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Northwest Central Pipeline Corp. v. State Corporation Commission: The Supreme Court Reaffirms State Authority to Regulate Natural Gas Production

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NOTES AND COMMENTS

NORTHWEST CENTRAL PIPELINE CORP. v. STATE CORPORATION COMMISSION: THE SUPREME COURT REAFFIRMS STATE AUTHORITY TO REGULATE NATURAL GAS PRODUCTION

I. INTRODUCTION

In the beginning of the oil and gas industry, the rule of capture was supreme to any notions of conservation.¹ In an effort to produce as much as possible as fast as possible, little, if any, thought was given to conservation.² As a result of the ensuing waste stemming from the rule of capture,³ the oil and gas producing states began enacting legislation designed to prevent such waste.⁴ The aim of the statutes was to protect correlative rights of landowners⁵ and to prevent waste of valuable natural resources.⁶ Predictably, the United States Supreme Court soon had occasion to examine the legality of such statutes. In *Ohio Oil Co. v. Indiana*,⁷ a case decided in 1900, the Court upheld an Indiana regulation

1. Motion of Interstate Oil Compact Commission (IOCC) for Leave to File Brief Amici Curiae in Support of Appellee at 3, *Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 109 S. Ct. 1262 (1989) (No. 86-1856). It is a long settled principle of property law that a landowner has the right to the oil and gas below the landowner's property. This is so even if the production results in drainage from an adjacent property. *Id.*

2. *Id.*

3. Waste results when a landowner's property is being drained by a neighboring well, and that landowner, to protect his or her interest, drills a well to produce before all that is under the landowner's surface is drained away. A rush to produce results in more wells being drilled than are necessary for the efficient production of the reservoir. Reservoir energy is prematurely depleted, resulting in oil or gas being left in the reservoir that could have been produced had prudent methods of production been used. Martin, *Regulation of Gas Production Rates and Imbalances After Transco v. Oil and Gas Board*, 27 WASHBURN L.J. 298, 300-01 (1988).

4. Brief for the IOCC, *supra* note 1, at 3. These conservation laws regulate the production of a field along sensible conservation principles and are intended to facilitate efficient and prudent production of oil and gas from a common pool. *Id.*

5. Martin, *supra* note 3, at 301. The principle of correlative rights is concerned with allowing a mineral owner the opportunity to produce all the oil or gas that he or she "owns", before it can be drained away. See *supra* note 3, at 326 n.102 for the Kansas Corporation Commission definition of correlative rights.

6. Brief for the IOCC, *supra* note 1, at 3.

7. 177 U.S. 190 (1900).

aimed at protecting correlative rights of property owners against a claim that such a regulation amounted to a taking of private property.⁸

The natural gas industry, in addition to being subject to regulations of the various gas producing states, became subject to dual authority in 1938, when Congress enacted the Natural Gas Act (NGA),⁹ and under additional regulation in 1978, when Congress enacted the Natural Gas Policy Act (NGPA).¹⁰ Since the creation of the dual regulatory scheme, the Supreme Court has labored to define the line between state and federal authority.¹¹ One particular aspect of the dual scheme, which the Court has struggled with clarifying, is whether state power to regulate natural gas rates of production and takes is preempted by federal law.¹²

8. *Id.* at 196. The challenged regulation involved a prohibition against venting gas, which the defendant company was doing in order to produce oil. This procedure, however, was reducing the back pressure required to keep salt water from invading a stratum that provided gas to nearby cities. *Id.* The defendant claimed that the regulation amounted to a taking of private property, for without venting the gas, it would not be able to produce the oil belonging to it. *Id.* at 198-99. *See also* Martin, *supra* note 3, at 299-300 (discussing the Supreme Court's response to early challenges to state conservation efforts).

9. 15 U.S.C. § 717-717w (1976). The NGA was enacted after the federal government had determined that the monopoly power then exercised by interstate pipelines was detrimental to distributors, consumers, and societal welfare. Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 VA. L. REV. 63, 65 (1982). Federal action was deemed necessary because the United States Supreme Court, using commerce clause analysis, had invalidated state attempts to regulate interstate pipelines. *Id.* (citing *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Oklahoma v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911)).

