial review provision is set forth by §3207(b)(2) (page 65a-66a of the Jur Stmt). Strikingly, this provision does not grant a right of judicial review. It instead provides that the Secretary is not authorized "to appeal or otherwise seek judicial review of the decisions of a State regulatory authority . . . or to become a party to any action to obtain such review or appeal. The Secretary may participate as an amicus curiae in any judicial review of an action arising under the provisions of this chapter." Under Title III, then, judicial review of state regulatory decisions apparently is only available as otherwise provided by state law.

A §210 counterpart to the judicial review provision does exist--for a change. Section 210(g)(1) (page 53a of the Jur Stmt) states that judicial review (respecting state regulatory proceedings for purposes of implementing the mandatory provisions) is to be available in the same manner as under §2633. Therefore the judicial review is continguous with judicial review under Title I of the PURPA. See page 3 supra.

This provision is difficult to understand, however, because §2633 grants judicial review rights only to those who participated in the proceedings or to those who already have review rights under otherwise applicable law. (The Secretary also is given amicus curiae rights.) But §210 does not grant participation rights in the first instance. See page 2 supra. Therefore apparently §210(g)(1) does not grant review rights that are any more expansive than those already extant under state law.

4. Judicial enforcement of PURPA

Finally, a right to enforce by state court action PURPA's Title I consideration provisions--with respect to utilities other than federal agencies--is provided by §2633(c)(1)(second sentence) (page 41a of the Jur Stmt). This right is granted to "[a]ny person (including the Secretary)," without any requirement that the person be a utility consumer or have participated in any regulatory proceedings. (Because "enforcement" presumably would mean forcing a regulatory commission to hold hearing and to consider standards, as Title I directs, in most instances there probably would be no proceedings in which litigants could yet have participated.) [Again, if the utility is a federal agency, §2633(c)(2)(second sentence) permits "[a]ny person (including the Secretary)" to bring an action to enforce the Title I consideration provisions in federal court.]

There are counterparts to this enforcement provision in both Title III and in §210. For Title III, "[a]ny person may bring an action to enforce the requirements of this chapter [to consider natural gas policies] in the appropriate State court." §3207(b)(1) (page 65a of the Jur Stmt). And for §210, "[a]ny person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority [requiring utilities to implement utility interconnections]. . . ." §210(g)(2) (page 53a of the Jur Stmt). Such §210 enforcement actions are to be brought in the same manner as provided under §2633. These §210 enforcement actions, however, differ from the enforcement provisions in Titles I and III; §210 directs enforcement against private parties--ordering them to comply with the state regulatory commission's orders--while enforcement under Titles I and III is aimed at the regulatory bodies themselves, requiring them to comply with PURPA's consideration requirements.

but see
§210(h)(2)

B. Discussion

I first discuss the type of standing provision granting state regulatory intervention rights. This type of standing provision differs from the traditional grant of standing to adjudicate. This distinction derives from the fact that the Mississippi Public Service Comm'n does more than adjudicate. In fact, the key activity here--policy decisions about electri-

I'm
not
sure

cal and natural gas pricing for the state--more closely resembles a rulemaking proceeding. This activity is quasi-legislative in character. This grant of standing consequently begins to resemble instructions to a state legislature to consider a given legislative proposal.

As a result, this standing provision conveys to "any electric consumer" a federal right to a place on the state legislative agenda. Because state decision about which laws to enact is, virtually beyond all dispute, an "essential attribute of state sovereignty," such a grant of "legislative standing" trenches on federalism values. States as sovereigns surely have a right to decide which political voices they will ultimately heed. It thus must be a component of this right for the state to decide who will be given an audience in the state legislative process. The federal government runs into a dangerous area when it begins to dictate to state legislators (and quasi-legislators) to whom and in what manner such legislators must pay attention, for the reason that federalism demands that states not be reduced to simple administrative arms of the federal government.

On the other hand, this right of autonomy respecting political input to the state legislative process cannot be absolute. Cf. Reynolds v. Sims, 377 U.S. 533 (1964) (federal reapportionment of Alabama Legislature). It strikes me as overly rigid to insist that Congress cannot tell states even to consider given legislative policies that the national govern-

ment believes to be important. The consequence would be to leave the federal government with the stark choice of either carrying out a policy itself--preempting the state role entirely (which most seem to concede that Congress could have done in this case)--or else doing nothing. The intermediate course of federal/state dialog--if conducted with regard for sovereign comity--does seem to me to offer a hopeful possibility of cooperative federalism. The prospect has some advantages beyond those offered either federal preemption or federal inaction, and is a technique of governance that should not be foreclosed by the decision in this case.

If absolute proscription of federal interference with the state legislative process is inappropriate, however, then dividing "acceptable" and "unacceptable" federal interference in state legislative processes is a line drawing problem: how much federal intervention is too much? The first type of standing provision--"legislative standing"--raises two distinct sort of problems: who is permitted to participate in state legislative decisions, and how are they to participate.

On the first point, PURPA's language is quite clear--"any electric consumer of an affected utility" is given participation rights. But the extent of the actual conflict with governing Mississippi law is quite unclear. Neither of the respondents' briefs explains current Miss. Public Service Comm'n standing laws. My own research (with the aid of the library staff) shows that the Mississippi PSC is to give notice

of proposed rate change "to such other persons as the commission, in its discretion, may determine." MCA §77-3-37 (1973). Moreover, "[a]ny interested person shall have the right to petition the commission for issuance, amendment, or repeal of a rule or regulation." Id. at §77-3-45. These sources suggest that the Miss PSC--like most state public utility comm'ns--is quite liberal in granting participation rights. (This does not surprise me. While in law school, I helped conduct a survey of state power plant siting statutes as part of a contract for the U.S. Energy Research & Development Admin. The study found relaxed--in many cases virtually nonexistent--standing rules to be characteristic of state utility comm'ns in the power plant siting area.)

Miss

*But
this
may be
different
from
right to
"intervene"*

In this light, my instinct is that Tenth Amendment standing conflicts may be better resolved on a case by case basis rather than in a facial attack. It may well be the policy of the Miss PSC to allow virtually any interested consumer group to join a given proceeding. (The rights that attend intervention is a different matter that I will consider in a moment.) At minimum, I have found nothing to show that Mississippi's policy is the contrary, and the parties have identified no sharp and inevitable conflicts. If the state and federal policies in fact do not conflict in noticable degree, this suggests that the case for invalidating an act of Congress in the absense of a concrete dispute is weak.

The Court, of course, should not engage in a wholesale

legitimation of PURPA's broadened standing laws. Rather, I think the appropriate technique would be to follow your practice in Virginia Surface Mining: note the problem (there a taking issue) and reserve it for adjudication in specific cases in which constitutional limitations bind in factually specific cases.

The alternative to this deferral technique is to invalidate all or a portion of this type of PURPA regulatory standing provision in this case. The Court is free to do this; it simply could say that the setting of the state legislative agenda is an integral operation of a sovereign state, and that PURPA's broad conferral of this power as a federal matter is unacceptable. The Court clearly would not be bound by Testa v. Katt, as that case simply directed that state courts enforce federal laws. Obviously legislatures can be distinguished from courts. The conclusion that the PURPA's standing provisions' infringement of state control of its own processes is excessive would be a novel holding, but that will be true no matter how the Court disposes of this case. One difficulty with this approach might be that all of Title I probably would have to excised from the PURPA; I doubt that the standing provision is sufficiently distinct from the remainder of this Title to allow any more detailed severance.

It is
quasi-
judicial

so
reversal

On the second point regarding how individuals are permitted to intervene in state hearings, again there is the problem of the lack of a concrete dispute about particular prac-

11.
tices. But I think that the Court should state that PURPA was passed with an evident regard for state autonomy. Therefore future courts interpreting the intervention provision should be directed to interpret PURPA to leave state regulatory authorities their traditional control over their own proceedings. For instance, PURPA certainly should be read to preserve state PSC power to set and enforce timing deadlines, limitations on oral presentations, consolidation of numbers of parties, and other essential powers of docket management. I think a plain expression that such an interpretation should be favored, together with a refusal to declare PURPA's intervention grant unconstitutional absent a showing of conflict with state law, should suffice to accomodate federalism values with congressional intent respecting this first type of standing provision.

These same comments largely apply to the second and fourth grants of standing--the rights to bring actions to enforce intervention rights and PURPA's hearing requirements. These rights to me seem to derive from the original PURPA mandate that state regulators allow participation and hold hearings. If the original PURPA mandate is legitimated, I believe it follows that these standing provisions should also be legitimated. They essentially amount to a federal grant of a private right of action to individuals against the states. Of course, both types of standing provision grant access to federal court under some circumstances. See pages 2-3 & 5-6 supra. The Court should observe that Article III limitations will ap-

ply in such situations. Further comment probably is not possible or appropriate until a concrete case arises.

On the other hand, if you are not inclined to defer judgment on the regulatory standing provisions that I discussed first, then these subsidiary standing grants should fall as well.

Finally I come to the third PURPA grant of standing, which essentially allows intervenors the right to appeal state regulatory decisions. See pages 3-4 supra. Significantly, the key provision, § 2633(c)(1), states that "[s]uch review or action in a State court shall be pursuant to any applicable State procedures."

*Right
to
appeal*

Again I am uncertain about the extent of actual conflict between PURPA and Miss. law. Miss. statutes provide that "[i]n addition to other remedies now available at law or in equity any party aggrieved by any final finding, order, or judgment of the commission shall have the right, regardless of the amount involved, of appeal to the chancery court Any person whose rights may be directly affected by said appeal may appear and become a party, or the court on proper notice order any person to be joined as a party." MCA §77-3-65 (emphasis added).

This is a relatively broad grant of a right of review. My feeling once more is that, while federal/state conflict certainly is not impossible, neither is it obvious on this facial record. Again I lean toward utilizing your Virginia Surface

Mining technique of identifying the issue, declining to resolve it on facial attack, and leaving resolution of the problem to a more concrete case. Once more, also, this provision logically should be invalidated if your belief is that the breadth of the federal intrusion is unacceptable as a facial matter.

C. Conclusion

The features of the PURPA that you find most troubling--its broad grants of standing--are complex and potentially very intrusive. In this case, however, the actual conflict between federal and state law is not sharp. In fact, while conflict is not impossible, it is not inevitable and may even be quite unlikely--given the broad state rights of participation that have used by state regulatory commissions in recent years. Collision between state and federal law can be further minimized by construing PURPA to accomodate traditional state regulatory agency controls over proceedings. I conclude that the Court should await a concrete clash between state and federal policy before it invalidates one of these vulnerable sections of the PURPA.

?

Perhaps

Memorandum to Justice Powell

Re: FERC intervention rights and amicus briefing

1. My fast research on whether "intervenors" become "parties" has focussed on Davis' Administrative Law Treatise. My initial conclusion is that existing law has usually assumed that an intervenor does become a party. This area of law, however, has undergone substantial change with "public interest intervention" in the 1970's. Because the question is solely one of legislative intent, the Court would be free to interpret the PURPA to preserve considerable Mississippi control over the conduct of its hearings conducted pursuant to PURPA. I append the relevant pages of Davis' 1980 treatise.

2. We have amicus briefs from six states. Texas and Louisiana urge affirmance. Maryland, Maine, and the Calif. Public Utilities Comm'n urge reversal. The Calif. Energy Comm'n and the State of Oregon urge partial reversal--taking no position beyond stating that the "preemption" portions of PURPA (the sections that entirely exempt small producers from any regulation) should be constitutional.

We also have briefs urging reversal from the United States Conference of Mayors and the County of Onondaga, New York.

80-1749

PURPA three areas:

1. Hostatary Standards

Requires consid.
of Fed standards as
to terms & conditions of ~~the~~ sales
Procedure mandatory

2. Mandatory

As to Fed Rules
Rate w/r to "cogenerators" &
small unregulated
producers of electricity.

3. Preemptive

Exempts from Fed
& State Reg. cogenerators
& small producers

4. Right to intervene

Different from Model

Regulation of
Publicly
Owned
Utilities

Differs from Model

No. 80-1749

Ferc v. Mississippi

Conf. 1/22/82

Rev. across board 6
App. 1 (O'Connor)
Rev. App. 2 (WHR & LFP)

The Chief Justice

Act trespasses on functions of states in numerous ways,
but Congress has power to go very far.

Title I & III are not mandatory. Sec 210
commands a state to enforce Fed standards.

Tentative view: ~~App~~ Rev as to I & III, probably
affirm as to II (210) - tentatively.

X X X

Rev. across Bd

Justice Brennan Rev.

Congress had power to enact entire
Act. No basis for holding any of Act facially invalid.
Right to intervene OK

§ 210 goes rather far - but Fed. Govt. has the
Const. authority.

Justice White Rev.

Agrees with WJB.

Justice Marshall

Rev

Agree with WJB

Justice Blackmun

~~Re~~ Rev

Commerce clause argument is frivolous
10 Amend does present novel Q. Fed
govt. commands state agencies.
Procedures present problems

Justice Powell

Agg ~~is~~ in most part, & Rev in part.

Justice Rehnquist

Reverse
~~But~~ except as to 210

Congress could not preempt & take over state procedures.

But under War Powers & ~~the~~ Comm. Clause most of this Act is probably OK

Tide v Katt is relevant

§ 210 goes too far & this is hard to distinguish from Nat Cities

Justice Stevens

~~But~~ Reverse across board

Justice O'Connor

Affirm

Commerce clause justified.

10th Amend issue is reverse

§ 210 in many respects are probably OK - but other portions go too far

Titles I & III alter the power of States to make decisions & choice of priorities.

State Commissions exercise leg. as well as judicial power. Then they are analogous to State legislatures. Congress should have no power to determine priorities & procedures of State legislative power.

jsw 02/16/82

Memorandum to Justice Powell
Re: HAB's FERC v. Mississippi draft

(good memo)
Though I
am inclined
to adopt the
"first" alternative

Justice Blackmun circulates his draft in this case. ^{on pp 3,4}
Sections I-II are factual and procedural. Section III holds that Congress had the power under the Commerce Clause to enact the PURPA. This is a reasonably argued section that reaches a result with which I agree and with which I expect you have no problem. So far, so good.

Section IV is the ^{"u"} guts of the opinion. It holds that the PURPA in its entirety passes scrutiny under National League of Cities. In section IV A, HAB gets around the difficult §210 "mandatory implementation" requirement in the predictable manner: by relying solely on the FERC regulation that softens the State's duty. This regulation permits the States to discharge the "implementation" function by requiring only that they "resolve disputes" Draft, at 16. Testa v. Katt is the authority for this point. As you recall, this is the approach I considered in my 1/15/82 supplemental bench memo in reaction to the SG's reply brief. I still believe it is a correct resolution of the challenge to this particular provision. The holding does not foreclose future state attacks on the manda-

tory implementation provision if in the future FERC adopts more intrusive regulatory policies.

Of key significance, §210 does not intrusively confer private rights of action against state regulatory bodies in the manner of the the other PURPA sections. See 1/21/82 supplemental bench memo at 2, 3, 4-5 & 6. I therefore advise that you consider joining this section of HAB's draft.

Section IV B of the draft addresses PURPA's direction that States consider its proposed federal standards. At core, this section states that Congress is permitted to try and "persuade" state legislative bodies by requiring them to consider federal issues. The only limiting principle in this section seems to be that "[t]here is nothing in PURPA 'directly compelling' the States to enact a legislative program." Draft at 20.

HAB's answer to PURPA's broad grant of rights of action to compel regulatory consideration through the courts is that PURPA's grant of "standing" rights is no broader than that presently accorded by Mississippi law. Draft at 22-23. Beyond that, HAB again finds Testa v. Katt controlling.

I continue to have mixed feelings regarding the legitimacy of federal efforts to "persuade" States to enact federally suggested policies. As I mentioned in our conversations on this subject, I do think this method of federal/state interaction has considerable potential for abuse; it would make a mockery of "federalism" if Congress could fill State legisla-

Is this
true?
Does
Miss.
concede
this?

??

I don't think Congress has authority to
mandate procedure, standing & jud. review
for the states even if it is the same.

tive agendas with mandatory federal issues so that no time was left for activity of the States's own choosing. On the other hand, it also would be unwise to condemn the "persuasion" technique completely. This would force Congress to the choice of entirely preempting a field wherever it seeks federal involvement. Surely it is preferable to leave Congress free to preserve as much state decision-making authority as possible. | yes

With such conflicting reactions, my response would be to balance. My conclusion in this case is that the PURPA "persuasion" burdens are acceptable -- because Mississippi (who must bear the burden of demonstrating constitutional invalidity of an act of Congress) has not shown the PURPA "consideration" burdens to involve even a significant amount of space on the State regulatory agenda. That is, we have not seen a demonstration that PURPA in fact imposes much of a time-and-expense compliance burden. This relatively slight injury to state sovereignty does not outweigh the federalism interest in preserving this type of "cooperative federalism" program. I therefore would join HAB's judgment on this point, writing separately to stress both that limits exist in this field and that Mississippi failed to make any factual showing regarding PURPA's actual compliance intrusion.

I know you are quite concerned about PURPA's broad grant of a right of action to enforce via the courts its "consideration" prescription. I see two alternatives. First, you could dissent from the validation of PURPA's broad grant of

access to courts to bring actions against state regulatory authorities. The dissenting principle presumably would be that the federal government should not be able to expand a State's rules of access to courts when the target of the lawsuit is the State itself. A rough analogy could be drawn to the Eleventh Amendment. The analogy would be very rough because the relevant judicial action here predominately is directed to take place in state court. The Eleventh Amendment, of course, prevents only unconsented actions against States in federal court. Still, part of the notion behind the Eleventh Amendment is that States are free to close their own courts to their citizens under principles of sovereign immunity. Under PURPA, States enjoy no such freedom.

The second alternative is to concur in the judgment on this issue and write separately. Your concurrence could say this problem of broad access to courts is serious but not amenable to facial attack. The reasoning is that I have previously proposed: there has been no showing that Mississippi's "standing" law differs in any significant respect from the broad PURPA grants of rights of action. See draft at 22-23.

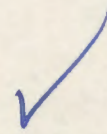
I recommend the second alternative. My instinct is that National League of Cities should be employed to invalidate congressional handiwork only when a State can point to a real difference between federal and state policy.

Finally, in section IV C HAB upholds PURPA's procedural requirements. I think these provisions do not differ significantly from the "consideration" issue -- indeed, they are part and parcel. I therefore would uphold them on the balancing logic set forth on page 3 of this memo. *no*

In sum, I recommend that you join the judgment and all but sections IV B & C. Your separate statement should stress the potential difficulties that lie ahead in this field, but that the federal requirements in this case have not been shown to be so intrusive and different from existing Mississippi policy as to justify a finding of unconstitutionality. Alternatively, you may wish to dissent from sections IV B & C on the grounds I have suggested, or others that I have missed. I of course stand ready to help with whatever course you decide.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



February 16, 1982

Re: 80-1749 - FERC v. Mississippi

Dear Harry:

Please join me.

Respectfully,

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

✓

February 16, 1982

No. 80-1749 Federal Energy Regulatory Comm.
v. Mississippi

Dear Harry,

I will circulate a dissent in due course.

Sincerely,

Sandra

Justice Blackmun

Copies to the Conference

Justice Powell:

By way of supplementing the memo I just gave you in this case, I now would advise awaiting SOC's effort. I spoke to her clerk at lunch and their Chambers may be quite in tune with ours on this case.

ju *yes*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 16, 1982

No. 80-1749 Federal Energy Regulatory Comm.
v. Mississippi

Dear Harry,

I will circulate a dissent in due course.

Sincerely,

Sandra

Justice Blackmun

Copies to the Conference

*I will await Sandra's
dissent*

February 16, 1982

80-1749 Federal Energy Regulatory Comm. v. Mississippi

Dear Harry:

I will await Sandra's dissent

Sincerely,

Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

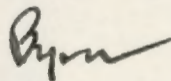
February 16, 1982

Re: 80-1749 - FERC v. Mississippi

Dear Harry,

Please join me.

Sincerely yours,



Justice Blackmun

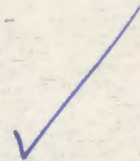
Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 17, 1982



RE: No. 80-1749 Federal Energy Regulatory Commission
v. Mississippi, et al.

Dear Harry:

I agree.

Sincerely,

o.

Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

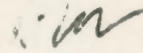
February 17, 1982

Re: No. 80-1749 Federal Energy Regulatory Comm. v.
Mississippi

Dear Harry:

I will await Sandra's dissent in this case.

Sincerely,



Justice Blackmun

Copies to the Conference

jsw 04/08/82

*John - Another thoughtful memo. I am inclined as you suggest to write separately:
(i) agreeing with much of what SC'O says about federalism*

Memorandum to Justice Powell

and "conscripting" state admin. agencies

Re: SOC dissent in FERC v. Mississippi

to but agreeing with you + HAB that on a facial attack I can't say Congress has gone beyond its power; but (ii) dissenting

SOC has written a dissent in which she can take real pride. as to power of Congress to prescribe the standing, procedure + jud. review of state admin. agencies

I think it is persuasive and eloquent. Although it sweeps more broadly than what I understood to be your initial inclinations in

this case, you may well wish to join her effort.