10. 15 U.S.C. § 3301-3432 (1985). The NGPA was enacted in response to severe gas shortages caused by artificial price schemes imposed by the NGA. *Transcontinental Pipe Line Corp. v. State Oil and Gas Board*, 474 U.S. 409, 431-32 (1986) (Rehnquist, J., dissenting). The NGPA's purpose was to deregulate the price of natural gas sold to interstate pipelines, allowing free-market conditions to balance the supply, demand and prices of natural gas. *Id.* Consequently, natural gas was divided into three categories: high-cost gas, new gas, and old gas. *Id.* *See* Pierce, *supra* note 9, at 86-89; Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 TEX. L. REV. 101 (1980).

11. *See Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954) (whether sales of natural gas by an independent producer to interstate pipeline companies which transport and resell the gas in interstate commerce are subject to federal regulation under the NGA); *Interstate Natural Gas Co. v. Federal Power Comm'n*, 331 U.S. 682 (1947) (whether the Federal Power Commission had jurisdiction to regulate sales made in the field by petitioner to interstate pipeline companies); *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581 (1945) (whether the FPC, in fixing petitioner's interstate wholesales rates, could consider the petitioner's gas wells and gas gathering facilities, which were beyond federal regulation, with all its transportation and distribution facilities, which were subject to federal regulation); *Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, 314 U.S. 498 (1942) (at issue was whether Illinois could require a gas company who supplied the intrastate market with gas it received from interstate sources to extend its instate facilities, or whether such a requirement was subject to federal jurisdiction). The aforementioned cases were all decided in favor of federal jurisdiction.

12. *See Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84 (1963) (hereinafter *Northern Natural*) *infra* text and accompanying notes 45-63; *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409 (1986) (hereinafter *Transco*) *infra* text and accompanying notes 64-113.

Northwest Central Pipeline Corp. v. State Corporation Commission,¹³ concerned whether a regulation adopted by the State Corporation Commission of Kansas (KCC), designed to prevent waste and to protect correlative rights in gas by encouraging that gas quotas be timely produced, was preempted by federal law or violated the Commerce Clause of the Constitution.¹⁴ In a unanimous decision, the Court ruled that the KCC order was not preempted by federal law nor violative of the Commerce Clause.¹⁵ Thus it appears that the Court, after having stirred fears that it would strike any conservation measure that might impact purchasing decisions,¹⁶ has at least allayed that fear as it relates to the regulation of natural gas producers.

II. STATEMENT OF THE CASE

A. Facts

The origins of the controversy in *Northwest Central* date back to 1944, when the KCC adopted the Basic Proration Order for the Hugoton Field after finding that correlative rights violations were commonplace.¹⁷ The Hugoton Field is a vast oil and gas field with portions located in Kansas, Oklahoma, and Texas.¹⁸ Several interstate¹⁹ and intrastate pipelines take gas from thousands of gas wells in the Kansas portion of the field alone.²⁰ The Basic Proration Order established an allowable formula permitting a developed lease the opportunity to produce roughly the amount of gas underlying the lease.²¹ The Basic Proration Order also established production tolerances, set forth in paragraph (p),²² to allow

13. 109 S. Ct. 1262 (1989) (hereinafter *Northwest Central*) *infra* text accompanying notes 17-44 and 114-153. Effective January 1, 1987, Northwest Central Pipeline Corporation changed its name to Williams Natural Gas Company. In order to avoid confusion, however, the name Northwest Central is used throughout this note.

14. *Northwest Central*, 109 S. Ct. at 1267.

15. *Id.*

16. See Northern Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 84 (1963), *infra* text accompanying notes 45-63.

17. *Northwest Central*, 109 S. Ct. at 1268.

18. Martin, *supra* note 3, at 325.

19. Brief for the Appellant at 8 n.8, *Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 109 S.Ct. 1262 (1989) (No. 86-1856). The other four interstate pipelines are: (1) Colorado Interstate Gas Company; (2) Northern Natural Gas Company; (3) Panhandle Eastern Pipe Line Company; and (4) KN Energy, Inc. *Id.*

20. Martin, *supra* note 3, at 325.

21. *Northwest Central*, 109 S. Ct. at 1268. An "allowable" is the well production quota. The quotas at play here were based on market demand, well spacing, and deliverability. *Id.*

22. Prior to its amendment in 1983, paragraph (p) provided:

(1) any well must be 'shut-in' if the well has overproduced its allowable by a cumulative amount equal to six times its allowable for the month of January; (2) if any well fell short

for under-and-over-production resulting from market fluctuations.²³ Pursuant to paragraph (p), once underages equaled several times the monthly allowable, they were cancelled.²⁴ Yet, because the cancellation could easily be overcome by simply applying to have the underages reinstated, there was no incentive to take the underages at any time.²⁵