If you harbor doubts about the breadth of her position, I would make the following points. The dissent can be charged with being long on rhetoric and short on analysis of the statute involved in this case. In particular, SOC objects to federal ordering of state legislative agendas. Federal involvement in state legislative agenda-setting is very intrusive, but I doubt that there should be an absolute ban on such federal intervention. For instance, state legislatures at federal direction now must devote a good deal of time to redistricting. It is true that this is a constitutional rather than a congressional requirement. But I'm not sure that states find the intrusion less objectionable because it comes from a 9-person Court instead of the national representative body.

My view still is that the Court should weigh the extent of federal intrusion against the value of preserving state choice in this type of "federal persuasion" legislation. See page 3 of my 2/16/82 memo on HAB's opinion. The statute in this case has not

been shown to involve a significant expenditure of state quasi-legislative effort. Indeed, if the States really have no interest at all in the PURPA's proposed policies, my understanding is that they could satisfy PURPA's demands with very little effort. Basically, the state commissions have to hold hearings and issue a written report. There is no minimum length for the hearings or the report. (There are generous intervenor and judicial review provisions, as you know. I will deal with these provisions separately, on page ___ of this memo.) Given these facts, my view is that Mississippi has not shown the federal intrusion into the setting of its quasi-legislative agenda to be of constitutional magnitude. I therefore would not follow SOC's broad objection to any federal interference in this regard.

My suggestion instead would be to write separately in order to identify the features that you find most troubling about the PURPA. I would sketch out the balancing approach that I suggest here, and state the conclusion that generally the PURPA has not been shown on its face to involve an impermissible federal invasion of state quasi-legislative prerogatives -- simply because the Court has not shown that the burden on Mississippi is in fact significant. In other words, if Mississippi thinks the federal standards are nonsense, we have not been shown that the PURPA requires States to take them with more serious than the State believes appropriate.

I also would, however, qualify this general approval of the PURPA. I would note that the PURPA's intervention and judicial review provisions may force open the doors to state courts and agen-

cies to a greater extent than the states themselves choose to do. In this regard, I would say that the federal government fairly may be held to take existing state institutions and procedures as it finds them. Correspondingly, the federal government ought to be prevented from making states more vulnerable to overcrowded agency hearings and to state judicial action than the states choose to make themselves.

Yes
good

The "principle" would be that state institutions have the right to determine their own rules of access and procedure when that access and procedure is directed against the State itself. The basis for this principle would be found in the federal principles of independent state governments. As I mentioned previously, the best analogy I can think of would be to the 11th Amendment. This analogy is not exact, because that Amendment bars the exercise of only federal judicial power against the States. But the 11th Amendment does leave the States free to decide their own vulnerability to any judicial power by means of adjustment of the sovereign immunity rules in state court. Under PURPA, however, the federal government arrogates the power to set rules on participation and judicial review of state agency decisionmaking.

Yes

may
basis
concern

This intervention and judicial review aspect is the only portion of the PURPA in which I think the federal government necessarily requires a State to devote a significant degree of time and energy to deliberation according to federal mandate. But, as I have said before, I think Justice Blackmun correctly points out that Mississippi has not shown that the PURPA expands Mississippi judicial

and administrative access provisions any farther than Mississippi itself already has on its own. Absent a concrete controversy in this regard, then, I would simply spell out the potential hazards that exist in this field but would conclude that the PURPA has not yet been shown to have run afoul of them. ?

* * * * *

In sum, You may find SOC's dissent persuasive enough to win your vote. It is an admirable piece of work. My own view, however, is that it sweeps too broadly and fails to focus on the provisions about which you have expressed the most concern. I would advise that you write separately.

April 12, 1982

PERSONAL

80-1749 Federal Energy Regulatory Comm. v. Mississippi

Dear Sandra:

The clerk working with me on this case (John Wiley) began his memorandum as follows: "Justice O'Connor has written a dissent in which she can take real pride. It is persuasive and eloquent." I agree with John's assessment, and think your opinion will be cited often and - in view of your legislative experience - will have influence over the years.

I am inclined, nevertheless, to write separately. As you may recall from Conference, my principal concern was with the extent to which the statute mandates state procedure, including standing, judicial review, etc. I may not conclude that the entire statute is facially invalid. I want to take a closer look at the case.

Sincerely,

Justice O'Connor

lfp/ss

April 12, 1982

80-1749 FERC v. Mississippi

Dear Harry:

Although I agree with much of what Sandra has written so well as to the intrusiveness of this statute, I am not entirely at rest and may write separately.

Sincerely,

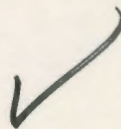
Justice Blackmun

lfp/ss

cc: The Conference

CHAMBERS OF
THE CHIEF JUSTICE

April 13, 1982



Re: 80-1749 - FERC v. Mississippi

MEMORANDUM TO THE CONFERENCE:

Sandra's opinion concurring in part and dissenting as to § IVB and IVC, persuades me the Court goes too far. I therefore join her dissent.

Regards,

[illegible]

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

*I am awaiting
Sandra's dissent.*

From: Justice Blackmun

Circulated: FEB 15 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION, ET
AL., APPELLANTS v. MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

[February —, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case, appellees successfully challenged the constitutionality of Titles I and III, and of § 210 of Title II, of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (PURPA or Act.) We conclude that appellees' challenge lacks merit and we reverse the judgment below.

I

On November 9, 1978, President Carter signed PURPA into law.¹ The Act was part of a package of legislation,² approved the same day, designed to combat the nationwide energy crisis.

At the time, it was said that the generation of electricity consumed more than 25% of all energy resources used in the United States. S. Rep. No. 95-442, p. 7 (1977). Approxi-

¹The Senate vote was taken on Oct. 9, 1978. The Mississippi Senators voted against the bill. See 124 Cong. Rec. S17818. The House vote was taken on Oct. 15, 1978. The five-member Mississippi delegation voted three "ayes" and two "nays." See 124 Cong. Rec. H38503.

²In addition to PURPA, the package included the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174; the National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206; the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289; and the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351.

mately one-third of the electricity in this country was generated through use of oil and natural gas, and electricity generation was one of the fastest growing segments of the Nation's economy. S. Rep. No. 95-361, p. 32 (1977). In part because of their reliance on oil and gas, electricity utilities were plagued with increasing costs and decreasing efficiency in the use of their generating capacities; each of these factors had an adverse effect on rates to consumers and on the economy as a whole. S. Rep. No. 95-442, at 9. Congress accordingly determined that conservation by electricity utilities of oil and natural gas was essential to the success of any effort to lessen the country's dependence on foreign oil, to avoid a repetition of the shortage of natural gas that had been experienced in 1977, and to control consumer costs.

A

Titles I and III

PURPA's Titles I and III, which relate to regulatory policies for electricity and gas utilities, respectively, are administered (with minor exceptions) by the Secretary of Energy. These provisions are designed to encourage the adoption of certain retail regulatory practices. The Titles share three goals: (1) to encourage "conservation of energy supplied by . . . utilities;" (2) to encourage "the optimization of the efficiency of use of facilities and resources" by utilities; and (3) to encourage "equitable rates . . . to consumers." §§ 101 and 301, 92 Stat. 3120 and 3149, 16 U. S. C. § 2611 (1976 ed., Supp. III), 15 U. S. C. § 3201 (1976 ed., Supp. IV).³ To achieve these goals, Titles I and III direct state utility regulatory commissions and nonregulated utilities to "consider" the adoption and implementation of specific "rate design" and regulatory standards.

³ For simplicity of citation, and to avoid repetition, unless otherwise noted herein, any reference to 16 U. S. C. relates to Supplement III of the 1976 edition of the Code, and any reference to 15 U. S. C. relates to Supplement IV of that edition.

Section 111(d) of the Act, 16 U. S. C. § 2621(d), requires each state regulatory authority and nonregulated utility to consider the use of six different approaches to structuring rates: (1) promulgation, for each class of electricity consumers, of rates that, "to the maximum extent practicable," would "reflect the costs of . . . service to such class"; (2) elimination of declining block rates;⁴ (3) adoption of time-of-day rates;⁵ (4) promulgation of seasonal rates;⁶ (5) adoption of interruptible rates;⁷ and (6) use of load management techniques.⁸ The Act directed each state authority and nonregulated utility to consider these factors not later than two years after PURPA's enactment, that is, by November 8, 1980, and provided that the authority or utility by November 8, 1981, was to have made a decision whether to adopt the standards. § 2622(b). The statute does not provide penalties for failure to meet these deadlines; the state author-

⁴"Declining block rates" are a traditional and still common approach used by utilities in their charges for electricity. The highest unit rate is charged for basic electrical consumption, with a declining per-unit price for each block of additional consumption. See S. Rep. No. 95-442, pp. 26-27 (1977).

⁵"Time-of-day rates" are designed to reduce "peak load," the term used to describe the greatest demand for a utility's electricity. Demand varies by hour and season, usually reaching a daily maximum in the afternoon and a seasonal maximum in mid-summer or mid-winter. A utility must have enough generating capacity to meet that demand; steps that reduce peak demand also reduce the required amount of generating capacity and the use of "peaking" generating equipment, which frequently is gas- or oil-fueled. Under time-of-day rates, utilities charge more for electricity consumed during peak load hours. See S. Rep. No. 95-442, at 29.

⁶"Seasonal rates" operate to reduce peak load by imposing higher rates during the seasons when demand is greatest.

⁷"Interruptible rates" tend to reduce peak load by charging less for service which the utility can interrupt, or stop, during peak demand periods.

⁸"Load management techniques" are methods used to reduce the demand for electricity at peak times. For example, a utility might employ remote-control devices that temporarily turn off appliances during periods when the demand is particularly great.

ity or nonregulated utility is merely directed to consider the standards at the first rate proceeding initiated by the authority after November 9, 1980. § 2622(c).

Section 113 of PURPA, 16 U. S. C. § 2623, requires each state regulatory authority and nonregulated utility to consider the adoption of a second set of standards relating to the terms and conditions of electricity service: (1) prohibition of master-metering in new buildings;⁹ (2) restrictions on the use of automatic adjustment clauses;¹⁰ (3) disclosure to consumers of information regarding rate schedules; (4) promulgation of procedural requirements relating to termination of service; and (5) prohibition of the recovery of advertising costs from consumers. Similarly, § 303, 15 U. S. C. § 3203, requires consideration of the last two standards—procedures for termination of service and the nonrecovery of advertising costs—for natural gas utilities. A decision as to the standards contained in §§ 113 and 303 was to have been made by November 1980, although, again, no penalty was provided by the statute for failure to meet the deadline.

Finally, § 114 of the Act, 16 U. S. C. § 2624, directs each state authority and nonregulated utility to consider promulgation of “lifeline rates”—that is, lower rates for service that meets the essential needs of residential consumers—if such rates have not been adopted by November 1980.

Titles I and III also prescribe certain procedures to be followed by the state regulatory authority and the nonregulated

⁹ “Master-metering” is the use of one meter for several living units. Studies have shown that tenants of master-metered buildings use 35% more electricity, on the average, than tenants of buildings where each apartment has its own meter. See S. Rep. No. 95-442, at 31.

¹⁰ An “automatic adjustment clause” provides that as a utility’s fuel costs rise it may increase its rates without public hearing or review by the state regulatory authority. A clause of this kind provides the utility with no incentive to reduce its costs or to shift away from oil- or gas-fueled generating facilities, and therefore tends to discourage the efficient use of energy resources.

utility when considering the proposed standards. Each standard is to be examined at a public hearing after notice, and a written statement of reasons must be made available to the public if the standards are not adopted. 16 U. S. C. §§ 2621(b) and (c)(2), and §§ 2623(a) and (c); 15 U. S. C. §§ 3203(a) and (c). "Any person" may bring an action in state court to enforce the obligation to hold a hearing and make determinations on the PURPA standards. 16 U. S. C. § 2633(c)(1); 15 U. S. C. § 3207(b)(1).

The Secretary of Energy, any affected utility, and any consumer served by an affected utility is given the right to intervene and participate in any rate-related proceeding considering the Title I standards. 16 U. S. C. § 2631(a). Under Title III, the Secretary alone has the right to intervene. 15 U. S. C. § 3205. Any person (including the Secretary) who intervenes or otherwise participates in the proceeding may obtain review in state court of any administrative determination concerning the Title I standards, 16 U. S. C. § 2633(c)(1), and the Secretary has the right to participate as an *amicus* in any Title III judicial review proceeding initiated by another. 15 U. S. C. § 3207(b)(2). The right to intervene is enforceable against the state regulatory authority by an action in federal court. 16 U. S. C. § 2633(b); 15 U. S. C. § 3207(a)(2).

Titles I and III also set forth certain reporting requirements. Within one year of PURPA's enactment, and annually thereafter for 10 years, each state regulatory authority and nonregulated utility is to report to the Secretary "respecting its consideration of the standards established." 16 U. S. C. § 2626(a); 15 U. S. C. § 3209(a). The Secretary, in turn, is to submit a summary and analysis of these reports to Congress. 16 U. S. C. § 2626(b); 15 U. S. C. § 3209(b). Electricity utilities also are required to collect information concerning their service costs. 16 U. S. C. § 2643. This information is to be filed periodically with appellant Federal Energy Regulatory Commission (FERC) and with appropri-

ate state regulatory agencies, and is to be made available to the public. Title III requires the Secretary, in consultation with FERC, state regulatory authorities, gas utilities, and gas consumers, to submit a report to Congress on gas utility rate design. 15 U. S. C. § 3206.

Despite the extent and detail of the federal proposals, however, no state authority or nonregulated utility is required to adopt or implement the specified rate design or regulatory standards. Thus, 16 U. S. C. §§ 2621(a) and 2623(a) and 15 U. S. C. § 3203(a) all provide: "Nothing in this subsection prohibits any State regulatory authority or nonregulated . . . utility from making any determination that it is not appropriate to [implement or adopt] any such standard, pursuant to its authority under otherwise applicable State law." Similarly, 16 U. S. C. § 2627(b) and 15 U. S. C. § 3208 make it clear that any state regulatory authority or nonregulated utility may adopt regulations or rates that are "different from any standard established by this [subchapter or chapter]."

B

Section 210

Section 210 of PURPA's Title II, 92 Stat. 3144, 16 U. S. C. § 824a-3, seeks to encourage the development of cogeneration and small power production facilities.¹¹ Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels. But it also felt that two problems impeded the development of nontraditional generating facilities: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power

¹¹ A "cogeneration facility" is one that produces both electric energy and steam or some other form of useful energy, such as heat. 16 U. S. C. § 796(18)(A). A "small power production facility" is one that has a production capacity of no more than 80 megawatts and uses biomass, waste, or renewable resources (such as wind, water, or solar energy) to produce electric power. § 796(17)(A).

to, the nontraditional facilities,¹² and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development.¹³

In order to overcome the first of these perceived problems, § 210(a) directs FERC, in consultation with state regulatory authorities, to promulgate "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration and small power production facilities. Section 210(f), 16 U. S. C. § 824a-3(f), requires each state regulatory authority and nonregulated utility to implement FERC's rules. And § 210(h), 16 U. S. C. § 824a-3(h), authorizes FERC to enforce this requirement in federal court against any state authority or nonregulated utility; if FERC fails to act after request, any qualifying utility may bring suit.

To solve the second problem perceived by Congress, § 210(e), 16 U. S. C. § 824a-3(e), directs FERC to prescribe rules exempting the favored cogeneration and small power facilities from certain state and federal laws governing electricity utilities.

Pursuant to this statutory authorization, FERC has adopted regulations relating to purchases and sales of electricity to and from cogeneration and small power facilities. See 18 CFR pt. 292 (1980); 45 Fed. Reg. 12214-12237 (1980). These afford state regulatory authorities and nonregulated

¹² See 123 Cong. Rec. 25848 (1977) (remarks of Sen. Percy); *id.*, at 32403 (remarks of Sen. Durkin); *id.*, at 32437 (remarks of Sen. Haskell); *id.*, at 32419 (remarks of Sen. Hart); National Energy Act: Hearings on H.R. 6831 et al. before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess., pt. 3, pp. 552-553 (1977).

¹³ See H.R. Conf. Rep. No. 95-1750, p. 98 (1978); H.R. Rep. No. 95-496, pt. 4, p. 157 (1977); 123 Cong. Rec. 32399 (1977) (remarks of Sen. Cranston); *id.*, at 32660 (remarks of Sen. Percy).

utilities latitude in determining the manner in which the regulations are to be implemented. Thus, a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules.¹⁴

II

In April 1979, the State of Mississippi and the Mississippi Public Service Commission, appellees here, filed this action in the United States District Court for the Southern District of Mississippi against FERC and the Secretary of Energy, seeking a declaratory judgment that PURPA's Titles I and III and § 201 are unconstitutional. App. 3.¹⁵ Appellees maintained that PURPA was beyond the scope of congressional power under the Commerce Clause and that it constituted an invasion of state sovereignty in violation of the Tenth Amendment.¹⁶

Following cross-motions for summary judgment, the District Court, in an unreported opinion, held that in enacting PURPA Congress had exceeded its powers under the Commerce Clause. App. to Juris. Statement 1a. The court observed that the Mississippi Public Service Commission by

¹⁴ Congress recognized that a State's compliance with the requirements of PURPA would involve the expenditure of funds. Accordingly, it authorized the Secretary of Energy to make grants to state regulatory authorities to assist them in carrying out the provisions of Titles I and III, including the reporting requirements, and the provisions of § 210. See 42 U. S. C. § 6807 (1976 ed., Supp. III).

For each of the fiscal years 1979 and 1980, Congress authorized for appropriation up to \$40 million to help state regulatory authorities defray the costs of complying with PURPA. Pub. L. No. 95-617, § 142(1), 92 Stat. 3134, 42 U. S. C. § 6808(1) (1976 ed., Supp. III).

¹⁵ Mississippi Power & Light Company was permitted to intervene in the action as a plaintiff and is also an appellee here.

¹⁶ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. Const., Amdt. 10.

state statute possessed the "power and authority to regulate and control intrastate activities and policies of all utilities operating within the sovereign state of Mississippi." *Id.*, at 2a. Relying on *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936), the court stated: "There is literally nothing in the Commerce Clause of the Constitution which authorizes or justifies the federal government in taking over the regulation and control of public utilities. These public utilities were actually unknown at the writing of the Constitution." App. to Juris. Statement 4a. Indeed, in the court's view, the legislation "does not even attempt to regulate commerce among the several states but it is a clear usurpation of power and authority which the United States simply does not have under the Commerce Clause of the Constitution." *Id.*, at 7a.

Relying on *National League of Cities v. Usery*, 426 U. S. 833 (1976), the court also concluded that PURPA trenches on state sovereignty.¹⁷ It therefore pronounced the statutory provisions void because "they constitute a direct intrusion on integral and traditional functions of the State of Mississippi." App. to Juris. Statement 8a-9a. For reasons it did not explain, the court also relied on the guarantee of a republican form of government, U. S. Const., Art. IV, § 4, and on the Supremacy Clause, Art. VI, cl. 2. App. to Juris. Statement 2a, n. 1, and 9a.

FERC and the Secretary of Energy appealed directly to this Court pursuant to 28 U. S. C. § 1252. See *Hodel v. Virginia Surface Min. & Recl. Assn.*, — U. S. —, —, n. 15 (1981). We noted probable jurisdiction. — U. S. — (1981).

III

The Commerce Clause

We readily conclude that the District Court's analysis and the appellees' arguments are without merit so far as they

¹⁷ "The sovereign state of Mississippi is not a robot, or lackey which may be shuttled back and forth to suit the whim and caprice of the federal government." App. to Juris. Statement 2a.

concern the Commerce Clause. To say that nothing in the Commerce Clause justifies federal regulation of even the intrastate operations of public utilities misapprehends the proper role of the courts in assessing the validity of federal legislation promulgated under one of Congress' plenary powers. The applicable standard was reiterated just last Term in *Hodel v. Indiana*, — U. S. — (1981):

"It is established beyond peradventure that 'legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality' *Usery v. Turner Elkhorn Mining Co.*, 428 U. S. 1, 15 (1978). . . . A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." *Id.*, at — (slip op. 7)."¹⁸

Despite these expansive observations by this Court, appellees assert that PURPA is facially unconstitutional because it

¹⁸ In the companion case decided the same day, this Court observed:

"Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress This power is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.' *Gibbons v. Ogden*, 9 Wheat. 1, 196 (1824). Moreover, this Court has made clear that the commerce power extends not only to 'the use of channels of interstate or foreign commerce' and to 'protection of the instrumentalities of interstate commerce . . . or persons or things in commerce,' but also to 'activities affecting commerce.' *Perez v. United States*, 402 U. S. 146, 150 (1971). As we explained in *Fry v. United States*, 421 U. S. 542, 547 (1975), '[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.'" *Hodel v. Virginia Surface Min. & Recl. Assn.*, — U. S. —, — (1981) (slip op. 9-10).

does not regulate "commerce"; instead, it is said, the Act directs the nonconsenting State to regulate in accordance with federal procedures. This, appellees continue, is beyond Congress' power: "In exercising the authority conferred by this clause of the Constitution, Congress is powerless to regulate anything which is not commerce, as it is powerless to do anything about commerce which is not regulation." *Carter v. Carter Coal Co.*, 298 U. S., at 297. The "governance of commerce" by the State is to be distinguished from commerce itself, for regulation of the former is said to be outside the plenary power of Congress.¹⁹

It is further argued that the proper test is not whether the regulated activity merely "affects" interstate commerce but, instead, whether it has "a substantial effect" on such commerce, citing JUSTICE REHNQUIST'S opinion concurring in the judgment in the *Hodel* cases, — U. S., at — (slip op. 5-6). PURPA, appellees maintain, does not meet this standard.

The difficulty with these arguments is that they disregard entirely the specific congressional finding, in § 2 of the Act, 16 U. S. C. § 2601, that the regulated activities have an immediate effect on interstate commerce. Congress there determined that "the protection of the public health, safety, and welfare, the preservation of national security, and the proper exercise of congressional authority under the Constitution to regulate interstate commerce require," among other things, a program for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electricity utilities, and equitable retail rates for electricity consumers, as well as a program to improve the wholesale

¹⁹ For this proposition, appellees reply on *Brown v. EPA*, 521 F. 2d 827, 839 (CA9 1975), vacated and remanded, 431 U. S. 99 (1977), and *District of Columbia v. Train*, 172 U. S. App. D.C. 311, 332, 521 F. 2d 971, 992 (1975), vacated and remanded *sub nom. EPA v. Brown*, 431 U. S. 99 (1977).

distribution of electric energy, and a program for the conservation of natural gas while ensuring that rates to gas consumers are equitable. 16 U. S. C. §2601. The findings, thus, are clear and specific.

The Court heretofore has indicated that federal regulation of intrastate power transmission may be proper because of the interstate nature of the generation and supply of electric power. *FPC v. Florida Power & Light Co.*, 404 U. S. 453 (1972). Our inquiry, then, is whether the congressional findings have a rational basis. *Hodel v. Virginia Surface Min. & Recl. Assn.*, — U. S., at — (slip op. 10); *Hodel v. Indiana*, — U. S., at — (slip op. 7).

The legislative history provides a simple answer: there is ample support for Congress' conclusions. The hearings were extensive. Committees in both Houses of Congress noted the magnitude of the Nation's energy problems and the need to alleviate those problems by promoting energy conservation and more efficient use of energy resources. See S. Rep. No. 95-442, at 7-10; H.R. Rep. No. 95-543, vol. I, pp. 5-10 (1977); H.R. Rep. No. 95-496, pt. 4, pp. 3-7, 125-130 (1977).²⁰ Congress was aware that domestic oil production had lagged behind demand and that the Nation had become increasingly dependent on foreign oil. *Id.*, at 3. The House Committee observed: "Reliance upon imported oil to meet the bulk of U. S. oil demands could seriously jeopardize the stability of the Nation's economy and could undermine the independence of the United States." *Ibid.* See H.R. Rep. No. 95-543, at 5-6. Indeed, the Nation had recently experienced severe shortages in its supplies of natural gas. *Id.*, at 7. The

²⁰ See also 124 Cong. Rec. S17528 (Oct. 7, 1978) (remarks of Sen. Jackson); *id.*, at S17530 (remarks of Sen. Bumpers); 124 Cong. Rec. S17804 (Oct. 9, 1978) (remarks of Sen. Robert C. Byrd); 124 Cong. Rec. H13103 (Oct. 14, 1978) (remarks of Rep. Ashley); *id.*, at H13121-H13122 (remarks of Rep. Dingell); 123 Cong. Rec. 25894 (1977) (remarks of Rep. Ashley); *id.*, at 25916-25917 (remarks of Rep. Ottinger); *id.*, at 27063-27064 (remarks of Rep. Wolff).

House and Senate committees both noted that the electricity industry consumed more than 25% of the total energy resources used in this country while supplying only 12% of the user demand for energy. S. Rep. No. 95-442, at 7-8; H.R. Rep. No. 95-496, pt. 4, at 125. In recent years, the electricity utility industry had been beset by numerous problems, *id.*, at 129, which resulted in higher bills for the consuming public, a result exacerbated by the rate structures employed by most utilities. S. Rep. No. 95-442, at 26. Congress naturally concluded that the energy problem was nationwide in scope,²¹ and that these developments demonstrated the need to establish federal standards regarding retail sales of electricity, as well as federal attempts to encourage conservation and more efficient use of scarce energy resources. See S. Rep. No. 95-442, at 24-32; H.R. Rep. No. 95-496, pt. 4, at 131-133, 136-138, 170-171.

Congress also determined that the development of cogeneration and small power production facilities would conserve energy. The evidence before Congress showed the potential contribution of these sources of energy: it was estimated that if proper incentives were provided, industrial cogeneration alone could account for 7%-10% of the Nation's electrical generating capacity by 1987. S. Rep. No. 95-442, at 21, 23.

We agree with appellants that it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility. No State relies solely on its own resources in this respect. See *FPC v. Florida Power & Light Co.*, *supra*. Indeed, the utilities involved in this very case, Mississippi Power & Light Company and Mississippi Power Company, sell their retail customers power that is generated in part beyond Mississippi's borders, and

²¹ See, e. g., 123 Cong. Rec. 32437-32438 (1977) (remarks of Sen. Brooke); *id.*, at 32444 (remarks of Sen. Percy).

offer reciprocal services to utilities in other States. App. 93-94. The intrastate activities of these utilities, although regulated by the Mississippi Public Service Commission, bring them within the reach of Congress' power over interstate commerce. See *FPC v. Florida Power & Light Co.*, 404 U. S., at 458; *New England Power Co. v. New Hampshire*, — U. S. — (1982).²²

Even if appellees were correct in suggesting that PURPA will not significantly improve the Nation's energy situation, the congressional findings compel the conclusion that "the means chosen by [Congress are] reasonably adapted to the end permitted by the Constitution" *Hodel v. Virginia Surface Min. & Recl. Assn.*, — U. S., at — (slip op. 9), quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, 262 (1964). It is not for us to say whether the means chosen by Congress represent the wisest choice. It is sufficient that Congress was not irrational in concluding that limited federal regulation of retail sales of electricity and natural gas, and of relationships between cogenerators and electric utilities, was essential to protect interstate commerce. That is enough to place the challenged portions of PURPA within Congress' power under the Commerce Clause.²³ Because PURPA's provisions concern private nonregulated utilities as well as state commissions, the statute necessarily is valid at least insofar as it regulates private parties. See

²² PURPA could be upheld even if some of its provisions were not directly related to the purpose of fostering interstate commerce: "A complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test." *Hodel v. Indiana*, — U. S. —, —, n. 17. (1981).

²³ This is not to say the Congress can regulate in an area that is only tangentially related to interstate commerce. See *Maryland v. Wirtz*, 392 U. S. 183, 196-197, n. 27 (1968). That obviously is not the case here.

Hodel v. Virginia Surface Min. & Recl. Assn., — U. S., at — (slip op. 19-20).

IV

The Tenth Amendment

Unlike the Commerce Clause question, the Tenth Amendment issue presented here is somewhat novel. This case obviously is related to *National League of Cities v. Usery*, 426 U. S. 833 (1976), insofar as both concern principles of state sovereignty. But there is a significant difference as well. *National League of Cities*, like *Fry v. United States*, 421 U. S. 542 (1975), presented a problem the Court often confronts: the extent to which state sovereignty shields the States from generally applicable federal regulations. In PURPA, in contrast, the Federal Government attempts to use state regulatory machinery to advance federal goals. To an extent, this presents an issue of first impression.

PURPA, for all its complexity, contains essentially three requirements: (1) § 210 has the States enforce standards promulgated by FERC; (2) Titles I and III direct the States to consider specified rate-making standards; and (3) those Titles impose certain procedures on state commissions. We consider these three requirements in turn:

A. Section 210. On its face, this appears to be the most intrusive of PURPA's provisions. The question of its constitutionality, however, is the easiest to resolve. Insofar as § 210 authorizes FERC to exempt qualified power facilities from "State laws and regulations," it does nothing more than pre-empt conflicting state enactments in the traditional way. Clearly, Congress can pre-empt the States completely in the regulation of retail sales by electricity and gas utilities and in the regulation of transactions between such utilities and cogenerators. Cf. *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 769 (1945). The propriety of this type of regulation—so long as it is a valid exercise of the commerce power—was made clear in *National League of Cities*, and

was reaffirmed in *Hodel v. Virginia Surface Min. & Recl. Assn.*: the Federal Government may displace state regulation even though this serves to “curtail or prohibit the States’ prerogatives to make legislative choices respecting subjects the States may consider important.” — U. S. —, at — (slip op. 23).

Section 210’s requirement that “each State regulatory authority shall, after notice and opportunity for public hearing, *implement* such rule (or revised rule) for each electric utility for which it has ratemaking authority,” 16 U. S. C. § 824a-3(f)(1) (emphasis added), is more troublesome. The statute’s substantive provisions require electricity utilities to purchase electricity from, and to sell it to, qualifying cogenerator and small power production facilities. § 824a-3(a). Yet FERC has declared that state commissions may implement this by, among other things, “an undertaking to resolve disputes between qualifying facilities and electric utilities arising under [PURPA].” 18 CFR § 292.401(a) (1980). In essence, then, the statute and the implementing regulations simply require the Mississippi authorities to adjudicate disputes arising under the statute. Dispute resolution of this kind is the very type of activity customarily engaged in by the Mississippi Public Service Commission. See, e. g., Miss. Code Ann. §§ 77-1-31, 77-3-5, 77-3-13(3), 77-3-21, 77-3-405 (1973).

Testa v. Katt, 330 U. S. 386 (1947), is instructive and controlling on this point. There, the Emergency Price Control Act, 56 Stat. 34, as amended, created a treble damages remedy, and gave jurisdiction over claims under the Act to state as well as federal courts. The courts of Rhode Island refused to entertain such claims, although they heard analogous state causes of action. This Court upheld the federal program. It observed that state courts have a unique role in enforcing the body of federal law, and that the Rhode Island courts had “jurisdiction adequate and appropriate under es-

tablished local law to adjudicate this action.” 330 U. S., at 394. Thus the state courts were directed to heed the constitutional command that “the policy of the federal Act is the prevailing policy in every state,” *id.*, at 393, “‘and should be respected accordingly in the courts of the State.’” *Id.*, at 392, quoting *Mondau v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 57 (1912).

So it is here. The Mississippi Commission has jurisdiction to entertain claims analogous to those granted by PURPA, and it can satisfy § 210’s requirements simply by opening its doors to claimants. That the Commission has administrative as well as judicial duties is of no significance.²⁴ Any other conclusion would allow the States to disregard both the pre-eminent position held by federal law throughout the Nation, cf. *Martin v. Hunter’s Lessee*, 1 Wheat. 304, 340–341 (1816), and the congressional determination that the federal rights granted by PURPA can appropriately be enforced through state adjudicatory machinery. Such an approach, *Testa* emphasized, “flies in the face of the fact that the States of the Union constitute a nation,” and “disregards the purpose and effect of Article VI of the Constitution.” 330 U. S., at 389.

B. Mandatory Consideration of Standards. We acknowledge that “the authority to make . . . fundamental . . . decisions” is perhaps the quintessential attribute of sovereignty. See *National League of Cities v. Usery*, 426 U. S., at 851. Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature. See *Bates v. State Bar of Arizona*, 433 U. S. 350, 360 (1977) (State Supreme Court speaks as sovereign because it is the “ultimate body wielding the State’s power over the practice of law”). It would follow that the ability of a state legislative (or, as

²⁴ In another context, the Court has noted that “the role of the modern federal hearing examiner or administrative law judge . . . is ‘functionally comparable’ to that of a judge.” *Butz v. Economou*, 438 U. S. 478, 513 (1978).

here, administrative) body—which makes decisions and sets policy for the State as a whole—to consider and promulgate regulations of its choosing must be central to a State's role in the federal system. Indeed, the nineteenth century view, expressed in a well known slavery case, was that Congress “has no power to impose upon a State officer, as such, any duty whatever, and compel him to perform it.” *Kentucky v. Dennison*, 24 How. 66, 107 (1861).

Recent cases, however, demonstrate that this rigid and isolated statement from *Kentucky v. Dennison*—which suggests that the States and the Federal Government in all circumstances must be viewed as co-equal sovereigns—is not representative of the law today. While this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, cf. *EPA v. Brown*, 431 U. S. 99 (1977), there are instances where the Court has upheld federal statutory structures that in effect directed state decision-makers to take or to refrain from taking certain actions. In *Fry v. United States*, 421 U. S. 542 (1975), for example, state executives were held restricted, with respect to state employees, to the wage and salary limitations established by the Economic Stabilization Act of 1970. *Washington v. Fishing Vessel Assn.*, 443 U. S. 658 (1979), acknowledged a federal court's power to enforce a treaty by compelling a state agency to “prepare” certain rules “even if state law withholds from [it] the power to do so.” *Id.*, at 695.²⁵ And certainly *Testa v. Katt*, *supra*, by declaring that “the policy of the federal Act is the prevailing policy in every state,” 330 U. S., at 393, reveals that the Federal Government has some power to enlist a branch of state government—there the judiciary—to further federal ends. In

²⁵ The Court did express doubt as to whether a state agency “may be ordered actually to promulgate regulations having effect as a matter of state law.” 443 U. S., at 695. As we have noted, however, PURPA does not require promulgation of particular regulations.

doing so, *Testa* clearly cut back on both the quoted language and the analysis of the *Dennison* case of the preceding century.²⁶

Whatever all this may forebode for the future, or for the scope of federal authority in the event of a crisis of national proportions, it plainly is not necessary for the Court in this case to make a definitive choice between competing views of federal power to compel state regulatory activity. Titles I and III of PURPA require only *consideration* of federal standards. And if a State has no utilities commission, or simply

²⁶ In *Dennison*, the Court concluded that the state courts entertained federal actions solely as a discretionary "matter of comity, which the several sovereignties extended to one another for their mutual benefit. It was not regarded by either party as an obligation imposed by the Constitution." 24 How., at 109. That analysis cannot survive *Testa*, which squarely held "that state courts do not bear the same relation to the United States that they do to foreign countries." 330 U. S., at 389. And *Testa*, of course, placed the obligation of state officials to enforce federal law squarely in the Supremacy Clause.

Our recent cases also demonstrate that the Federal Government, at least in certain circumstances, can structure the State's exercise of its sovereign powers. In *National League of Cities v. Usery*, 426 U. S. 833 (1976), for example, the Court made clear that the State's regulation of its relationship with its employees is an "undoubted attribute of state sovereignty." *Id.*, at 845. Yet, by holding "unimpaired" *California v. Taylor*, 353 U. S. 553 (1957), which upheld a federal labor regulation as applied to state railroad employees, 426 U. S., at 854, n. 18, *National League of Cities* acknowledged that not all aspects of a State's sovereign authority are immune from federal control. This analysis was restated in *Hodel v. Virginia Surface Min. & Recl. Assn.*, *supra*, which indicated that federal regulations are subject to Tenth Amendment attack only if they "regulat[e] the 'States as States,' " "address matters that are indisputably 'attributes of state sovereignty,' " and impair the States' "ability 'to structure integral operations in areas of traditional functions.'" — U. S., at — (slip op. 21), quoting *National League of Cities v. Usery*, 426 U. S., at 854, 845, 852. And even when these requirements are met, "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies State submission." *Hodel v. Virginia Surface Min. & Recl. Assn.*, — U. S., at — (slip op. 21 n.29).

stops regulating in the field, it need not even entertain the federal proposals. In a sense, then, this case is only one step beyond *Hodel v. Virginia Surface Min. & Recl. Assn.*, *supra*. There, the Federal Government could have pre-empted all surface mining regulations; instead, it allowed the States to enter the field if they promulgated regulations consistent with federal standards. In the Court's view, this raised no Tenth Amendment problem: "We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role." — U. S., at — (slip op. 24.) "[T]here can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a regulatory program." *Id.*, at — (slip op. 22).

Similarly here, Congress could have pre-empted the field; PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* the suggested federal standards.²⁷ There is nothing in PURPA "directly compelling" the States to enact a legislative program. And because the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States' "sepa-

²⁷ It seems evident that Congress intended to defer to state prerogatives—and expertise—in declining to pre-empt the utilities field entirely. See, e. g., S. Rep. No. 95-442, pp. 9, 13-14 (1977); 124 Cong. Rec. S17528 (Oct. 7, 1978) (remarks of Sen. Jackson); *id.*, at S17530 (remarks of Sen. Bumpers); *id.*, at S17801 (remarks of Sen. Metzenbaum); *id.*, at S17806 (remarks of Sen. Durkin); 123 Cong. Rec. 32430 (1977) (remarks of Sen. Johnston); *id.*, at 32395 (remarks of Sen. Bartlett). The congressional intention would not save the statute, of course, if the method of regulation were constitutionally impermissible. But it would be a peculiar type of federalism that encourages Congress to pre-empt a field entirely, when its preference is to allow the States a continued role in the field.

rate and independent existence," *Lane County v. Oregon*, 7 Wall. 71, 76 (1869); *Coyle v. Oklahoma*, 221 U. S. 559, 580 (1911), and do not impair the ability of the States "to function effectively in a federal system." *Fry v. United States*, 421 U. S., at 547, n. 7; *National League of Cities v. Usery*, 426 U. S., at 852. To the contrary, they offer the States a vehicle for remaining active in an area of overriding concern.

We recognize, of course, that the choice put to the States—that of either abandoning regulation of the field altogether or considering the federal standards—may be a difficult one. And that is particularly true when Congress, as is the case here, has failed to provide an alternative regulatory mechanism to police the area in the event of state default. Yet in other contexts the Court has recognized that valid federal enactments may have an effect on state policy—and may, indeed, be designed to induce state action in areas that otherwise would be beyond Congress' regulatory authority. Thus in *Oklahoma v. Civil Service Comm'n*, 330 U. S. 127 (1947), the Court upheld Congress' power to attach conditions to grants-in-aid received by the States, although the condition under attack involved an activity that "the United States is not concerned with, and has no power to regulate." *Id.*, at 143. The Tenth Amendment, the Court declared, "has been consistently construed 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end,'" *ibid.*, quoting *United States v. Darby*, 312 U. S. 100, 124 (1941)—the end there being the disbursement of federal funds. Thus it cannot be constitutionally determinative that the federal regulation is likely to move the States to act in a given way, or even to "coerc[e] the States" into assuming a regulatory role by affecting their "freedom to make decisions in areas of 'integral governmental functions.'" *Hodel v. Virginia Surface Min. & Recl. Assn.*, — U. S., at — (slip op. 22, 23).

Equally as important, it has always been the law that state legislative and judicial decisionmakers must give preclusive effect to federal enactments concerning governmental activity, no matter what the strength of the competing local interests. See *Martin v. Hunter's Lessee*, 1 Wheat., at 340-341. This requirement follows from the nature of governmental regulation of private activity. "[I]ndividual businesses necessarily [are] subject to the dual sovereignty of the government of the Nation and the State in which they reside," *National League of Cities v. Usery*, 426 U. S., at 845; when regulations promulgated by the sovereigns conflict, federal law necessarily controls. This is true though Congress exercises its authority "in a manner that displaces the States' exercise of their police powers," *Hodel v. Virginia Surface Min. & Recl. Assn.*, — U. S., at — (slip op. 25), or in such a way as to "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important," *id.*, at — (slip op. 23)—or, to put it still more plainly, in a manner that is "extraordinarily intrusive." *Id.*, at — (POWELL, J., concurring) (slip op. 1). Thus it may be unlikely that the States will or easily can abandon regulation of public utilities to avoid PURPA's requirements. But this does not change the constitutional analysis: as in *Hodel v. Virginia Surface Min. & Recl. Assn.*, "[t]he most that can be said is that the . . . Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Id.*, at — (slip op. 22).