As a result of the vast amounts of underages being stockpiled, the KCC, upon investigation, amended paragraph (p) in February, 1983.²⁶ Expert testimony during the KCC investigation indicated that the lack of uniform production was severely harming the correlative rights of producers in the field.²⁷ During the investigation the KCC concluded that as

of producing its allowable by a cumulative amount equal to six times the prior January allowable, this shortfall would be cancelled and the producer required to apply to the commission to reinstate the cancelled underage before later making up the shortage; and (3) cancelled underages will be reinstated upon a 'showing that the wells are in an overproduced status; that the purchaser is willing and able to take the amount of gas; and that the length of time proposed by applicant for the production of the amounts of gas to be reinstated is reasonable under the circumstances.'

Brief for the Appellee, at 4 n.1, *Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 109 S. Ct. 1262 (1989) (No. 86-1856).

23. *Northwest Central*, 109 S. Ct. at 1269.

24. *Id.* at 1269.

25. *Id.*

26. Brief for the Appellee, at 4-10, *Northwest Central*, 109 S. Ct. at 1269. As of September 1, 1982, uncanceled underages totalled 204 billion cubic feet and cancelled and unreinstated underages totalled 314 billion cubic feet. *Id.* For comparison, the Hugoton Field produced 268 billion cubic feet of gas in 1986. Martin, *supra* note 3, at 326 n.101 (citing the *Oil and Gas Journal*). It is noteworthy that because paragraph (p) allowed for cancelled underages to be readily reinstated, interstate purchasers were deliberately using the Kansas Hugoton Field for storage. *Northwest Central*, 109 S.Ct. at 1270. This was due to the fact that following the enactment of the NGPA, many pipelines entered long-term take-or-pay contracts to purchase the higher-priced deregulated gas. *Id.* The KCC was also interested in stopping the drainage that was occurring as the natural gas moved from areas of shut-in well to open, producing wells. Brief for the Appellee, *supra* note 22, at 11. Drainage results in waste of natural gas due to dissipation as the gas moves through the reservoir rock. *Id.*

27. Brief for the Appellee, *supra* note 22, at 10. Drainage can violate the correlative rights of producers that regularly operate their wells as well as producers of shut-in wells. *Id.* at 11. The following examples, given during hearings conducted pursuant to the KCC's investigation, illustrate both types of correlative rights violations:

(1) pipeline (P) contract[s] to purchase gas from producer (A) and producer (B). The market demand is 100 BCF. A and B have equal deliverability capability of (X), and each have 640 acres attributed to their respective wells. When these factors are computed through the Commission's allowable formula, the wells are assigned the same allowable. During period one, producer A is shut-in to the extent that he accumulates excess underage which is cancelled. During the same period, producer B produces his entire allowable. Over the next two periods of production, A is shut-in completely while B continues to produce. By this time, B, who has been producing all along, has a deliverability of less than (X) due to decreasing shut-in pressure. Therefore, B is assigned a lower allowable than A. Meanwhile, A continues to have underage cancelled at a rate equal to or higher than the original allowable, because, over time, his shut-in pressure has risen. This continues for many periods as B's allowable is gradually reduced and A continues to receive an increasing allowable assignment, which is cancelled every period. For all practical purposes, A is banking his underages to be spent later. After many periods, A will reinstate

paragraph (p) then existed, it was likely that the accumulated underages would be drained away and would never be produced.²⁸ Thus, paragraph (p) was amended to permanently cancel underages unless the underages are reinstated and produced within a specific time period.²⁹ The purpose was to motivate the timely production of natural gas in order to provide greater protection of correlative rights.³⁰

B. Issue

Northwest Central Pipeline challenged the amended paragraph arguing that because it impacted interstate pipelines' purchasing practices, the new paragraph (p) was preempted by the NGA.³¹ The argument was founded on *Northern Natural Gas Co. v. State Corporation Commission*,³² where the court stated that the NGA precluded any state regulation that

and produce this cancelled underage. If the pipeline then decides to take a lot of gas, A may reinstate and produce all of its backlog of cancelled underage in a short period of time. In this event, B, who will be producing less at a lower allowable, may have its gas drained away to fulfill A's greater demand upon the reservoir. Over a stretch of ten periods, A will have accumulated an allowable of at least ten times the original allowable. B will have been assigned a gradually reduced allowable of the same ten periods. If, in the tenth period, A reinstates and produces all its backlog, A will have produced much more gas than B, and possibly at B's expense. (2)[Here] the shut-in producer (A) is surrounded by producing wells which are draining gas from under A's acreage. A will be accumulating cancelled underage which may, of course, be reinstated and produced at a later date. Unless the drainage from the shut-in wells is stopped, A may be unable to produce his entire underage by the end of the field's life. Therefore, A may never recover his share of reserves.