To be sure, PURPA gives virtually any affected person the right to compel consideration of the statutory standards through judicial action. We fail to see, however, that this places any particularly onerous burden on the State. Mississippi by statute already grants "[a]ny interested person . . .

the right to petition the [Public Service] [C]ommission for issuance, amendment or repeal of a rule or regulation," Miss. Code Ann. § 77-3-45 (1973) (emphasis added), and provides that "*any party aggrieved by any final finding, order or judgment of the commission shall have the right, regardless of the amount involved, of appeal in chancery court.*" Miss. Code Ann. § 77-3-67(1) (1981 Cum. Supp.) (emphasis added). Indeed, "[a]ny person whose rights may be directly affected by said appeal may appear and become a party. . . ." *Ibid.* And "[a]ppeals in accordance with law may be had to the supreme court of the State of Mississippi from any final judgment of the chancery court." Miss. Code Ann. § 77-3-71 (1973).

It is hardly clear on the statute's face, then, that PURPA's standing and appeal provisions grant any rights beyond those presently accorded by Mississippi law, and appellees point to no specific provision of the Act expanding on the State's existing, liberal approach to public participation in ratemaking. In this light, we again find the principle of *Testa v. Katt*, *supra*, controlling: the State is asked only to make its administrative tribunals available for the vindication of federal as well as state-created rights. PURPA, of course, establishes as federal policy the requirement that state commissions consider various ratemaking standards, and it gives individuals a right to enforce that policy; once it is established that the requirement is constitutionally supportable, "the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide." *Testa v. Katt*, 330 U. S., at 391. See *Second Employers' Liability Cases*, 223 U. S. 1, 57 (1912).

In short, Titles I and III do not involve the compelled exercise of Mississippi's sovereign powers. And, equally important, they do not set a mandatory agenda to be considered in all events by state legislative or administrative decisionmakers. As we read them, Titles I and III simply

establish requirements for continued state activity in an otherwise pre-emptible field. Whatever the constitutional problems associated with more intrusive federal programs, the "mandatory consideration" provisions of Titles I and III must be validated under the principle of *Hodel v. Virginia Surface Min. & Recl. Assn.*²⁸

C. The Procedural Requirements. Titles I and III also require state commissions to follow certain notice and comment procedures when acting on the proposed federal standards. In a way, these appear more intrusive than the "consideration" provisions; while the latter are essentially hortatory, the procedural provisions obviously are prescriptive. Appellants and *amici* Maryland, *et al.*, argue that the procedural requirements simply establish minimum due process standards, something Mississippi appears already to provide,²⁹ and therefore may be upheld as an exercise of Con-

²⁸ As we note above, PURPA imposes certain reporting requirements on state commissions. But because these attach only if the State chooses to continue its regulatory efforts in the field, we find them supportable for the reasons addressed in connection with the other provisions of Titles I and III. Appellees nevertheless suggest that PURPA's requirements must fall because compliance will impose financial burdens on the States. We are unconvinced: in a Tenth Amendment challenge to congressional activity, "the determinative factor . . . [is] the nature of the federal action, not the ultimate economic impact on the States." *Hodel v. Virginia Surface Min. & Recl. Assn.*, — U. S., at —, n. 33. In any event, Congress has taken steps to reduce or eliminate the economic burden of compliance. See n. 14, *supra*.

²⁹ Mississippi law provides for reasonable notice in the fixing of rates and conditions of service of utilities. Miss. Code Ann. § 77-3-33(2) (1973). It also requires the Public Service Commission to keep a "full and complete record" of all proceedings, § 77-3-63, and to "make and file its findings and order, and its opinion, if any," § 77-3-59. Indeed, the state statute requires that "[a]ll findings of the commission and the determination of every matter by it shall be in writing and placed upon its minutes." § 77-1-41. These "shall be deemed a public record, and shall at all seasonable times be subject to the inspection of the public." *Ibid.* Thus, the requirements that appellees characterize as an extraordinary burden on the State appear

gress' Fourteenth Amendment powers. We need not go that far, however, for we uphold the procedural requirements under the same analysis employed above in connection with the "consideration" provisions. If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a pre-emptible field—and we hold today that it can—there is nothing unconstitutional about Congress' requiring certain procedural minima as that body goes about undertaking its tasks. The procedural requirements obviously do not compel the exercise of the State's sovereign powers, and do not purport to set standards to be followed in all areas of the state commission's endeavors.

The judgment of the District Court is reversed.

It is so ordered.

to accord few, if any, procedural rights not already established by Mississippi law.

Strong points:

1. Reliance on Nat. Coker + Hodel - 5
2. What PURPA does - 5
3. Harlan - ABA journal article - 11 (I may quote) p. 14
(and Ed Levi) 15
4. States as "laboratories" - 12 et seq
5. Part II reviews History of
federalism extremely well - 15

1st DRAFT

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

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SUPREME COURT OF THE UNITED STATES

No. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION ET
AL., APPELLANTS, v. MISSISSIPPI ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

[April —, 1982]

JUSTICE O'CONNOR, concurring in part in the judgment
and dissenting in part.

I agree with the majority that the Commerce Clause supported Congress' enactment of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (PURPA). I disagree, however, with much of the majority's Tenth Amendment analysis. Titles I and III of PURPA conscript state utility commissions into the national bureaucratic army. This result is contrary to the principles of *National League of Cities v. Usery*, 426 U. S. 833 (1976), antithetical to the values of federalism, and inconsistent with our constitutional history. Accordingly, I dissent from subsections IVB and C of the majority's opinion.¹

¹ I concur in the majority's decision to uphold Title II, § 210 of PURPA against appellees' facial attack. As the majority explains, part of that section permits the Federal Energy Regulatory Commission (FERC) to exempt cogeneration and small power production facilities from otherwise applicable state and federal laws. 16 U. S. C. § 824a-3 (e) (1976 ed., Supp. IV). This exemption authority does not violate the Tenth Amendment, for it merely preempts state control of private conduct, rather than regulating the "States as States." See *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U. S. 264, 287-293 (1981).

Section 210's requirement that the States "implement" rules promulgated by the Secretary of Energy, 16 U. S. C. § 824a-3 (f) (1976 ed., Supp. IV), is more disturbing. Appellants, however, have interpreted this statu-

*Procedural
not specifically
addressed*

I

Titles I and III of PURPA require state regulatory agencies to decide whether to adopt a dozen federal standards governing gas and electric utilities.² The statute describes, in some detail, the procedures state authorities must follow when evaluating these standards,³ but does not compel the

procedure

tory obligation to include "an undertaking to resolve disputes between qualifying facilities and electric utilities arising under [§ 210], or any other action reasonably designed to implement [that section]." 18 CFR § 292.401 (a) (1981). It appears, therefore, that state regulatory authorities may satisfy § 210's implementation requirement simply by adjudicating private disputes arising under that section. As the majority points out, *ante*, at 16-17, the Mississippi Public Service Commission has jurisdiction over similar state disputes, and it is settled that a State may not exercise its judicial power in a manner that discriminates between analogous federal and state causes of action. See *Testa v. Katt*, 330 U. S. 386 (1947). Under these circumstances, but without foreclosing the possibility that particular applications of § 210's implementation provision might uncover hidden constitutional defects, I would not sustain appellees' facial attack on the provision.

Section 210 also authorizes FERC, electric utilities, cogenerators, and small power producers to "enforce" the above implementation provision against state utility commissions. 16 U. S. C. § 824a-3 (h) (2) (1976 ed., Supp. IV). As applied, it is conceivable that this enforcement provision would raise troubling federalism issues. Once again, however, I decline to accept appellees' facial challenge to the provision, preferring to consider the constitutionality of this provision in the setting of a concrete controversy.

²The statute imposes the same requirements upon nonregulated utilities. In this respect, it regulates purely private conduct and does not violate the Tenth Amendment. Throughout this dissent, I consider only the constitutionality of Titles I and III as applied to state regulatory authorities. I would allow the District Court, on remand, to decide whether the constitutionally defective aspects of Titles I and III are severable from the unobjectionable portions.

³See majority op., *ante*, at 4-6. The majority overlooks several of PURPA's procedural mandates. For example, with respect to six of the standards, the state agency must publish a written determination, including findings, even if it decides to adopt the federal standard. 16 U. S. C.

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States to adopt the suggested federal standards. 15 U. S. C. § 3203 (a) (1976 ed., Supp. IV); 16 U. S. C. §§ 2621 (a), 2623 (a), 2627 (b) (1976 ed., Supp. IV). The latter, deceptively generous, feature of PURPA persuades the Court that the statute does not intrude impermissibly into state sovereign functions. The Court's conclusion, however, rests upon a fundamental misunderstanding of the role that state governments play in our federalist system.

State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes limit the scope of state authority, they do not harness that power for national purposes. The Constitution contemplates "an indestructible Union, composed of indestructible States," a system in which both the state and national governments retain a "separate and independent existence." *Texas v. White*, 7 Wall. 700, 725 (1869); *Lane County v. Oregon*, 7 Wall. 71, 76 (1869).

Adhering to these principles, the Court has recognized that the Tenth Amendment restrains congressional action that would impair "a State's ability to function as a State." *United Transportation Union v. Long Island R. Co.*, 455

not "field
office"!

§ 2621 (b) (1976 ed., Supp. IV). In addition, PURPA guarantees certain rights to discover information, § 2631 (b); requires the State to provide transcripts, at the cost of reproduction, to parties to ratemaking proceedings or other "regulatory proceeding[s] relating to [electric utility] rates or rate design," § 2632 (c); and, under some circumstances, mandates compensation for reasonable attorney's fees, expert witness fees, and other costs to consumers who contribute substantially to the adoption of a Title I standard, § 2632 (a), (b). These requirements, as well as the ones described by the majority, may impose special burdens on state administrative agencies. I do not weigh the constitutionality of these individual procedural requirements, however, because I would invalidate the entire regimen Titles I and III impose on state regulatory authorities.

U. S. —, — (1982); *National League of Cities v. Usery*, 426 U. S. 833, 842–852 (1976); *Fry v. United States*, 421 U. S. 542, 547, n. 7 (1975). See also *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 423–424 (1978) (CHIEF JUSTICE BURGER, concurring in the judgment). For example, in *National League of Cities v. Usery*, *supra*, the Court held that Congress could not prescribe the minimum wages and maximum hours of state employees engaged in “traditional governmental functions,” *id.*, at 852, because the power to set those wages and hours is an “attribute of state sovereignty” that is “essential to [a] separate and independent existence.” *Id.*, at 845 (quoting *Lane County v. Oregon*, *supra*, at 76).

Just last Term this Court identified three separate inquiries underlying the result in *National League of Cities*. A congressional enactment violates the Tenth Amendment, we observed, if it regulates the “‘States as States,’” addresses “‘matters that are indisputably ‘attribute[s] of state sovereignty,’” and “‘directly impair[s] [the States]’ ability to ‘structure integral operations in areas of traditional governmental functions.’” *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U. S. 264, 287–288 (1981) (quoting *National League of Cities*, *supra*, at 854, 845, 852). See also *United Transportation Union*, *supra*, at —.⁴

Application of these principles to the present case reveals the Tenth Amendment defects in Titles I and III. Plainly those titles regulate the “States as States.” While the statute’s ultimate aim may be the regulation of private utility companies, PURPA addresses its commands solely to the

⁴In both *Hodel* and *United Transportation Union* we further noted that, even when these three requirements are met, “the nature of the federal interest advanced may be such that it justifies state submission.” *Hodel*, 452 U. S., at 288, n. 29; *United Transportation Union*, 455 U. S., at —, n. 9. Neither of those cases involved such an exception to *National League of Cities*, and the Court has not yet explored the circumstances that might justify such an exception.

Regulation
of the
States —
not the
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utilities

States. Instead of requesting private utility companies to adopt lifeline rates, declining block rates, or the other PURPA standards, Congress directed state agencies to appraise the appropriateness of those standards. It is difficult to argue that a statute structuring the regulatory agenda of a state agency is not a regulation of the "State."

I find it equally clear that Titles I and III address "attributes of state sovereignty." Even the majority recognizes that "the power to make decisions and to set policy is what gives the State its sovereign nature." *Ante*, at 17. The power to make decisions and set policy, however, embraces more than the ultimate authority to enact laws; it also includes the power to decide which proposals are most worthy of consideration, the order in which they should be taken up, and the precise form in which they should be debated. PURPA intrudes upon all of these functions. It chooses twelve proposals, forcing their consideration even if the state agency deems other ideas more worthy of immediate attention. In addition, PURPA hinders the agency's ability to schedule consideration of the federal standards.⁵ Finally, PURPA specifies, with exacting detail, the content of the standards that will absorb the agency's time.⁶

⁵ As the majority recognizes, *ante*, at 5, PURPA permits "[a]ny person" to bring an action in state court to enforce the agency's obligation to consider the federal standards. 15 U. S. C. § 3207 (b) (1) (1976 ed., Supp. IV); 16 U. S. C. § 2633 (c) (1) (1976 ed., Supp. IV). The Secretary of Energy, moreover, may intervene in any ongoing ratemaking proceeding to require consideration of PURPA's standards. 15 U. S. C. § 3205 (a) (1976 ed., Supp. IV); 16 U. S. C. §§ 2631 (a), 2622 (a) (1976 ed., Supp. IV). Title I grants affected utilities and consumers the same right of intervention. 16 U. S. C. § 2631 (a) (1976 ed., Supp. IV). Because of these rights of intervention and enforcement, state agencies lack even the power to schedule their consideration of PURPA's standards.

⁶ For example, the proposed standards governing advertising provide that "No electric [or gas] utility may recover from any person other than the shareholders (or other owners) of such utility any direct or indirect expenditure by such utility for promotional or political advertising as [fur-

Yes - ?
agree.
This is what
Nat. League
& Hodel
(see p 4)
appear to
require

What
PURPA
does

If Congress routinely required the state legislatures to debate bills drafted by congressional committees, it could hardly be questioned that the practice would affect an attribute of state sovereignty. PURPA, which sets the agendas of agencies exercising delegated legislative power in a specific field, has a similarly intrusive effect.

ther] defined in . . . this title." 16 U. S. C. § 2623 (b) (5) (1976 ed., Supp. IV); 15 U. S. C. § 3203 (b) (2) (1976 ed., Supp. IV). PURPA then defines the terms advertising, political advertising, and promotional advertising:

"(1) For purposes of this section and section 2623 (b) (5) of this title—

(A) The term 'advertising' means the commercial use, by an electric utility, of any media, including newspaper, printed matter, radio, and television, in order to transmit a message to a substantial number of members of the public or to such utility's electric consumers.

(B) The term 'political advertising' means any advertising for the purpose of influencing public opinion with respect to legislative, administrative, or electoral matters, or with respect to any controversial issue of public importance.

(C) The term 'promotional advertising' means any advertising for the purpose of encouraging any person to select or use the service or additional service of an electric utility or the selection or installation of any appliance or equipment designed to use such utility's service.

"(2) For purposes of this subsection and section 2623 (b) (5) of this title, the terms 'political advertising' and 'promotional advertising' do not include—

(A) advertising which informs electric consumers how they can conserve energy or can reduce peak demand for electric energy,

(B) advertising required by law or regulation, including advertising required under part 1 of title II of the National Energy Conservation Policy Act . . . ,

(C) advertising regarding service interruptions, safety measures, or emergency conditions,

(D) advertising concerning employment opportunities with such utility,

(E) advertising which promotes the use of energy efficient appliances, equipment or services, or

(F) any explanation or justification of existing or proposed rate schedules, or notifications of hearings thereon." 16 U. S. C. § 2625 (h) (1976 ed., Supp. IV).

See also 15 U. S. C. § 3204 (b) (1976 ed., Supp. IV) (containing similar provisions for gas utilities).

Finally, PURPA directly impairs the States' ability to "structure integral operations in areas of traditional governmental functions." Utility regulation is a traditional function of state government,⁷ and the regulatory commission is the most integral part of that function. By taxing the limited resources of these commissions, and decreasing their ability to address local regulatory ills, PURPA directly impairs the power of state utility commissions to discharge their traditional functions efficiently and effectively.⁸

The majority sidesteps this analysis, suggesting that the States may escape PURPA simply by ceasing regulation of public utilities. Even the majority recognizes that this choice "may be a difficult one," *ante*, at 21, and that "it may be unlikely that the States will or easily can abandon regulation of public utilities to avoid PURPA's requirements." *Ante*, at 22. In fact, the majority's "choice" is an absurdity, for if its analysis is sound, the Constitution no longer limits federal regulation of state affairs. Under the majority's

Yes

⁷The Court has not explored fully the extent of "traditional" state functions. Utility regulation, however, should fall within any definition of that term. See generally W. Jones, *Cases and Materials on Regulated Industries* 25-44 (2d ed. 1976) (tracing history of state regulation of utilities).

⁸PURPA thus offends each of the criteria named in *Hodel*. I do not believe, moreover, that this is a case in which "the nature of the federal interest advanced may be such that it justifies state submission." See n. 4, *supra*. Whatever the ultimate content of that standard, it must refer, not only to the weight of the asserted federal interest, but to the necessity of vindicating that interest in a manner that intrudes upon state sovereignty. In this case, the Government argues that PURPA furthers vital national interests in energy conservation. Although the congressional goal is a noble one, appellants have not shown that Congress needed to commandeer state utility commissions to achieve its aim. Consistent with the Tenth Amendment, Congress could have assigned PURPA's tasks to national officials. Alternatively, it could have requested state commissions to comply with Titles I and III and directed the Secretary to shoulder the burden of any State choosing not to comply.

analysis, for example, *National League of Cities*, would have been wrongly decided, because the States could have avoided the Fair Labor Standards Act by “choosing” to fire all employees subject to that Act and to close those branches of state government. Similarly, Congress could dictate the agendas and meeting places of state legislatures, because unwilling States would remain free to abolish their legislative bodies.⁹ I do not agree that this dismemberment of state government is the correct solution to a Tenth Amendment challenge.

The choice put to the States by the Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. § 1201 et seq. (1976 ed., Supp. III), the federal statute upheld in *Hodel* and discussed by the Court, *ante*, at 19–20, is quite different from the decision PURPA mandates. The Surface Mining Act invites the States to submit proposed surface mining regulations to the Secretary of the Interior. 30 U. S. C. § 1253 (1976 ed., Supp. III). If the Secretary approves a state regulatory program, then the State enforces that program. If a State chooses not to submit a program, the Secretary develops and implements a program for that State. § 1254. Even States in the latter category, however, may supplement the Secretary’s program with consistent state laws.¹⁰

⁹ But cf. *Coyle v. Oklahoma*, 221 U. S. 559, 565 (1911) (“The power to locate its own seat of government and to determine when and how it shall be changed from one place to another . . . are essentially and peculiarly state powers. That one of the . . . States could now be shorn of such powers by an act of Congress would not be for a moment entertained”).

¹⁰ Subsection 1254 (g) of Title 30 only preempts state laws “insofar as they interfere with the achievement of the purposes and the requirements of this chapter and the Federal program.” Similarly, § 1255 (a) provides that no state law or regulation “shall be superseded by any provision of this chapter or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this chapter.” Subsection 1255 (b) explains that neither state laws that are more stringent than the federal standards nor state laws governing operations “for which no provision is contained in this chapter” are “inconsistent” with the con-

The Surface Mining Act does not force States to choose between performing tasks set by Congress and abandoning all mining or land use regulation. That statute is "a program of cooperative federalism," 452 U. S., at 289, because it allows the States to choose either to work with Congress in pursuit of federal surface mining goals or to devote their legislative resources to other mining and land use problems. By contrast, there is nothing "cooperative," about a federal program that compels state agencies either to function as bureaucratic puppets of the federal government or to abandon regulation of an entire field traditionally reserved to state authority.¹¹ Yet this is the "choice" the Court today forces upon the States.

The Court further defends its novel decision to permit federal conscription of state legislative power by citing three cases that "in effect directed state decision-makers to take or to refrain from taking certain actions." *Ante*, at 18. *Testa v. Katt*, 330 U. S. 386 (1947), is the most suggestive of these decisions.¹² In *Testa*, the Court held that state trial courts

gressional Act.

¹¹ As one scholar has written, "[a] federal system implies a partnership, all members of which are effective players on the team and all of whom retain the capacity for independent action. It does not imply a system of collaboration in which one of the collaborators is annihilated by the other." L. White, *The States and the Nation* 3 (1953) (hereinafter White).

¹² The other two decisions, *Fry v. United States*, 421 U. S. 542 (1975), and *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U. S. 658 (1979), are readily distinguishable. *Fry* upheld a temporary wage freeze as applied to state and local governmental employees. As we subsequently observed, this emergency restraint "displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves. Instead, it merely required that the wage scales and employment relationships which the States themselves had chosen be maintained during [a] period of . . . emergency." *National League of Cities v. Usery*, *supra*, at 853. In *Washington State Fishing Vessel Association*, state agencies were defendants to a suit charging violations of federal treaties, and we

? Purpa leaves states free entirely to reject the substance of the federal policies
"Puppet" characterization is more rhetorical than accurate.

may not refuse to hear a federal claim if "th[e] same type of claim arising under [state] law would be enforced by that State's courts." *Id.*, at 394. A facile reading of *Testa* might suggest that state legislatures must also entertain congressionally sponsored business, as long as the federal duties are similar to existing state obligations. Application of *Testa* to legislative power, however, would expand vastly the scope of that decision. Because trial courts of general jurisdiction do not choose the cases that they hear, the requirement that they evenhandedly adjudicate state and federal claims falling within their jurisdiction does not infringe any sovereign authority to set an agenda. As explained above, however, the power to choose subjects for legislation is a fundamental attribute of legislative power, and interference with this power unavoidably undermines state sovereignty. Accordingly, the existence of a congressional authority to "enlist . . . the [state] judiciary . . . to further federal ends," *ante*, at 18, does not imply an equivalent power to impress state legislative bodies into federal service.

The Court, finally, reasons that, because Congress could have preempted the entire field of intrastate utility regulation, the Constitution should not forbid PURPA's "less intrusive scheme." *Ante*, at 20 and n. 27. The majority's evaluation of intrusiveness, however, is simply irrelevant to the constitutional inquiry. The Constitution permits Congress to govern only through certain channels. This Court's task is to enforce those limits, not to decide whether alternative

upheld the lower court's power to enforce its judgment by ordering the defendants to comply with federal law. The power of a court to enjoin adjudicated violations of federal law, however, is far different from the power of Congress to demand state legislative action in the absence of any showing that the State has violated existing federal duties. See Hart, *The Relations Between State and Federal Law*, 54 *Colum. L. Rev.* 489, 515-516 (1954) (hereinafter Hart); Salmon, *The Federalist Principle: The Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act*, 2 *Colum. J. Envtl. L.* 290, 334-337 (1976) (hereinafter Salmon).

courses would better serve state and federal interests.¹³ I do not believe, moreover, that Titles I and III of PURPA are less intrusive than preemption.¹⁴ When Congress preempts a field, it precludes only state legislation that conflicts with the national approach. The States usually retain the power to complement congressional legislation, either by regulating details unsupervised by Congress or by imposing requirements that go beyond the national threshold.¹⁵ Most importantly, after Congress preempts a field, the States may simply devote their resources elsewhere. This country does not lack for problems demanding legislative attention. PURPA, however, drains the inventive energy of state governmental bodies by requiring them to weigh its detailed standards, enter written findings, and defend their determinations in state court. While engaged in these congressionally mandated tasks, state utility commissions are less able to pursue local proposals for conserving gas and electric power. The States

¹³ Justice Harlan once commented that times of "international unrest and domestic uncertainty" are "bound to produce temptations and pressures to depart from or temporize with traditional constitutional precepts or even to short-cut the processes of change which the Constitution establishes." Harlan, Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 A.B.A.J. 943, 943 (1963) (hereinafter Harlan). Justice Harlan then cautioned that it "[i]s . . . the special responsibility of lawyers, whether on or off the bench, to see to it that such things do not happen." *Ibid.*

¹⁴ In 1975, then Attorney General Edward H. Levi responded to a similar argument that the "greater" power of preemption includes the "lesser" power of demanding affirmative action from state governments. Attorney General Levi remarked that "it is an insidious point to say that there is more federalism by compelling a State instrumentality to work for the Federal Government." Hearings on S. 354 before the Senate Committee on Commerce, 94th Cong., 1st Sess., 503 (1975). In a similar vein, he warned against "lov[ing] the States to their demise." *Id.*, at 507.

¹⁵ In rare instances, Congress so occupies a field that any state regulation is inconsistent with national goals. The Court, however, is reluctant to infer such expansive preemption "in the absence of persuasive reasons." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142 (1963).

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How great of an
imposition is this
in fact? This seems
to me the key issue.

Good

yes

might well prefer that Congress simply impose the standards described in PURPA; this, at least, would leave them free to exercise their power in other areas.

Federal preemption is less intrusive than PURPA's approach for a second reason. Local citizens hold their utility commissions accountable for the choices they make. Citizens, moreover, understand that legislative authority usually includes the power to decide which ideas to debate, as well as which policies to adopt. Congressional compulsion of state agencies, unlike preemption, blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs.¹⁶

The foregoing remarks suggest that, far from approving a minimally intrusive form of federal regulation, the majority's decision undermines the most valuable aspects of our federalism. Courts and commentators frequently have recognized that the fifty States serve as laboratories for the development of new social, economic, and political ideas.¹⁷ State in-

but here state PUC's remain
free to decide whether
to adopt federal
Does it?

¹⁶ See generally Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1239-1247 (1977) (hereinafter Stewart); Comment, *Redefining the National League of Cities State Sovereignty Doctrine*, 129 U. Pa. L. Rev. 1460, 1477-1478 (1981).

Daniel Elazar, testifying before the Advisory Commission on Intergovernmental Relations in March 1980, commented upon this problem of garbled political responsibility. He suggested that national officials tend to force state governments to administer unpopular programs, thus transferring political liability for those programs to the States. Advisory Commission on Intergovernmental Relations, *The Federal Role in the Federal System: The Dynamics of Growth*, Hearings on the Federal Role 32 (October 1980). As an example, he cited the President's attempt in 1979 to force state governors to establish and enforce unpopular gas rationing mechanisms. *Id.*, at 85 (formal statement of Professor Elazar).

¹⁷ See, e. g., *Chandler v. Florida*, 449 U. S. 560, 579 (1981); *Reeves, Inc. v. Stake*, 447 U. S. 429, 441 (1980); *Whalen v. Roe*, 429 U. S. 589, 597 and n. 20 (1977); *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting); Hart, *supra*, n. 12, at 540, 542; Macmahon, *The Problems of Federalism: A Survey*, in *Federalism, Mature and Emergent*

novation is no judicial myth. When Wyoming became a State in 1890, it was the only State permitting women to vote.¹⁸ That novel idea did not bear national fruit for another thirty years.¹⁹ Wisconsin pioneered unemployment insurance,²⁰ while Massachusetts initiated minimum wage laws for women and minors.²¹ After decades of academic debate, state experimentation finally provided an opportunity to observe no-fault automobile insurance in operation.²² Even in the field of environmental protection, an area subject to heavy federal regulation, the States have supplemented national standards with innovative and far-reaching statutes.²³ Utility regulation itself is a field marked by valuable state invention.²⁴ PURPA, which commands state agencies

3, 10-11 (A. Macmahon, ed. 1955); N. Rockefeller, *The Future of Federalism* 8-9 (1962) (hereinafter Rockefeller); Stewart, *supra*, n. 16, at 1210; White, *supra*, n. 11, at 46-47.

¹⁸ Wyoming's policy followed a practice it had adopted as a territory. Compare Act of Jan. 21, 1891, ch. 100, § 4, 1890-1891 Wyo. Sess. Laws 394, with Act of March 14, 1890, ch. 80, § 5, 1890 Sess. Laws Wyo. Territory 157. See generally C. Beard & M. Beard, *The Rise of American Civilization* 563 (rev. ed. 1937).

¹⁹ The Nineteenth Amendment, ratified in 1920, prohibits abridgement of the right to vote "on account of sex."

²⁰ See Act of Jan. 28, 1932, ch. 20, 1931-1932 Wis. Laws 57; Act of June 1, 1933, ch. 186, 1933 Wis. Laws 448; Act of June 2, 1933, ch. 194, 1933 Wis. Laws 491; W. Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932-1940*, p. 130 (1963); Rockefeller, *supra*, n. 17, at 16.

²¹ See Act of June 4, 1912, ch. 706, 1912 Mass. Acts 780; R. Morris, *Encyclopedia of American History* 768 (bicentennial ed. 1976).

²² See C. Morris & C. Morris, Jr., *Morris on Torts* 244-245 (2d ed. 1980); Friendly, *Federalism: A Foreword*, 86 Yale L.J. 1019, 1034 (1977).

²³ Florida, for example, has enacted particularly strict legislation against oil spills. Fla. Stat. Ann. §§ 376.011-.21 (1974 ed. and Supp. 1982). This Court upheld that legislation in *Askew v. American Waterways Operators, Inc.*, 411 U. S. 325 (1973).

²⁴ See *Federal Power Commission v. East Ohio Gas Co.*, 338 U. S. 464, 489 (1950) (Jackson, J., dissenting) ("Long before the Federal Government could be stirred to regulate utilities, courageous states took the initiative

to spend their time evaluating federally proposed standards and defending their decisions to adopt or reject those standards, will retard this creative experimentation.

In addition to promoting experimentation, federalism enhances the opportunity of all citizens to participate in representative government. Alexis de Tocqueville understood well that participation in local government is a cornerstone of American democracy:

“It is incontestably true that the love and habits of republican government in the United States were engendered in the townships and in the provincial assemblies. . . . [I]t is this same republican spirit, it is these manners and actions of a free people, which are engendered and nurtured in the different States, to be afterwards applied to the country at large.” 1 A. de Tocqueville, *Democracy in America* 149–150 (H. Reeve trans. 1966).²⁵

Citizens, however, cannot learn the lessons of self-government if their local efforts are devoted to reviewing proposals formulated by a far-away national legislature. If we want to preserve the ability of citizens to learn democratic processes through participation in local government, local citizens must retain the power to govern, not merely administer, their local problems.

Finally, our federal system provides a salutary check on governmental power. As Justice Harlan once explained, our ancestors “were suspicious of every form of all-powerful cen-

and almost the whole body of utility practice has resulted from their experiences”).

²⁵ See also Stewart, *supra*, n. 16, at 1210–1211, n. 62 (quoting Ignazio Silone) (“The first test to be applied in judging an alleged democracy is the degree of self-governing attained by its local institutions. If . . . the province is governed by the representative of the central government, there can be no true and complete democracy. Only local government can accustom men to responsibility and independence, and enable them to take part in the wider life of the state”).

tral authority." Harlan, *supra* n. 13, at 944. To curb this evil, they both allocated governmental power between state and national authorities, and divided the national power among three branches of government. Unless we zealously protect these distinctions, we risk upsetting the balance of power that buttresses our basic liberties. While analyzing this brake on governmental power, Justice Harlan noted that "[t]he diffusion of power between federal and state authority . . . takes on added significance as the size of the federal bureaucracy continues to grow." *Ibid.*²⁸ Today, the Court disregards this warning and permits Congress to kidnap state utility commissions into the national regulatory family. Whatever the merits of our national energy legislation, I am not ready to surrender this state legislative power to the Federal Energy Regulatory Commission.

II

As explained above, the majority's decision to uphold Titles I and III violates the principles of *National League of Cities* and threatens the values promoted by our federal system. The majority's result, moreover, is is at odds with our constitutional history, which demonstrates that the Framers consciously rejected a system in which the national legislature would achieve its ends by controlling state legislative power.

*At odds
with our
history*

The principal defect of the Articles of Confederation, eighteenth century writers agreed, was that the new national government lacked the power to compel individual action. Instead, the central government had to rely upon the cooperation of state legislatures to achieve national goals. Thus, Alexander Hamilton explained that: "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERN-

²⁸ See also Stewart, *supra*, n. 16, at 1241-1244 (discussing "political safeguards of federalism"); Rockefeller, *supra*, n. 17, at 10.

MENTS, in their CORPORATE or COLLECTIVE CAPACITIES and as contradistinguished from the INDIVIDUALS of whom they consist." The Federalist No. 15, p. 93 (J. Cooke ed. 1961). He pointed out, for example, that the national government had "an indefinite discretion to make requisitions for men and money," but "no authority to raise either by regulations extending to the individual citizens of America." *Ibid.*

The Constitution cured this defect by permitting direct contact between the national government and the individual citizen, a change repeatedly acknowledged by the delegates assembled in Philadelphia. George Mason, for example, declared that:

"Under the existing Confederacy, Congress represent[s] the *States* not the *people* of the States: their acts operate on the *States* not on the individuals. The case will be changed in the new plan of Government." 1 The Records of the Federal Convention of 1787, p. 133 (M. Farrand ed. 1911) (hereinafter Farrand) (abbreviations expanded in this and subsequent quotations).

Alexander Hamilton subsequently explained to the people of New York that the Constitution marked the "difference between a league and a government," because it "extend[ed] the authority of the union to the persons of the citizens,—the only proper objects of government." The Federalist No. 15, p. 95. Similarly, Charles Pinckney told the South Carolina House of Representatives that "the necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present; . . . however they may have differed with respect to the quantum of power, no objection was made to the system itself." 4 Elliot's Debates 256.

The speeches and writings of the Framers suggest why they adopted this means of strengthening the national government. Mason, for example, told the Convention that be-

cause "punishment could not [in the nature of things be executed on] the States collectively," he advocated a national government that would "directly operate on individuals." 1 Farrand 34. Hamilton predicted that a national government forced to work through the States could only "degenerate into a military despotism." The Federalist No. 16, p. 101 (J. Cooke ed. 1961). This was so because a national government could enforce its will against the States only by maintaining a "large army, continually on foot to execute the ordinary requisitions or decrees of the government." *Ibid.* See also *id.*, at 102; The Federalist No. 15, pp. 95-96.

Thus, the Framers concluded that government by one sovereign through the agency of a second cannot be satisfactory. At one extreme, as under the Articles of Confederation, such a system is simply ineffective. At the other, it requires a degree of military force incompatible with stable government and civil liberty.²⁷ For this reason, the Framers concluded that "the execution of the laws of the national government . . . should not require the intervention of the State Legislatures," The Federalist No. 16, p. 103, and abandoned the Articles of Confederation in favor of direct national legislation.

At the same time that the members of the Constitutional Convention fashioned this principle, they rejected two proposals that would have given the national legislature direct power to control state governments. The first proposal would have authorized Congress "to call forth the force of the

²⁷ Henry M. Hart, Jr., agreed that the Framers were well aware "of the delicacy, and the difficulties of enforcement, of affirmative mandates from a federal government to the governments of the member states." Hart, *supra*, n. 12, at 515. Until the second half of this century, congressional regulation apparently heeded this wisdom. "Federal law," Hart observed in 1954, "often says to the states, 'Don't do any of these things,' leaving outside the scope of its prohibition a wide range of alternative courses of action. But it is illuminating to observe how rarely it says, 'Do *this* thing,' leaving no choice but to go ahead and do it." *Ibid.*

Union against any member of the Union failing to fulfill its duty under the articles thereof." 1 Farrand 21. The delegates never even voted on this suggestion. Madison moved to postpone it, stating that "the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually." *Id.*, at 54. Several other delegates echoed his concerns,²⁸ and Madison ultimately reported that "[t]he practicability of making laws, with coercive sanctions, for the States as political bodies [has] been exploded on all hands." 2 Farrand 9.

The second proposal received more favorable consideration. Governor Randolph suggested that Congress should have the power "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." 1 Farrand 21. On May 31, 1787, the Committee of the Whole approved this proposal without debate. *Id.*, at 61. A week later, Pinckney moved to extend the congressional negative to all state laws "which [Congress] should judge to be improper." *Id.*, at 164. Numerous delegates criticized this attempt to give Congress unbounded control over state lawmaking. Hugh Williamson, for example, thought "the State Legislatures ought to possess independent powers in cases purely local," *id.*, at 171, while Elbridge Gerry thought Pinckney's idea might "enslave the States." *Id.*, at 165. After much debate, the Convention rejected Pinckney's suggestion.

Late in July, the delegates reversed their approval of even Randolph's more moderate congressional veto. Several del-

²⁸ Randolph, for example, opposed a similar proposal for national coercion on the ground that it was "impracticable, expensive, cruel to individuals." Instead, he advocated "resort . . . to a national Legislation over individuals." 1 Farrand 256 (emphasis deleted). Mason eloquently argued that "[t]he most jarring elements of nature; fire & water themselves are not more incompatible than [sic] such a mixture of civil liberty and military execution." *Id.*, at 339.

legates now concluded that the negative would be "terrible to the States," "unnecessary," and "improper." 2 Farrand 27.²⁹ Omission of the negative, however, left the new system without an effective means of adjusting conflicting state and national laws. To remedy this defect, the delegates adopted the Supremacy Clause, providing that the federal Constitution, laws, and treaties are "the supreme Law of the Land" and that "the Judges in every State shall be bound thereby." Art. VI, cl. 2. Thus, the Framers substituted judicial review of state laws for congressional control of state legislatures.

While this history demonstrates the Framers' commitment to a strong central government, the means that they adopted to achieve that end are as instructive as the end itself.³⁰ Under the Articles of Confederation, the national legislature operated through the States. The Framers could have fortified the central government, while still maintaining the same system, if they had increased Congress' power to demand obedience from state legislatures. In time, this scheme might have relegated the States to mere departments of the national government, a status the Court appears to endorse

²⁹ Thomas Jefferson disapproved of the congressional veto as soon as he heard of it. Writing to Madison from Paris, he declared: "The negative proposed to be given [the national legislators] on all the acts of the several Legislatures is now for the first time suggested to my mind. Prima facie I do not like it." C. Warren, *The Making of the Constitution* 168 (1937) (hereinafter Warren). Notably, Jefferson suggested that "an appeal from the State Judicatures to a Federal Court, in all cases where the Act of Confederation controuled the question, [would] be as effectual a remedy." *Id.*, at 168-169.

³⁰ Experience under the Articles of Confederation taught the Framers that multiple state legislatures, unchecked by any central power, "threat[en] danger not to the harmony only, but to the tranquillity of the Union." Warren, *supra*, n. 29, at 166 (quoting Madison). My analysis of the Framers' intent does not detract from the proper role of federal power in a federalist system, but merely requires the exercise of that power in a manner that does not destroy state independence.

today. The Framers, however, eschewed this course. They permitted Congress to pass laws directly affecting individuals, and rejected proposals that would have given Congress military or legislative power over state governments. In this way, the Framers established independent state and national sovereigns. Each government retained the power to pursue its own ends, subject only to the Constitution and the restraints of judicial review.³¹ The product of the Constitutional Convention, I believe, is fundamentally inconsistent with a system in which either Congress or a state legislature harnesses the legislative powers of the other sovereign.³²

³¹ This Court quickly recognized that Congress' strength derives from its own enumerated powers, not from the ability to direct state legislatures. In *M'Culloch v. Maryland*, 4 Wheat. 316 (1819), the historic decision affirming Congress' power to establish a national bank, Chief Justice Marshall declared: "No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; *and on those means alone was it expected to rely for the accomplishment of its ends.*" *Id.*, at 424 (emphasis added). See also S. Davis, *The Federal Principle* 114 (1978) (after examining history of Constitutional Convention, "only the principle of *duality* articulated in a single constitutional system of two distinct governments, national and state, each acting in its own right, each acting directly on individuals, and each qualified master of a limited domain of action, stands out as the clearest fact"); Salmon, *supra*, n. 12, at 359 (discussing history of Constitutional Convention and concluding that substitution of Supremacy Clause for negative on state laws "evidenced the clear distinction in [the Framers'] minds between the supremacy of the nation, which they approved, and the power of the nation to control the functioning of the states, which they rejected").

³² After the Convention, several thinkers suggested that the national government might rely upon state officers to perform some of its tasks. Madison, for example, thought that Congress might rely upon state officials to collect national revenue. *The Federalist* No. 45, pp. 312-313 (J. Cooke ed. 1961). None of these suggestions, however, went so far as to propose congressional control of state legislative power. The suggestions, moreover, seemed to assume that the States would consent to national use of their officials. See also W. Anderson, *The Nation and the States, Rivals or Partners?* 86-87 (1955) (noting that First Congress rejected propos-

III

During his last Term of service on this Court, Justice Black eloquently explained that our notions of federalism subordinate neither national nor state interests:

“The concept does not mean blind deference to ‘States’ Rights’ any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.” *Younger v. Harris*, 401 U. S. 37, 44 (1971).

In this case, I firmly believe that a proper “sensitivity to the legitimate interests of both State and National Governments” requires invalidation of Titles I and III of PURPA insofar as they apply to “state regulatory authorities.” Accordingly, I respectfully dissent from the Court’s decision to uphold those portions of the statute.

als to rely upon state officials to enforce federal law and suggesting that this decision to leave “the states free to work out, and to concentrate their attention and resources upon, their own functions” has become part of our constitutional understanding).

PR 8, 11, 12, 17, 18

Changed do
not affect
my views.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell —
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

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Recirculated: **MAY** 11 1982

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION ET
AL., APPELLANTS, *v.* MISSISSIPPI ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

[May —, 1982]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and
JUSTICE REHNQUIST join, concurring in part in the judgment
and dissenting in part.