Id. at 11-12.

28. *Northwest Central*, 109 S. Ct. at 1270.

29. Brief for the Appellee, *supra* note 22, at 5 n.3. The amendment provides:

(1) underages cancelled before 1975 could be reinstated only if reinstatement had been requested by the end of 1983; (2) underages cancelled from January 1, 1975, through December 31, 1982, could only be reinstated if reinstatement was requested by December 31, 1985, and only if the well was in an overproduced status at the time of the request; and (3) underages cancelled after December 31, 1982, could only be reinstated within three years of the cancellation and only if the well was in an overproduced status at the time of the request.

Id. at 5.

30. *Northwest Central*, 109 S. Ct. at 1271.

31. *Northwest Central*, 109 S. Ct. at 1272.

32. 372 U.S. 84 (1963). In *Northern Natural*, the Supreme Court invalidated an order of the Kansas Corporation Commission requiring an interstate pipeline purchaser to take ratably from all wells supplying it with gas from a common gas pool. *Id.* The Court found that the order did not fall within the state regulated "production or gathering" exemption of the NGA, 15 U.S.C. § 717(b), thus it was preempted by the NGA. *Id.* at 89-90. The Court went on to say that "[t]he federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of gas . . . or for state regulations which would indirectly achieve the same result." *Id.* at 91. See *infra* text and accompanying notes 45-63.

could affect, either directly or indirectly, pipelines' purchasing decisions.³³ The pipeline also argued that paragraph (p) encroached on exclusive federal control over the abandonment of natural gas supplies committed to interstate markets.³⁴ The pipeline's final argument was based on the belief that because the amendment would force interstate pipelines to take more gas from Kansas, other producing states' share of the interstate market would decrease, thereby violating the Commerce Clause.³⁵

C. *The Kansas Supreme Court's Opinion*

In May, 1985, the Kansas Supreme Court³⁶ distinguished *Northern Natural*³⁷ and affirmed the District Court of Grey County, holding that the regulation was valid because it was controlled by § 1(b) of the NGA,³⁸ which gives to the states regulatory power over the production and gathering of natural gas.³⁹ On appeal, the United States Supreme Court vacated and remanded⁴⁰ the decision to the Kansas Supreme Court for further review in light of the Court's decision in *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*.⁴¹

On remand, the Kansas Supreme Court again affirmed the KCC order,⁴² holding that whereas the regulation at issue in *Transco* was aimed at purchasers, the KCC order was aimed at producers.⁴³ It further held

33. *Northwest Central*, 109 S. Ct. at 1272.

34. *Id.*

35. *Id.* at 1267.

36. *Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 237 Kan. 248, 699 P.2d 1002 (1985).

37. *Northwest Central*, 109 S. Ct. at 1272-73.

38. 15 U.S.C. § 717(b) (1976) reads:

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the *production or gathering* of natural gas.

Id. (Emphasis added.)

39. *Northwest Central*, 109 S. Ct. at 1272-73.

40. *Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 475 U.S. 1002 (1986).

41. 474 U.S. 409 (1986). The regulation at issue in *Transco* was essentially identical to the Kansas order that had been struck down in *Northern Natural*. The Mississippi Supreme Court, however, had ruled that the enactment of the NGPA effectively nullified *Northern Natural*. The United States Supreme Court disagreed. It overturned the Mississippi decision, declaring that the characteristics of the federal regulatory scheme that provided the preemption framework in *Northern Natural* had not been altered by the NGPA. See *infra* text and accompanying notes 64-113.

42. *Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 240 Kan. 638, 732 P.2d 775 (1987).

43. *Northwest Central*, 109 S. Ct. at 1273.

that any effect paragraph (p) had on interstate sales was merely incidental rather than the goal of the regulation.⁴⁴

III. LAW OF RATABLE TAKE REGULATIONS PRIOR TO *NORTHWEST CENTRAL*

A. *The Northern Natural Case*

It is somewhat fitting that the Hugoton Field is the focus of the regulation at issue in *Northwest Central*, for it was the Supreme Court's ruling in *Northern Natural Gas Co. v. State Corporation Commission*,⁴⁵ a case involving a KCC ratable take regulation in the Hugoton Field, to which all ratable take orders since have been measured.

At issue then was a 1959 KCC order requiring Northern Natural Gas Co. (Northern), an interstate pipeline company, to purchase ratably from all wells to which it was connected in the Hugoton Field.⁴⁶ The pipeline, however, was operating under only approximately 125 purchase contracts.⁴⁷ The oldest of these contracts was with Republic Natural Gas Company, a contract under which Northern was required to purchase all the gas that Republic's wells could produce.⁴⁸ Because Northern's contracts with other producers were conditioned upon the Republic contract, Northern had only to take from those other producers that portion of gas needed beyond that supplied by Republic.⁴⁹

The 1958 ratable take order came about because Northern's purchases that year were much lower than the allowables for the wells from which it was taking gas.⁵⁰ However, because of the Republic contract calling for Northern to purchase all the gas Republic was allowed

44. *Id.*

45. 372 U.S. 84 (1963).

46. *Northern Natural*, 372 U.S. at 85-86. In 1960, this order was superseded by a general order directed at all natural gas purchasers, which read:

In each common source of supply under proration by this Commission, each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall maintain all such wells in substantially the same proportionate status as to overproduction or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser.

Id. at 86 n.1. To take ratably means that purchases must be in such quantities that each owner will be able to recover a fair share of the oil and gas originally in place beneath the owner's land. See H. WILLIAMS & C. MEYERS, *MANUAL OF OIL AND GAS TERMS* 802 (7th ed. 1987).

47. *Northern Natural*, 372 U.S. at 86.

48. *Id.* at 87.

49. *Id.*

50. *Id.*

to produce, it was the producers with the contracts subordinate to Republic's that suffered the drop in production.⁵¹ The order required Northern to take gas ratably from all wells, that is, to take gas in proportion to well allowables, with the intent being to correct the field's imbalance.⁵²

Consequently, Northern sought judicial relief on the premise that the NGA preempted the order because it sought to regulate "the sale and transportation of natural gas in interstate commerce for resale."⁵³ The Kansas Supreme Court upheld the order based on its belief that the order did not affect interstate commerce or regulate the price of gas.⁵⁴ The United States Supreme Court, in a five-to-three decision, reversed the Kansas Supreme Court and held that the NGA had conferred upon the Federal Power Commission exclusive jurisdiction over the transportation and sales of natural gas committed to interstate markets, and that since the KCC orders could not be considered to be within the "production and gathering" exemption,⁵⁵ the orders were therefore preempted.⁵⁶

In broad and potentially far-reaching language, the Court said that "[t]he federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas,⁵⁷ or for state regulations which would *indirectly* achieve the same result."⁵⁸ The Court then found the order preempted because it intruded into the area of regulation that had been granted to the Federal Power Commission.⁵⁹ The orders, the Court said, impermissibly burdened interstate pipelines, rather than the KCC, with the responsibility of "balancing the output of thousands of natural gas wells within the state."⁶⁰ Also, "any readjustment of purchasing patterns which such orders might require of purchasers who previously took unratably, could seriously impair the Federal

51. *Id.* at 88.

52. *Id.* at 88-89.

53. *Northern Natural*, 372 U.S. at 89.

54. *Northern Natural Gas Co. v. State Corp. Comm'n*, 188 Kan. 351, 362 P.2d 599 (1961), *reh'g denied*, 188 Kan. 624, 364 P.2d 668 (1961).

55. *See supra* note 38.

56. *Northern Natural*, 372 U.S. at 91. The Court stated: "Congress enacted a comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company.'" *Id.* at 91 (quoting *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682 (1954)).

57. *Id.* at 91 (citing *Natural Gas Pipeline Co. v. Panoma Corp.*, 349 U.S. 44 (1955)).

58. *Id.* (emphasis added) (footnote omitted).

59. *Id.* at 91-92.