I agree with the Court that the Commerce Clause sup-
ported Congress' enactment of the Public Utility Regulatory
Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117
(PURPA). I disagree, however, with much of the Court's
Tenth Amendment analysis. Titles I and III of PURPA con-
script state utility commissions into the national bureaucratic
army. This result is contrary to the principles of *National
League of Cities v. Usery*, 426 U. S. 833 (1976), antithetical
to the values of federalism, and inconsistent with our con-
stitutional history. Accordingly, I dissent from subsections
IVB and C of the Court's opinion.¹

¹I concur in the Court's decision to uphold Title II, § 210 of PURPA
against appellees' facial attack. As the Court explains, part of that section
permits the Federal Energy Regulatory Commission (FERC) to exempt
cogeneration and small power production facilities from otherwise appli-
cable state and federal laws. 16 U. S. C. § 824a-3 (e) (1976 ed., Supp.
IV). This exemption authority does not violate the Tenth Amendment,
for it merely preempts state control of private conduct, rather than regu-
lating the "States as States." See *Hodel v. Virginia Surface Mining &
Reclamation Association, Inc.*, 452 U. S. 264, 287-293 (1981).

Section 210's requirement that the States "implement" rules promul-

I

Titles I and III of PURPA require state regulatory agencies to decide whether to adopt a dozen federal standards governing gas and electric utilities.² The statute describes, in some detail, the procedures state authorities must follow when evaluating these standards,³ but does not compel the States to adopt the suggested federal standards. 15

gated by the Secretary of Energy, 16 U. S. C. § 824a-3 (f) (1976 ed., Supp. IV), is more disturbing. Appellants, however, have interpreted this statutory obligation to include “an undertaking to resolve disputes between qualifying facilities and electric utilities arising under [§ 210], or any other action reasonably designed to implement [that section].” 18 CFR § 292.401 (a) (1981). It appears, therefore, that state regulatory authorities may satisfy § 210’s implementation requirement simply by adjudicating private disputes arising under that section. As the Court points out, *ante*, at 16-17, the Mississippi Public Service Commission has jurisdiction over similar state disputes, and it is settled that a State may not exercise its judicial power in a manner that discriminates between analogous federal and state causes of action. See *Testa v. Katt*, 330 U. S. 386 (1947). Under these circumstances, but without foreclosing the possibility that particular applications of § 210’s implementation provision might uncover hidden constitutional defects, I would not sustain appellees’ facial attack on the provision.

Section 210 also authorizes FERC, electric utilities, cogenerators, and small power producers to “enforce” the above implementation provision against state utility commissions. 16 U. S. C. § 824a-3 (h) (2) (1976 ed., Supp. IV). As applied, it is conceivable that this enforcement provision would raise troubling federalism issues. Once again, however, I decline to accept appellees’ facial challenge to the provision, preferring to consider the constitutionality of this provision in the setting of a concrete controversy.

²The statute imposes the same requirements upon nonregulated utilities. In this respect, it regulates purely private conduct and does not violate the Tenth Amendment. Throughout this dissent, I consider only the constitutionality of Titles I and III as applied to state regulatory authorities. I would allow the District Court, on remand, to decide whether the constitutionally defective aspects of Titles I and III are severable from the unobjectionable portions.

³See *ante*, at 4-6. The Court overlooks several of PURPA’s procedural mandates. For example, with respect to six of the standards, the

U. S. C. § 3203 (a) (1976 ed., Supp. IV); 16 U. S. C. §§ 2621 (a), 2623 (a), 2627 (b) (1976 ed., Supp. IV). The latter, deceptively generous feature of PURPA persuades the Court that the statute does not intrude impermissibly into state sovereign functions. The Court's conclusion, however, rests upon a fundamental misunderstanding of the role that state governments play in our federalist system.

State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes. The Constitution contemplates "an indestructible Union, composed of indestructible States," a system in which both the state and national governments retain a "separate and independent existence." *Texas v. White*, 7 Wall. 700, 725 (1869); *Lane County v. Oregon*, 7 Wall. 71, 76 (1869).

Adhering to these principles, the Court has recognized that the Tenth Amendment restrains congressional action that would impair "a State's ability to function as a State."

state agency must publish a written determination, including findings, even if it decides to adopt the federal standard. 16 U. S. C. § 2621 (b) (1976 ed., Supp. IV). In addition, PURPA guarantees certain rights to discover information, § 2631 (b); requires the State to provide transcripts, at the cost of reproduction, to parties to ratemaking proceedings or other "regulatory proceeding[s] relating to [electric utility] rates or rate design," § 2632 (c); and, under some circumstances, mandates compensation for reasonable attorney's fees, expert witness fees, and other costs to consumers who contribute substantially to the adoption of a Title I standard, § 2632 (a), (b). These requirements, as well as the ones described by the Court, may impose special burdens on state administrative agencies. I do not weigh the constitutionality of these individual procedural requirements, however, because I would invalidate the entire regimen that Titles I and III impose on state regulatory authorities.

United Transportation Union v. Long Island R. Co., 455 U. S. —, — (1982); *National League of Cities v. Usery*, 426 U. S. 833, 842–852 (1976); *Fry v. United States*, 421 U. S. 542, 547, n. 7 (1975). See also *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 423–424 (1978) (THE CHIEF JUSTICE, concurring in the judgment). For example, in *National League of Cities v. Usery*, *supra*, the Court held that Congress could not prescribe the minimum wages and maximum hours of state employees engaged in “traditional governmental functions,” *id.*, at 852, because the power to set those wages and hours is an “attribute of state sovereignty” that is “essential to [a] separate and independent existence.” *Id.*, at 845 (quoting *Lane County v. Oregon*, *supra*, at 76).

Just last Term this Court identified three separate inquiries underlying the result in *National League of Cities*. A congressional enactment violates the Tenth Amendment, we observed, if it regulates the “‘States as States,’” addresses “‘matters that are indisputably ‘attribute[s] of state sovereignty,’” and “‘directly impair[s] [the States’] ability to ‘structure integral operations in areas of traditional governmental functions.’” *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U. S. 264, 287–288 (1981) (quoting *National League of Cities*, *supra*, at 854, 845, 852). See also *United Transportation Union*, *supra*, at —. ⁴

Application of these principles to the present case reveals the Tenth Amendment defects in Titles I and III. Plainly those titles regulate the “States as States.” While the statute’s ultimate aim may be the regulation of private utility companies, PURPA addresses its commands solely to the

⁴In both *Hodel* and *United Transportation Union* we further noted that, even when these three requirements are met, “the nature of the federal interest advanced may be such that it justifies state submission.” *Hodel*, 452 U. S., at 288, n. 29; *United Transportation Union*, 455 U. S., at —, n. 9. Neither of those cases involved such an exception to *National League of Cities*, and the Court has not yet explored the circumstances that might justify such an exception.

States. Instead of requesting private utility companies to adopt lifeline rates, declining block rates, or the other PURPA standards, Congress directed state agencies to appraise the appropriateness of those standards. It is difficult to argue that a statute structuring the regulatory agenda of a state agency is not a regulation of the "State."

I find it equally clear that Titles I and III address "attribute[s] of state sovereignty." Even the Court recognizes that "the power to make decisions and to set policy is what gives the State its sovereign nature." *Ante*, at 17. The power to make decisions and set policy, however, embraces more than the ultimate authority to enact laws; it also includes the power to decide which proposals are most worthy of consideration, the order in which they should be taken up, and the precise form in which they should be debated. PURPA intrudes upon all of these functions. It chooses twelve proposals, forcing their consideration even if the state agency deems other ideas more worthy of immediate attention. In addition, PURPA hinders the agency's ability to schedule consideration of the federal standards.⁵ Finally, PURPA specifies, with exacting detail, the content of the standards that will absorb the agency's time.⁶

⁵ As the Court recognizes, *ante*, at 5, PURPA permits "[a]ny person" to bring an action in state court to enforce the agency's obligation to consider the federal standards. 15 U. S. C. § 3207 (b) (1) (1976 ed., Supp. IV); 16 U. S. C. § 2633 (c) (1) (1976 ed., Supp. IV). The Secretary of Energy, moreover, may intervene in any ongoing ratemaking proceeding to require consideration of PURPA's standards. 15 U. S. C. § 3205 (a) (1976 ed., Supp. IV); 16 U. S. C. §§ 2631 (a), 2622 (a) (1976 ed., Supp. IV). Title I grants affected utilities and consumers the same right of intervention. 16 U. S. C. § 2631 (a) (1976 ed., Supp. IV). Because of these rights of intervention and enforcement, state agencies lack even the power to schedule their consideration of PURPA's standards.

⁶ For example, the proposed standards governing advertising provide that "No electric [or gas] utility may recover from any person other than the shareholders (or other owners) of such utility any direct or indirect expenditure by such utility for promotional or political advertising as [further] defined in . . . this title." 16 U. S. C. § 2623 (b) (5) (1976 ed., Supp.

If Congress routinely required the state legislatures to debate bills drafted by congressional committees, it could hardly be questioned that the practice would affect an attribute of state sovereignty. PURPA, which sets the agendas of agencies exercising delegated legislative power in a specific field, has a similarly intrusive effect.

Finally, PURPA directly impairs the States' ability to "structure integral operations in areas of traditional govern-

IV); 15 U. S. C. § 3203 (b) (2) (1976 ed., Supp. IV). PURPA then defines the terms advertising, political advertising, and promotional advertising: "(1) For purposes of this section and section 2623 (b) (5) of this title—

(A) The term 'advertising' means the commercial use, by an electric utility, of any media, including newspaper, printed matter, radio, and television, in order to transmit a message to a substantial number of members of the public or to such utility's electric consumers.

(B) The term 'political advertising' means any advertising for the purpose of influencing public opinion with respect to legislative, administrative, or electoral matters, or with respect to any controversial issue of public importance.

(C) The term 'promotional advertising' means any advertising for the purpose of encouraging any person to select or use the service or additional service of an electric utility or the selection or installation of any appliance or equipment designed to use such utility's service.

"(2) For purposes of this subsection and section 2623 (b) (5) of this title, the terms 'political advertising' and 'promotional advertising' do not include—

(A) advertising which informs electric consumers how they can conserve energy or can reduce peak demand for electric energy,

(B) advertising required by law or regulation, including advertising required under part 1 of title II of the National Energy Conservation Policy Act . . . ,

(C) advertising regarding service interruptions, safety measures, or emergency conditions,

(D) advertising concerning employment opportunities with such utility,

(E) advertising which promotes the use of energy efficient appliances, equipment or services, or

(F) any explanation or justification of existing or proposed rate schedules, or notifications of hearings thereon." 16 U. S. C. § 2625 (h) (1976 ed., Supp. IV).

See also 15 U. S. C. § 3204 (b) (1976 ed., Supp. IV) (containing similar provisions for gas utilities).

mental functions.” Utility regulation is a traditional function of state government,⁷ and the regulatory commission is the most integral part of that function. By taxing the limited resources of these commissions, and decreasing their ability to address local regulatory ills, PURPA directly impairs the power of state utility commissions to discharge their traditional functions efficiently and effectively.⁸

The Court sidesteps this analysis, suggesting that the States may escape PURPA simply by ceasing regulation of public utilities. Even the Court recognizes that this choice “may be a difficult one,” *ante*, at 22, and that “it may be unlikely that the States will or easily can abandon regulation of public utilities to avoid PURPA’s requirements.” *Ante*, at 23. In fact, the Court’s “choice” is an absurdity, for if its analysis is sound, the Constitution no longer limits federal regulation of state governments. Under the Court’s analysis, for example, *National League of Cities v. Usery*, 426 U. S. 833 (1976), would have been wrongly decided, because the States could have avoided the Fair Labor Standards Act by “choosing” to fire all employees subject to that Act and to

⁷The Court has not explored fully the extent of “traditional” state functions. Utility regulation, however, should fall within any definition of that term. See generally W. Jones, *Cases and Materials on Regulated Industries* 25-44 (2d ed. 1976) (tracing history of state regulation of utilities).

⁸PURPA thus offends each of the criteria named in *Hodel*. I do not believe, moreover, that this is a case in which “the nature of the federal interest advanced may be such that it justifies state submission.” See n. 4, *supra*. Whatever the ultimate content of that standard, it must refer, not only to the weight of the asserted federal interest, but also to the necessity of vindicating that interest in a manner that intrudes upon state sovereignty. In this case, the Government argues that PURPA furthers vital national interests in energy conservation. Although the congressional goal is a noble one, appellants have not shown that Congress needed to commandeer state utility commissions to achieve its aim. Consistent with the Tenth Amendment, Congress could have assigned PURPA’s tasks to national officials. Alternatively, it could have requested state commissions to comply with Titles I and III and directed the Secretary to shoulder the burden of any State choosing not to comply.

close those branches of state government.⁹ Similarly, Congress could dictate the agendas and meeting places of state legislatures, because unwilling States would remain free to abolish their legislative bodies.¹⁰ I do not agree that this dismemberment of state government is the correct solution to a Tenth Amendment challenge.

The choice put to the States by the Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. § 1201 *et seq.* (1976 ed., Supp. III), the federal statute upheld in *Hodel v. Vir-*

⁹ Contrary to the Court's suggestion, *ante*, at 26, n. 31, *National League of Cities* did not involve only "federal interference with the State's provision of essential services." The 1974 amendments to the Fair Labor Standards Act brought "almost all public employees employed by the States and by their various political subdivisions" within the Act's coverage. 426 U. S., at 836. As one of the appellants in that case stressed, the amendments affected the wages and hours of nonprofessional workers employed in both "governmental" and "proprietary" agencies. Brief for Appellant State of California in *National League of Cities v. Usery*, O.T. 1974, Nos. 74-878, 74-879, pp. 39-48. The complaint, for example, alleged that the federal Act would affect "state and local administrative and regulatory agencies which enforce laws and regulations preserving the public health, safety and welfare, including . . . licensing of occupations and businesses, . . . preservation of environmental quality, . . . [and] protection of the public against fraud and sharp practice." 1 App. in *National League of Cities v. Usery*, O. T. 1974, Nos. 74-878, 74-879, p. 16. The Court did not intimate that, because Congress could have preempted state regulation of these fields, it could regulate wages and hours as a condition of "continued state activity in an otherwise pre-emptible field." *Ante*, at 25. Instead, the Court shielded the activities that state governments perform "in discharging their dual functions of administering the public law and furnishing public services." 426 U. S., at 851 (emphasis added).

I am confident that, as the Court itself stresses, *ante*, at 25-26, n. 31, today's decision is not intended to overrule *National League of Cities*. Instead, the novelty of PURPA's scheme, see *ante*, at 15, merely seems to have obscured the relevance of *National League of Cities* to this case.

¹⁰ But cf. *Coyle v. Oklahoma*, 221 U. S. 559, 565 (1911) ("The power to locate its own seat of government and to determine when and how it shall be changed from one place to another . . . are essentially and peculiarly state powers. That one of the . . . States could now be shorn of such powers by an act of Congress would not be for a moment entertained").

ginia Surface Mining & Reclamation Association, 452 U. S. 264 (1981), and discussed by the Court, *ante*, at 20–21, 24, n. 30, is quite different from the decision PURPA mandates. The Surface Mining Act invites the States to submit proposed surface mining regulations to the Secretary of the Interior. 30 U. S. C. § 1253 (1976 ed., Supp. III). If the Secretary approves a state regulatory program, then the State enforces that program. If a State chooses not to submit a program, the Secretary develops and implements a program for that State. § 1254. Even States in the latter category, however, may supplement the Secretary's program with consistent state laws.¹¹ The Surface Mining Act does not force States to choose between performing tasks set by Congress and abandoning all mining or land use regulation. That statute is "a program of cooperative federalism," *Hodel, supra*, at 289, because it allows the States to choose either to work with Congress in pursuit of federal surface mining goals or to devote their legislative resources to other mining and land use problems. By contrast, there is nothing "cooperative" about a federal program that compels state agencies either to function as bureaucratic puppets of the Federal Government or to abandon regulation of an entire field traditionally reserved to state authority.¹² Yet this is the "choice" the

¹¹ Subsection 1254 (g) of Title 30 only preempts state laws "insofar as they interfere with the achievement of the purposes and the requirements of this chapter and the Federal program." Similarly, § 1255 (a) provides that no state law or regulation "shall be superseded by any provision of this chapter or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this chapter." Subsection 1255 (b) explains that neither state laws that are more stringent than the federal standards nor state laws governing operations "for which no provision is contained in this chapter" are "inconsistent" with the congressional Act.

¹² As one scholar has written, "[a] federal system implies a partnership, all members of which are effective players on the team and all of whom retain the capacity for independent action. It does not imply a system of collaboration in which one of the collaborators is annihilated by the other." L. White, *The States and the Nation* 3 (1953).

Court today forces upon the States.

The Court defends its novel decision to permit federal conscription of state legislative power by citing three cases upholding statutes that “in effect directed state decision-makers to take or to refrain from taking certain actions.” *Ante*, at 18. *Testa v. Katt*, 330 U. S. 386 (1947), is the most suggestive of these decisions.¹³ In *Testa*, the Court held that state trial courts may not refuse to hear a federal claim if “th[e] same type of claim arising under [state] law would be enforced by that State’s courts.” *Id.*, at 394. A facile reading of *Testa* might suggest that state legislatures must also entertain congressionally sponsored business, as long as the federal duties are similar to existing state obligations. Application of *Testa* to legislative power, however, vastly expands the scope of that decision. Because trial courts of general jurisdiction do not choose the cases that they hear, the requirement that they evenhandedly adjudicate state and

¹³ The other two decisions, *Fry v. United States*, 421 U. S. 542 (1975), and *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U. S. 658 (1979), are readily distinguishable. *Fry* upheld a temporary wage freeze as applied to state and local governmental employees. As we subsequently observed, this emergency restraint “displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves. Instead, it merely required that the wage scales and employment relationships which the States themselves had chosen be maintained during [a] period of . . . emergency.” *National League of Cities v. Usery*, 426 U. S. 833, 853 (1976). In *Washington State Fishing Vessel Association*, state agencies were defendants to a suit charging violations of federal treaties, and we upheld the lower court’s power to enforce its judgment by ordering the defendants to comply with federal law. The power of a court to enjoin adjudicated violations of federal law, however, is far different from the power of Congress to demand state legislative action in the absence of any showing that the State has violated existing federal duties. See Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 515–516 (1954); Salmon, *The Federalist Principle: The Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act*, 2 Colum. J. Envtl. L. 290, 334–337 (1976).

federal claims falling within their jurisdiction does not infringe any sovereign authority to set an agenda.¹⁴ As explained above, however, the power to choose subjects for legislation is a fundamental attribute of legislative power, and interference with this power unavoidably undermines state sovereignty. Accordingly, the existence of a congressional authority to “enlist . . . the [state] judiciary . . . to further federal ends,” *ante*, at 19, does not imply an equivalent power to impress state legislative bodies into federal service.

The Court, finally, reasons that because Congress could have preempted the entire field of intrastate utility regulation, the Constitution should not forbid PURPA’s “less intrusive scheme.” *Ante*, at 21 and n. 29.¹⁵ The Court’s evalua-

¹⁴ The Court suggests, *ante*, at 19, n. 27, that the requirement that state courts adjudicate federal claims may, as a practical matter, undermine the capacity of those courts to decide state controversies. Whatever the force of that observation, it does not demonstrate *Testa*’s relevance to this case. State legislative bodies possess at least one attribute of sovereignty, the power to set an agenda, that trial courts lack. This difference alone persuades me not to embrace the Court’s expansion of *Testa*.

¹⁵ The Court’s suggestion is somewhat disingenuous because Congress concluded that federal preemption of the matters governed by Titles I and III would be inappropriate. The administration’s original proposal, as well as the version of PURPA approved by the House, would have preempted state law by establishing minimum federal ratemaking standards. See generally H.R. Conf. Rep. No. 95-1750, pp. 63-65 (1978); S. Conf. Rep. No. 95-1292, pp. 63-65 (1978). The Senate Committee on Energy and Natural Resources, however, rejected this approach because:

“the committee felt that setting minimum federal standards for utility rates, or mandating the use of certain costing methods for ratesetting, would be an unnecessary intrusion into an area which has traditionally been regulated by the States. It was apparent to the committee that many State utility commissions are currently involved in innovative ratemaking and are working toward the goal of conservation of energy through rate reform. At present, the State regulatory agencies rather than the Federal Government, possess the expertise to conduct the detailed costing and demand studies required to implement rate structure revision. Moreover, the committee recognized that rate structures must re-

no change
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tion of intrusiveness, however, is simply irrelevant to the constitutional inquiry. The Constitution permits Congress to govern only through certain channels. If the Tenth Amendment principles articulated in *National League of Cities v. Usery*, 426 U. S. 833 (1976), and *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U. S. 264 (1981), foreclose PURPA's approach, it is no answer to argue that Congress could have reached the same destination by a different route. This Court's task is to enforce constitutional limits on congressional power, not to decide whether alternative courses would better serve state and federal interests.¹⁶

I do not believe, moreover, that Titles I and III of PURPA are less intrusive than preemption.¹⁷ When Congress pre-

flect the individual needs and local peculiarities of each utilities' service area Finally the committee felt that the potential uncertainty and delays accompanying Federal regulation threatened to have an adverse impact on the financial health of the utility industry which outweighed the projected savings in capital expenditures claimed by supporters of the administration's proposal." S. Rep. No. 95-442, p. 9 (1977).

See also 123 Cong. Rec. 32392-32393 (1977) (remarks of Sen. Johnston); *id.*, at 32394 (remarks of Sen. Domenici). The Senate version of PURPA, accordingly, eschewed the preemption route. See H.R. Conf. Rep. No. 95-1750, pp. 65-66 (1978); S. Conf. Rep. No. 95-1292, pp. 65-66 (1978). While the Conferees produced a compromise bill, they too stopped short of preemption. Today's decision, therefore, permits Congress to set state legislative agendas in a field that Congress might have occupied but expressly found unsuited to preemption.

¹⁶ Justice Harlan once commented that times of "international unrest and domestic uncertainty" are "bound to produce temptations and pressures to depart from or temporize with traditional constitutional precepts or even to short-cut the processes of change which the Constitution establishes." Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A.J. 943, 943 (1963). Justice Harlan then cautioned that it "[i]s . . . the special responsibility of lawyers, whether on or off the bench, to see to it that such things do not happen." *Ibid.*

¹⁷ In 1975, then Attorney General Edward H. Levi responded to a similar argument that the "greater" power of preemption includes the "lesser" power of demanding affirmative action from state governments. Attorney General Levi remarked that "it is an insidious point to say that there is

empties a field, it precludes only state legislation that conflicts with the national approach. The States usually retain the power to complement congressional legislation, either by regulating details unsupervised by Congress or by imposing requirements that go beyond the national threshold.¹⁸ Most importantly, after Congress preempts a field, the States may simply devote their resources elsewhere. This country does not lack for problems demanding legislative attention. PURPA, however, drains the inventive energy of state governmental bodies by requiring them to weigh its detailed standards, enter written findings, and defend their determinations in state court. While engaged in these congressionally mandated tasks, state utility commissions are less able to pursue local proposals for conserving gas and electric power. The States might well prefer that Congress simply impose the standards described in PURPA; this, at least, would leave them free to exercise their power in other areas.

Federal preemption is less intrusive than PURPA's approach for a second reason. Local citizens hold their utility commissions accountable for the choices they make. Citizens, moreover, understand that legislative authority usually includes the power to decide which ideas to debate, as well as which policies to adopt. Congressional compulsion of state agencies, unlike preemption, blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs.¹⁹

more federalism by compelling a State instrumentality to work for the Federal Government." Hearings on S. 354 before the Senate Committee on Commerce, 94th Cong., 1st Sess., 503 (1975). In a similar vein, he warned against "lov[ing] the States to their demise." *Id.*, at 507.

¹⁸ In rare instances, Congress so occupies a field that any state regulation is inconsistent with national goals. The Court, however, is reluctant to infer such expansive preemption "in the absence of persuasive reasons." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142 (1963).

¹⁹ See generally Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1239-1247 (1977); Comment, *Redefining the National*

The foregoing remarks suggest that, far from approving a minimally intrusive form of federal regulation, the Court's decision undermines the most valuable aspects of our federalism. Courts and commentators frequently have recognized that the fifty States serve as laboratories for the development of new social, economic, and political ideas.²⁰ This state innovation is no judicial myth. When Wyoming became a State in 1890, it was the only State permitting women to vote.²¹ That novel idea did not bear national fruit for another thirty years.²² Wisconsin pioneered unemployment insurance,²³ while Massachusetts initiated minimum wage laws

League of Cities State Sovereignty Doctrine, 129 U. Pa. L. Rev. 1460, 1477-1478 (1981).

Daniel Elazar, testifying before the Advisory Commission on Intergovernmental Relations in March 1980, commented upon this problem of garbled political responsibility. He suggested that national officials tend to force state governments to administer unpopular programs, thus transferring political liability for those programs to the States. Advisory Commission on Intergovernmental Relations, *The Federal Role in the Federal System: The Dynamics of Growth*, Hearings on the Federal Role, p. 32 (October 1980). As an example, he cited the President's attempt in 1979 to force state governors to establish and enforce unpopular gas rationing mechanisms. *Id.*, at 85 (formal statement of Professor Elazar).

²⁰ See, e. g., *Chandler v. Florida*, 449 U. S. 560, 579 (1981); *Reeves, Inc. v. Stake*, 447 U. S. 429, 441 (1980); *Whalen v. Roe*, 429 U. S. 589, 597 and n. 20 (1977); *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting); Hart, *supra*, n. 12, at 540, 542; Macmahon, *The Problems of Federalism: A Survey*, in *Federalism, Mature and Emergent* 3, 10-11 (A. Macmahon, ed. 1955); N. Rockefeller, *The Future of Federalism* 8-9 (1962); Stewart, *supra* n. 19, at 1210; White, *supra* n. 12, at 46-47.

²¹ Wyoming's policy followed a practice it had adopted as a territory. Compare Act of Jan. 21, 1891, ch. 100, § 4, 1890-1891 Wyo. Sess. Laws 394, with Act of March 14, 1890, ch. 80, § 5, 1890 Sess. Laws Wyo. Territory 157. See generally C. Beard & M. Beard, *The Rise of American Civilization* 563 (rev. ed. 1937).

²² The Nineteenth Amendment, ratified in 1920, prohibits abridgement of the right to vote "on account of sex."

²³ See Act of Jan. 28, 1932, ch. 20, 1931-1932 Wis. Laws 57; Act of June 1, 1933, ch. 186, 1933 Wis. Laws 448; Act of June 2, 1933, ch. 194, 1933

for women and minors.²⁴ After decades of academic debate, state experimentation finally provided an opportunity to observe no-fault automobile insurance in operation.²⁵ Even in the field of environmental protection, an area subject to heavy federal regulation, the States have supplemented national standards with innovative and far-reaching statutes.²⁶ Utility regulation itself is a field marked by valuable state invention.²⁷ PURPA, which commands state agencies to spend their time evaluating federally proposed standards and defending their decisions to adopt or reject those standards, will retard this creative experimentation.

In addition to promoting experimentation, federalism enhances the opportunity of all citizens to participate in representative government. Alexis de Tocqueville understood well that participation in local government is a cornerstone of American democracy:

“It is incontestably true that the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies. . . . [I]t is this same republican spirit, it is these manners and customs of a free people, which are engendered

Wis. Laws 491; W. Leuchtenburg, Franklin D. Roosevelt and the New Deal, 1932-1940, p. 130 (1963); Rockefeller, *supra* n. 20, at 16.

²⁴ See Act of June 4, 1912, ch. 706, 1912 Mass. Acts 780; R. Morris, Encyclopedia of American History 768 (bicentennial ed. 1976).

²⁵ See C. Morris & C. Morris, Jr., Morris on Torts 244-245 (2d ed. 1980); Friendly, Federalism: A Foreword, 86 Yale L.J. 1019, 1034 (1977).

²⁶ Florida, for example, has enacted particularly strict legislation against oil spills. Fla. Stat. Ann. §§ 376.011-.21 (1974 ed. and Supp. 1982). This Court upheld that legislation in *Askew v. American Waterways Operators, Inc.*, 411 U. S. 325 (1973).

²⁷ See *Federal Power Commission v. East Ohio Gas Co.*, 338 U. S. 464, 489 (1950) (Jackson, J., dissenting) (“Long before the Federal Government could be stirred to regulate utilities, courageous states took the initiative and almost the whole body of utility practice has resulted from their experiences”).

and nurtured in the different States, to be afterwards applied to the country at large." 1 A. de Tocqueville, *Democracy in America* 181 (H. Reeve trans. 1961).²⁸

Citizens, however, cannot learn the lessons of self-government if their local efforts are devoted to reviewing proposals formulated by a far-away national legislature. If we want to preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer, their local problems.

Finally, our federal system provides a salutary check on governmental power. As Justice Harlan once explained, our ancestors "were suspicious of every form of all-powerful central authority." Harlan, *supra* n. 16, at 944. To curb this evil, they both allocated governmental power between state and national authorities, and divided the national power among three branches of government. Unless we zealously protect these distinctions, we risk upsetting the balance of power that buttresses our basic liberties. In analyzing this brake on governmental power, Justice Harlan noted that "[t]he diffusion of power between federal and state authority . . . takes on added significance as the size of the federal bureaucracy continues to grow." *Ibid.*²⁹ Today, the Court disregards this warning and permits Congress to kidnap state utility commissions into the national regulatory family. Whatever the merits of our national energy legislation, I am

²⁸ See also I. Silone, *The School for Dictators* 119 (W. Weaver trans. 1963) ("A regime of freedom should receive its lifeblood from the self-government of local institutions. When democracy, driven by some of its baser tendencies, suppresses such autonomies, it is only devouring itself. If in the factory the master's word is law, if bureaucracy takes over the trade union, if the central government's representative runs the city and the province, . . . then you can no longer speak of democracy").

²⁹ See also Stewart, *supra*, n. 19, at 1241-1244 (discussing "political safeguards of federalism"); Rockefeller, *supra* n. 20, at 10.

not ready to surrender this state legislative power to the Federal Energy Regulatory Commission.

II

As explained above, the Court's decision to uphold Titles I and III violates the principles of *National League of Cities* and threatens the values promoted by our federal system. The Court's result, moreover, is at odds with our constitutional history, which demonstrates that the Framers consciously rejected a system in which the national legislature would employ state legislative power to achieve national ends.

The principal defect of the Articles of Confederation, eighteenth century writers agreed, was that the new National Government lacked the power to compel individual action. Instead, the central government had to rely upon the cooperation of state legislatures to achieve national goals. Thus, Alexander Hamilton explained that: "The great and radical vice in the construction of the existing Confederation is in the principle of legislation for states or governments, in their corporate or collective capacities and as contradistinguished from the individuals of whom they consist." *The Federalist* No. 15, p. 93 (J. Cooke ed. 1961) (emphasis omitted). He pointed out, for example, that the National Government had "an indefinite discretion to make requisitions for men and money," but "no authority to raise either by regulations extending to the individual citizens of America." *Ibid.*

The Constitution cured this defect by permitting direct contact between the National Government and the individual citizen, a change repeatedly acknowledged by the delegates assembled in Philadelphia. George Mason, for example, declared that:

"Under the existing Confederacy, Congress represent[s] the *States* not the *people* of the States: their acts operate on the *States* not on the individuals. The case will be

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changed in the new plan of Government.” 1 The Records of the Federal Convention of 1787, p. 133 (M. Farrand ed. 1911) (hereinafter Farrand) (abbreviations expanded in this and subsequent quotations).

Hamilton subsequently explained to the people of New York that the Constitution marked the “difference between a league and a government,” because it “extend[ed] the authority of the union to the persons of the citizens,—the only proper objects of government.” The Federalist No. 15, p. 95. Similarly, Charles Pinckney told the South Carolina House of Representatives that “the necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present; . . . however they may have differed with respect to the quantum of power, no objection was made to the system itself.” 4 Elliot’s Debates 256.

The speeches and writings of the Framers suggest why they adopted this means of strengthening the National Government. Mason, for example, told the Convention that because “punishment could not [in the nature of things be executed on] the States collectively,” he advocated a National Government that would “directly operate on individuals.” 1 Farrand 34. Hamilton predicted that a National Government forced to work through the States would “degenerate into a military despotism” because it would have to maintain a “large army, continually on foot” to enforce its will against the States. The Federalist No. 16, p. 101 (J. Cooke ed. 1961). See also *id.*, at 102; The Federalist No. 15, pp. 95–96.

Thus, the Framers concluded that government by one sovereign through the agency of a second cannot be satisfactory. At one extreme, as under the Articles of Confederation, such a system is simply ineffective. At the other, it requires a degree of military force incompatible with stable government and civil liberty.³⁰ For this reason, the Framers concluded

³⁰ Henry M. Hart, Jr., agreed that the Framers were well aware “of the

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that "the execution of the laws of the national government . . . should not require the intervention of the State Legislatures," The Federalist No. 16, p. 103, and abandoned the Articles of Confederation in favor of direct national legislation.

At the same time that the members of the Constitutional Convention fashioned this principle, they rejected two proposals that would have given the national legislature power to supervise directly state governments. The first proposal would have authorized Congress "to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof." 1 Farrand 21. The delegates never even voted on this suggestion. James Madison moved to postpone it, stating that "the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually." *Id.*, at 54. Several other delegates echoed his concerns,³¹ and Madison ultimately reported that "[t]he practicability of making laws, with coercive sanctions, for the States as political bodies [has] been exploded on all hands." 2 Farrand 9.

The second proposal received more favorable consider-

delicacy, and the difficulties of enforcement, of affirmative mandates from a federal government to the governments of the member states." Hart, *supra* n. 13, at 515. Until the second half of this century, Congress apparently heeded this wisdom. "Federal law," Hart observed in 1954, "often says to the states, 'Don't do any of these things,' leaving outside the scope of its prohibition a wide range of alternative courses of action. But it is illuminating to observe how rarely it says, 'Do *this* thing,' leaving no choice but to go ahead and do it." *Ibid.*

³¹Governor Randolph of Virginia, for example, opposed a similar proposal for national coercion on the grounds that it was "impracticable, expensive, [and] cruel to individuals." Instead, he advocated "resort . . . to a national Legislation over individuals." 1 Farrand 256 (emphasis deleted). Mason eloquently argued that "[t]he most jarring elements of nature; fire & water themselves are not more incompatible than [*sic*] such a mixture of civil liberty and military execution." *Id.*, at 339.

ation. Virginia's Governor Randolph suggested that Congress should have the power "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." 1 Farrand 21. On May 31, 1787, the Committee of the Whole approved this proposal without debate. *Id.*, at 61. A week later, Pinckney moved to extend the congressional negative to all state laws "which [Congress] should judge to be improper." *Id.*, at 164. Numerous delegates criticized this attempt to give Congress unbounded control over state lawmaking. Hugh Williamson, for example, thought "the State Legislatures ought to possess independent powers in cases purely local," *id.*, at 171, while Elbridge Gerry thought Pinckney's idea might "enslave the States." *Id.*, at 165. After much debate, the Convention rejected Pinckney's suggestion.

Late in July, the delegates reversed their approval of even Randolph's more moderate congressional veto. Several delegates now concluded that the negative would be "terrible to the States," "unnecessary," and "improper." 2 Farrand 27.³² Omission of the negative, however, left the new system without an effective means of adjusting conflicting state and national laws. To remedy this defect, the delegates adopted the Supremacy Clause, providing that the federal Constitution, laws, and treaties are "the supreme Law of the Land" and that "the Judges in every State shall be bound thereby." Art. VI, cl. 2. Thus, the Framers substituted judicial review of state laws for congressional control of state

³² Thomas Jefferson disapproved of the congressional veto as soon as he heard of it. Writing to Madison from Paris, he declared: "The negative proposed to be given [the national legislators] on all the acts of the several Legislatures is now for the first time suggested to my mind. Prima facie I do not like it." C. Warren, *The Making of the Constitution* 168 (1937). Notably, Jefferson suggested that "an appeal from the State Judicatures to a Federal Court, in all cases where the Act of Confederation controuled the question, [would] be as effectual a remedy." *Id.*, at 168-169.

legislatures.

While this history demonstrates the Framers' commitment to a strong central government, the means that they adopted to achieve that end are as instructive as the end itself.³³ Under the Articles of Confederation, the national legislature operated through the States. The Framers could have fortified the central government, while still maintaining the same system, if they had increased Congress' power to demand obedience from state legislatures. In time, this scheme might have relegated the States to mere departments of the National Government, a status the Court appears to endorse today. The Framers, however, eschewed this course, choosing instead to allow Congress to pass laws directly affecting individuals, and rejecting proposals that would have given Congress military or legislative power over state governments. In this way, the Framers established independent state and national sovereigns. The National Government received the power to enact its own laws and to enforce those laws over conflicting state legislation. The States retained the power to govern as sovereigns in fields that Congress cannot or will not preempt.³⁴ This product of the Constitu-

³³ Experience under the Articles of Confederation taught the Framers that multiple state legislatures, unchecked by any central power, "threat[en] danger not to the harmony only, but to the tranquillity of the Union." C. Warren, *supra* n. 32, at 166 (quoting Madison). My analysis of the Framers' intent does not detract from the proper role of federal power in a federalist system, but merely requires the exercise of that power in a manner that does not destroy state independence.

³⁴ This Court quickly recognized that Congress' strength derives from its own enumerated powers, not from the ability to direct state legislatures. In *M'Culloch v. Maryland*, 4 Wheat. 316 (1819), the historic decision affirming Congress' power to establish a national bank, Chief Justice Marshall declared: "No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the

tional Convention, I believe, is fundamentally inconsistent with a system in which either Congress or a state legislature harnesses the legislative powers of the other sovereign.³⁵

III

During his last Term of service on this Court, Justice Black eloquently explained that our notions of federalism subordinate neither national nor state interests:

“The concept does not mean blind deference to ‘States’ Rights’ any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system

accomplishment of its ends.” *Id.*, at 424 (emphasis added). See also S. Davis, *The Federal Principle* 114 (1978) (after examining history of Constitutional Convention, “only the principle of *duality* articulated in a single constitutional system of two distinct governments, national and state, each acting in its own right, each acting directly on individuals, and each qualified master of a limited domain of action, stands out as the clearest fact”); Salmon, *supra* n. 13, at 359 (discussing history of Constitutional Convention and concluding that substitution of Supremacy Clause for negative on state laws “evidenced the clear distinction in [the Framers’] minds between the supremacy of the nation, which they approved, and the power of the nation to control the functioning of the states, which they rejected”).

³⁵ After the Convention, several thinkers suggested that the National Government might rely upon state officers to perform some of its tasks. Madison, for example, thought that Congress might rely upon state officials to collect national revenue. *The Federalist* No. 45, pp. 312–313 (J. Cooke ed. 1961). None of these suggestions, however, went so far as to propose congressional control of state legislative power. The suggestions, moreover, seemed to assume that the States would consent to national use of their officials. See also W. Anderson, *The Nation and the States, Rivals or Partners?* 86–87 (1955) (noting that First Congress rejected proposals to rely upon state officials to enforce federal law and suggesting that this decision to leave “the states free to work out, and to concentrate their attention and resources upon, their own functions” has become part of our constitutional understanding).

in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.” *Younger v. Harris*, 401 U. S. 37, 44 (1971).

In this case, I firmly believe that a proper “sensitivity to the legitimate interests of both State and National Governments” requires invalidation of Titles I and III of PURPA insofar as they apply to “state regulatory authorities.” Accordingly, I respectfully dissent from the Court’s decision to uphold those portions of the statute.

File
John Draft

04/29/82 jsw

No. 80-1749: FERC v. Mississippi

Justice Powell, dissenting.

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B/

The Public Utility Regulatory Policy Act of 1978,

Pub. L. No. 95-617, 92 Stat. 3117 et seq., (PURPA), im-
poses unprecedented burdens on the States. As Justice

O'Connor ably demonstrates, it intrusively requires them

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to make a place on their administrative agenda for consid-
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sketch

"standards." But the statute does not simply ask States

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to consider ~~ponder~~ quasi-legislative matters that Congress believes

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require ~~the length of instructing~~ the States to follow detailed ~~about how their de-~~
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cisonal process will operate. In my view, the PURPA vio-

lates the Tenth Amendment when it must ~~seeks~~ to decide for
decision making procedures that the States
States how they will run their own state government.

must follow

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The most basic attribute of a government's sover-

eighty is its right of self-conception. There is an amazing variety of ways in which governmental institutions can be designed and operated. The diversity of political bodies and traditions in our fifty States evidence this fact.

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A keystone of the genius of our federal system is that decisions about the structure of state governments have been reserved to the States. Heretofore that allocation of responsibility has not been questioned. This principle of decentralization is basic to our constitutional scheme

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and key to the success and adaptability of our federal system of government.¹ If "state sovereignty," National League of Cities v. Usery, 426 U.S. 833, 842 (1976), is to have any meaning, it must include the recognition that States have the right to shape the structure of their own governmental institutions as they see fit.

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Our decisions reflect the assumption that, so

¹Among the values of local autonomy are "the greater sensitivity of local officials to the preferences of citizens and the costs of achieving . . . goals in a given locality; the diffusion of governmental power and the promotion of cultural and social diversity; and the enhancement of individual participation in and identification with governmental decisionmaking." Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L. J. 1196, 1231 (1977). See also id., at 1210-1211.

long as individual constitutional rights are not infringed,² state choice about the architecture of state government is to be preserved for determination by the States. As Justice Blackmun has recognized in a related context,

"[j]ust as the Framers of the Constitution intended the States to keep for themselves, as provided by the Tenth Amendment, the power to regulate elections, . . . each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen. . . . Such power inheres in the State by virtue of its obligation . . . to preserve the basic conception of a political community. . . . And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." Sugarman v. Dougall, 413 U.S. 634, 647 (1973) (citations and quotations omitted).

The fourth section of Article IV of the Constitution provides that the "United States shall guarantee to each State in this Union a Republican Form of Government." Consistent with the principle of state autonomy, however, this Court has refused to constrict the States' design of their own institutions on this basis. Rather it has ruled

²This exemption must encompass individual, as defined by legislation passed pursuant to §5 of the Fourteenth Amendment. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287 n. 28 (1981).

the Guarantee Clause nonjusticiable. E.g., Pacific Telephone Co. v. Oregon, 223 U.S. 118, 142-143 (1912). "No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of ^{at} their own pleasure." Luther v. Borden, 7 How. 1, 47 (1849). See Fortson v. Morris, 385 U.S. 231, 234 (1966) ("There is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor."). Indeed, though our federal tradition is premised on the notion that decentralized state democracies promote individual liberty, so free are States to fashion their own forms of government that they are not bound even by a federal requirement that they extend a right to vote.³ See San Antonio School Dist. v. Rodri-

³"[T]he privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution." Pope v. Williams, 193 U.S. 621, 632 (1904). See Minor v. Happersett, 21 Wall. 162, 172-173 (1874).

quez, 411 U.S. 1, 35 n. 78 (1973); id., at 101 (Marshall, J., dissenting) ("the right to vote in state elections has itself never been accorded the stature of an independent constitutional guarantee"). Compare Rivera Rodriguez v. Popular Democratic Party, No. 81-328 (not yet circulated).

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Recognition of the States' exclusive right to determine the nature of their own institutions resonates throughout our federal tradition. As the products of independent and coordinate organs of government, state decisions regarding state law have remained immune from federal review. E.g., Murdock v. City of Memphis, 20 Wall. 590 (1874). Cf. Eire v. R.R. v. Tompkins, 304 U.S. 64, 78-79 (1938) ("the Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States -- independence in their legislative and independence in their judicial departments") (quoting Baltimore & Ohio R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

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By means ^{of} the Eleventh Amendment, the nation from its earliest years has protected the integrity of independent state government structures by barring the federal

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courts from hearing unconsented suits against state treasuries. E.g., Edelman v. Jordan, 415 U.S. 651, 663-668 (1974). State sovereign immunity recognizes that budgetary vulnerability in a national forum could diminish the States' freedom to allocate their financial resources between their institutions of government as they choose. Cf. Hans v. Louisiana, 134 U.S. 1, 21 (1890) ("to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge public debts, would be attended with greater evils than such a failure can cause"). To be meaningful, this tribute to the extent to which sovereign state policies are free from federal control must presuppose that the very framework of the political institutions through which state policies are formulated and administered must be similarly independent. Indeed, it would be a confused constitutional scheme that would recognize a State's freedom to decide where to locate its state capitol, Coyle v. Oklahoma, 221 U.S. 559, 565, 579 (1911), but would deny the far more important right to decide of what that capitol will consist.

The Court has held that Congress may require state courts to adjudicate federal causes of action.

Testa v. Katt, 330 U.S. 386 (1947). This illustrates that

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under some conditions the federal government indeed may call upon state governmental institutions to decide matters of federal policy for it. But when doing so, Congress must respect the state institution's own structure

and method of decision. Testa recognized this limitation

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when its limited its holding to circumstances under which

the state court has "jurisdiction adequate and appropriate

under established local law to adjudicate this [federal]

action." 330 U.S., at 394 (emphasis added).⁴ Testa

therefore supports the principle that Congress must defer

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to a State's design of its own institution. "The general

rule, bottomed deeply in belief in the importance of state

⁴The Testa Court then emphasized its meaning by citing Herb v. Pitcairn, 324 U.S. 117 (1945), where the Court stated that "it would not be open to us" to insist on adjudication in a state court of a federal claim arising beyond the jurisdiction of the state court. Id., 121. See Note, Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Developments in Judicial Federalism, 60 Harv. L. Rev. 966, 971 (1947) ("in the Testa opinion there is no language which would upset the traditional doctrine that Congress may not interfere with a state's sovereign right to determine and control the jurisdictional requirements of its own courts").

control of state judicial procedure, is that federal law takes state courts as it finds them." Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954).

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II

The PURPA breaks with this tradition. Fairly read, it commands the States to conform their terms and conditions of governmental participation to federal prescription.⁵ Irrespective of preexisting State practice,

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⁵The Court says Congress has given States a choice by which they can avoid this order. *Ante*, 20-22. If Mississippi dissolves its Public Service Commission and abandons entirely any governmental oversight of its monopoly public utilities, the Court reasons, then Mississippi need alter no instrument of state government. I find such reasoning Orwellian. By employing this dialect, one may transform the statement "your money or your life" from an order to a simple offer of choice.

The impoverished character of the "choice" in this case may be appreciated by considering a case in which States were offered a meaningful option by Congress. In *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), Congress established an interim federal regulatory program in a new area of concern: surface mining and reclamation. The statute at issue there offered States the choice of assuming control of the new regulatory program on a permanent basis -- if their program conformed to federal standards. "If a State d[id] not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden w[ould] be borne by the Federal Government." *Id.*, at 288. By contrast, here the Court acknowledges that the PURPA "has failed to provide an alternative regulatory mechanism to police the area in the event of state default." *Ante*, at 22.

In the cases of federal programs passed under the Spending Clause, Congress also may offer States the genuine choice of accepting new federal financial benefits in return for cooperative renunciation of aspects of state sovereignty. See, e.g., *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127, 143 (1947). Commerce Clause

Footnote continued on next page.

the PURPA purports to establish the rules governing who may initiate and participate in state regulatory proceedings.⁶ It provides that these participation rights are enforceable against the State in federal court.⁷ If the nature or timing of state regulatory proceedings fail to satisfy everyone, the PURPA authorizes "any person" to enforce judicially the PURPA's requirements -- no matter what the States' rule is as to what parties normally are permitted to petition judicially to ^{initiate or} ~~spur~~ administrative action.⁸ And once the State has carried out its federally-imposed duties, the PURPA grants any federally-mandated participant the right to subject the state agency to state judicial review.⁹ ~~Once~~ ^{Again} no ^{deference} ~~attention~~ is paid to ~~standard~~ state rules governing access to state

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cases by their very nature, however, may contain a coercive aspect absent from the conditional disbursement of federal bounty under the Spending Clause.

⁶ See 16 U.S.C. §2631(a) (Supp. IV 1980); 15 U.S.C. §3205 (Supp. IV 1980)

⁷ See 16 U.S.C. §2633(b)(1) and (2) (Supp. IV 1980); 15 U.S.C. §3207(a)(2) (Supp. IV 1980).

⁸ See 16 U.S.C. §2633(c)(1) (Supp. IV 1980); 15 U.S.C. §3207(b)(1) (Supp. IV 1980); 16 U.S.C. §824a-3h(2)(A) and (B) (Supp. IV 1980).

⁹ See 16 U.S.C. §2633(c)(1); 15 U.S.C. §3207(b)(2) (Supp. IV 1980); and 16 U.S.C. §824a-3(g)(1) (Supp. IV 1980).

courts for the purpose of ~~protesting~~^{reviewing} state administrative action.

The terms and conditions of public participation in agency decisionmaking are core aspects of the design of a State's administrative ~~apparatus~~^{procedure}. Some States may believe that public utilities should be regulated by appointed officials serving lengthy terms, and that any state citizen should be able to petition those officials on any matter of regulatory policy. Other States may opt for direct election of public utility commissioners for relatively short terms, but otherwise may restrict the participation rights of the general public by means of rigorous standing, intervention, and reviewability requirements. Still other states may decide that no utility regulation at all is desirable. Possible mixes of representation and direct participation in the establishment of quasi-legislative administrative bodies are endless. In each particular instance, decision about the extent of direct political participation before the representative body marks a crucial and distinctive feature of that body.

The PURPA invades the liberty of the States to

determine the character of one of their own regulatory bodies.¹⁰ I therefore would hold that these provisions of the PURPA transgress the Tenth Amendment.

In defense of its holding, the Court reasons that 190 Congress can condition the States' utility regulatory activities on any terms it pleases since, under the Commerce Clause, Congress has the power to preempt~~d~~ completely the States' utility regulatory activities. Ante, 21-22. Under this logic, however, Congress validly ~~could~~ establish 195 a national park that admits persons on the condition that they be white -- on the ground that the Necessary and Proper Clause confers federal power to establish national parks that exclude everyone. Plainly this reasoning is faulty. It fails to distinguish between the separate lim- 200 itations on federal power contained by the Necessary and Proper Clause and by the Fourteenth Amendment. As National League of Cities v. Usery stated, 426 U.S., at 841, and

¹⁰The Court argues that Mississippi's practices in fact are not at odds with the prescriptions of the PURPA. Ante, 24-25. This is not ~~an~~ an adequate defense of the statute. The PURPA purports to remove States' choice over matters that I believe the Tenth Amendment commits to their choice alone. The intrusion is not cured by the current -- and perhaps otherwise temporary -- coincidence of state and federal choice.

as the structure of the Court's own opinion makes plain,
ante, at 9 and 15, the Commerce Clause and the Tenth
 Amendment also embody distinct limitations on federal power.
 That Congress has satisfied the one demonstrates nothing
 about whether Congress has satisfied the other.¹¹

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It is true the provisions at issue rework state
 rules of government in ways that might not seem dramatic.

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But this is the first occasion on which this Court has
 been required to pass on such federal action. "Of course,
 no one expects Congress to obliterate the states, at least
 in one fell swoop. If there is any danger, it lies in the
 tyranny of small decisions -- in the prospect that Congress
 will nibble away at state sovereignty, bit by bit,
 until someday essentially nothing is left but a gutted
 shell." L. Tribe, American Constitutional Law 302 (1978).

Tribe

215

In my view, Congress may not coercively reshape the design

¹¹The Court also cites Washington v. Fishing Vessel Assn., 443 U.S. 658 (1979), to support its holding. Ante, 18. The case stands for the unremarkable proposition that a District Court, after adjudicating a contest under federal law between a State and Indian tribes over fishing rights, may order the losing State to abide by the court's decision. Nothing in our Fishing Vessel Assn. opinion authorized the federal court to amend the structure of a state political institution.

use

of state government under a false banner of "cooperative
federalism." Because I believe that provisions of the
PURPA do force just such a recasting, I would hold these
provisions invalid under the Tenth Amendment as interpret-
ed by National League of Cities v. Usery.

220

I respectfully dissent.

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L70

05/10/82 jsw

No. 80-1749 FERC v. Mississippi

(Second Draft)

Justice Powell, dissenting.

The Public Utility Regulatory Policy Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 et seq., (PURPA), imposes unprecedented burdens on the States. As Justice O'Connor ably demonstrates, it intrusively requires them to make a place on their administrative agenda for consideration and potential adoption of federally proposed "standards." The statute does not simply ask States to consider quasi-legislative matters that Congress believes they would do well to adopt. It also prescribes administrative and judicial procedures that States must follow in deciding whether to adopt the proposed standards. At least to this extent, I think the PURPA violates the Tenth Amendment.

I

Most, if not all, of the States have administrative

bodies - usually a commission - that regulate the electric and gas public utility companies. As these utilities normally are given monopoly jurisdiction, they are extensively regulated both substantively and procedurally by State law. Until now, with limited exceptions, the federal government wisely has not attempted to preempt this essential State function, and certainly has not undertaken to prescribe the procedures by which State regulatory bodies make their decisions. PURPA, for the first time, breaks ^{with} this longstanding deference to principles of federalism.

Now, regardless of established procedures before State administrative regulatory agencies, and of State law with respect to judicial review, PURPA mandates standing rights and procedures including judicial review, that must be followed in considering the proposed substantive standards.

(Note to John): Here, please spell out in appropriate detail the standing rights, procedures and requirements for review under the Federal Act. You have done this in general terms on p 9 of your draft. As the focus of my dissent is on these provisions, and I would like them to be specifically identified in the text. My recollection is that the procedures prescribed differ in some respects according to the Part of the Act.

The foregoing requirements by PURPA intrude upon - in effect preempt --core areas of a State's administrative and judicial procedure.

II

In sustaining these provisions of the Act, the Court reasons that Congress can condition the utility regulatory activities of States on any terms it pleases since, under the Commerce Clause, Congress has the power to preempt completely all such activities. Ante, 21-22. This is suggested even though utility regulation has been exercised by some States since the turn of the century. Under the "threat" of preemption reasoning, Congress - one supposes - could reduce the States to federal provinces. But ²²National League of Cities v. Usery stated, 426 U.S. at 841, and indeed as the structure of the Court's opinion today makes plain, Ante, at 9 and 15, the Commerce Clause and the Tenth Amendment embody distinct limitations on federal power. That Congress has satisfied the one demonstrates nothing as to whether Congress has satisfied the other. (John: add here the notes you now have as fn. 11).

It may be true that the procedural provisions of PURPA that prompt this dissent may not effect dramatic changes in the laws and procedures of some States. But I know of no other attempt by the federal government to supplant State prescribed procedures for administrative agencies. If Congress may do this, presumably it has the power to preempt State court rules of civil procedure and judicial review in classes of cases found to affect commerce. This would be the type of gradual encroachment hypothesized by Professor Tribe: "Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions -- in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell." (Put in fn. L. Tribe, American Constitutional Law 302 (1978)).

I have limited this dissent to the provisions of PURPA identified above. Despite the appeal - and indeed wisdom - of Justice O'Connor's evocation of the principles

of federalism, I believe precedents of this Court support the constitutionality of the substantive provisions of this Act.

(John: Here cite Hodel and one or two other cases you think most relevant). Accordingly, to the extent the procedural provisions may be separable, I would affirm in part and dissent in part.

(John: In addition to filling in the provisions that we object to, as above requested, several of your footnotes are good and perhaps you can find a place for them. For example, fn 4, p 7. Your use of Testa, also is good, and could be put in a note. The quote from Hart, p. 7, possibly also may be used.)

For John

05/10/82 jsw

No. 80-1749 FERC v. Mississippi

(Second Draft)

Justice Powell, dissenting.

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^

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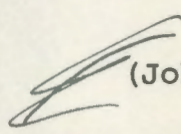
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I have limited this dissent to the provisions of PURPA identified above. Despite the appeal - and indeed wisdom - of Justice O'Connor's evocation of the principles

of federalism, I believe precedents of this Court support the constitutionality of the substantive provisions of this Act.

 (John: Here cite Hodel and one or two other cases you think most relevant). ^{No A} Accordingly, to the extent the procedural provisions may be separable, I would affirm in part and dissent in part.

(John: In addition to filling in the provisions that we object to, as above requested, several of your footnotes are good and perhaps you can find a place for them. For example, fn 4, p 7. Your use of Testa, also is good, and could be put in a note. The quote from Hart, p. 7, possibly also may be used.)

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION, ET
AL., APPELLANTS *v.* MISSISSIPPI ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

[May —, 1982]

JUSTICE POWELL, dissenting.

The Public Utility Regulatory Policy Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 *et seq.*, (PURPA), imposes unprecedented burdens on the States. As JUSTICE O'CONNOR ably demonstrates, it intrusively requires them to make a place on their administrative agenda for consideration and potential adoption of federally proposed "standards." The statute does not simply ask States to consider quasi-legislative matters that Congress believes they would do well to adopt. It also prescribes administrative and judicial procedures that States must follow in deciding whether to adopt the proposed standards. At least to this extent, I think the PURPA violates the Tenth Amendment.

I

Most, if not all, of the States have administrative bodies—usually commissions—that regulate electric and gas public utility companies. As these utilities normally are given monopoly jurisdiction, they are extensively regulated both substantively and procedurally by state law. Until now, with limited exceptions, the federal government has not attempted to preempt this important state function, and certainly has not undertaken to prescribe the procedures by which state regulatory bodies make their decisions. The

PURPA, for the first time, breaks with this longstanding deference to principles of federalism.

Now, regardless of established procedures before State administrative regulatory agencies, and of state law with respect to judicial review, the PURPA forces federal procedures on state regulatory institutions. The PURPA prescribes rules directing that "the Secretary [of Energy], any affected electric utility, or any electric consumer of an affected electric utility may intervene and participate as a matter of right" in regulatory proceedings respecting electrical rates.¹ It directs that "[a]ny person (including the Secretary) may bring an action to enforce" the obligations with respect to electrical rate consideration that the PURPA lays upon state regulatory commissions.² The statute provides that "[a]ny person (including the Secretary) may obtain [judicial] review of any determination" made by a state regulatory commission regarding PURPA's electrical rate policies.³

¹ 16 U. S. C. § 2631(a) (Supp. IV 1980). "[A]ny electric utility or electric consumer" may enforce its intervention and participation rights in federal court. § 2633(b)(2). See also § 2633(b)(1).

The PURPA grants similar intervention and participation rights to the Secretary with respect to state natural gas utility rate proceedings. See 15 U. S. C. § 3205 (Supp. IV 1980). These rights also are specified to be enforceable in federal court. See § 3207(a)(2).

² 16 U. S. C. § 2633(c)(1) (Supp. IV 1980). The same enforcement right is granted in the case of natural gas rate proceedings. 15 U. S. C. § 3207(b)(1) (Supp. IV 1980).

Under PURPA's Title II, § 210, States must implement federal rules relating to the interconnection of electrical utilities with qualifying cogeneration and small power production facilities. 16 U. S. C. § 824a-3 (Supp. IV 1980). The Federal Energy Regulatory Commission or (under certain conditions) "[a]ny electrical utility, qualifying cogenerator, or qualifying small power producer" may bring judicial actions against state regulatory commissions to require the implementation of the federal rules. § 824a-3(h)(2)(A) and (B).

³ 16 U. S. C. § 2633(c)(1) (Supp. IV 1980). The PURPA also makes available a right of judicial review in the same manner with respect to the interconnection of electrical utilities with cogeneration and small power

The foregoing requirements by PURPA intrude upon—in effect preempt—core areas of a State's administrative and judicial procedure.

II

In sustaining these provisions of the Act, the Court reasons that Congress can condition the utility regulatory activities of States on any terms it pleases since, under the Commerce Clause, Congress has the power to preempt completely all such activities. *Ante*, 21–22. Under the “threat of preemption” reasoning, Congress—one supposes—could reduce the States to federal provinces. But as *National League of Cities v. Usery* stated, 426 U. S., at 841, and indeed as the structure of the Court's opinion today makes plain, *ante*, at 9 and 15, the Commerce Clause and the Tenth Amendment embody distinct limitations on federal power. That Congress has satisfied the one demonstrates nothing as to whether Congress has satisfied the other.⁴

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As a separate matter, the PURPA specifies the procedural requirements for the state regulatory agencies consideration and determination of the PURPA's federally proposed standards. See § 3203(c); 16 U. S. C. § 2621(b)(1) (Supp. IV 1980).

⁴The Court cites *Testa v. Katt*, 330 U. S. 386 (1947), in support of the proposition that under some conditions the federal government may call upon state governmental institutions to decide matters of federal policy. But *Testa* recognized that, when doing so, Congress must respect the state institution's own decisionmaking structure and method. That opinion limited its holding to circumstances under which the state court has “jurisdiction adequate and appropriate *under established local law* to adjudicate this [federal] action.” 330 U. S., at 394 (emphasis added). The *Testa* Court then emphasized its meaning by citing *Herb v. Pitcairn*, 324 U. S. 117 (1945), where the Court stated that “it would not be open to us” to insist on adjudication in a state court of a federal claim arising beyond the jurisdiction of the state court. *Id.*, 121. See Note, Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Developments in

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I limit this dissent to the provisions of the PURPA identified above. Despite the appeal—and indeed wisdom—of JUSTICE O'CONNOR's evocation of the principles of federalism, I believe precedents of this Court support the constitu-

Judicial Federalism, 60 Harv. L. Rev. 966, 971 (1947) (nothing in *Testa* upsets "the traditional doctrine that Congress may not interfere with a state's sovereign right to determine and control the jurisdictional requirements of its own courts").

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tionality of the substantive provisions of this Act on this facial attack. See *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981); *Testa v. Katt*, 330 U. S. 386 (1947). Accordingly, to the extent the procedural provisions may be separable, I would affirm in part and reverse in part.

P 3

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: **MAY 17 1982**

Recirculated: _____

FIRST DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1749

**FEDERAL ENERGY REGULATORY COMMISSION,
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THE SOUTHERN DISTRICT OF MISSISSIPPI**

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P.1,3

Ready for
printer

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: **MAY 17 1982**

Recirculated: _____

SECOND

~~FIRST~~ DRAFT

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No. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION,
ET AL., APPELLANTS *v.* MISSISSIPPI ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

[May —, 1982]

JUSTICE POWELL, *dissenting.*

concurring and

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P1,3

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'82 MAY 19 A9:48

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: MAY 17 1982

Recirculated: _____

SECOND

~~FIRST~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1749

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ET AL., APPELLANTS *v.* MISSISSIPPI ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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[May —, 1982]

JUSTICE POWELL, *dissenting.*

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Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
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From: **Justice Powell**

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2nd DRAFT

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