60. *Id.* at 92. This statement has been characterized as "mystifying . . . since the Court was apparently taking away the principal mechanism for balancing output and since it was leaving it to

Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States."⁶¹ Although the Court conceded that it was possible that the state order might not interfere with the federal scheme,⁶² it went on to say, "there lurks such imminent possibility of collision in orders purposely directed at interstate wholesale purchasers that the orders must be declared a nullity in order to assure the effectuation of the comprehensive federal regulation ordained by Congress."⁶³

B. *The Transco Case*

The second critical case in the unfolding of the *Northwest Central* decision is *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*.⁶⁴ The United States Supreme Court, by a five-to-four decision, invalidated a Mississippi regulation that compelled Transcontinental Gas Pipe Line (Transco) to take ratably from all owners of a common pool, irrespective of whether the pipeline had a contract with each owner.⁶⁵ Transco, relying on *Northern Natural*, argued that the order was preempted by the NGA.⁶⁶ However, the Mississippi Supreme Court held that *Northern Natural* was no longer applicable, for it was the Court's belief that the Natural Gas Policy Act of 1978⁶⁷ had transferred jurisdiction of wellhead purchases from federal to state authority.⁶⁸

The *Transco* problem originated in the Harper Sand gas pool in Marion County, Mississippi, which at the time the regulation was challenged had only six producing wells.⁶⁹ Transco operated an interstate natural gas pipeline that took gas from fields in Mississippi, Louisiana, and Texas.⁷⁰ Some of the interest owners in the Harper gas, such as Getty Oil Co. (Getty), actually operated the wells, while others, such as Coastal Exploration (Coastal), only owned a smaller working interest in

the pipeline to control its takes contract by contract, well by well, balance or no balance. The Court was shifting the authority for controlling wells from the state to the pipelines, with the pipelines having no one's interest except their own to account to in this management." Martin, *supra* note 3, at 315 n.57.

61. *Northern Natural*, 372 U.S. at 92.

62. *Id.*

63. *Id.*

64. 474 U.S. 409 (1986).

65. *Id.* at 409-10.

66. *Id.*

67. 15 U.S.C. § 3301-3432 (1985).

68. *Transco*, 474 U.S. at 411.

69. *Id.* Because Harper gas is produced from below 15,000 feet, it is classified under the NGPA, 15 U.S.C. § 3317(c)(1) as "high-cost natural gas." *Id.*

70. *Transco*, 474 U.S. at 412.

the different wells.⁷¹ In the late 1970's, Transco entered into numerous contracts⁷² for Harper gas.⁷³ Transco's contracts with Getty called for Transco to take only Getty's gas, while Transco's contracts with another operator, Florida Exploration, obligated Transco to take all of a well's production regardless of whether all the production was under contract.⁷⁴ Gas demand was such that Transco also purchased Coastal's and other small interest owner's production shares in the Getty wells, even though there was no contract between the smaller interest owners and Transco.⁷⁵

In 1982, however, as the nation-wide natural gas supply began to exceed demand, Transco was suddenly faced with taking more gas than it could sell.⁷⁶ As a result, in May 1982, Transco ceased buying gas from owners with whom it had not contracted.⁷⁷ Unexpectedly confronted with no buyer for its gas, Coastal asked for, but was denied, Transco's authorization to ratify the Getty contract.⁷⁸ Transco did, however, offer to buy Coastal's gas for less than the contract price for which it was taking Getty's gas.⁷⁹ Coastal refused this offer.⁸⁰ Subsequently, Getty reduced its production to equal the amount of its ownership interest in its wells.⁸¹

Although Getty's cut back resulted in depriving Coastal of income because none of its Harper gas was being produced, the more momentous effect of the reduction was that it was causing drainage of Coastal's gas.⁸² Coastal understandably cried foul in that Getty's cut back resulted in gas draining from Getty's area of the field (where Coastal's ownership interests were located) to the Florida Exploration wells, which were still producing at near full production.⁸³

In July, 1982, as a result of Coastal being deprived of its share of the

71. *Id.*

72. Transco's contracts contained take-or-pay provisions which generally require the purchaser to pay for a minimum percentage of gas even if the purchaser takes no gas. Take-or-pay provisions generally provide sellers with a steady income stream, and facilitate prudent development. *Id.* See Pierce, *supra* note 9, at 77-79.

73. *Transco*, 474 U.S. at 412.

74. *Id.* at 412-13.

75. *Id.* at 413.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* Recall that field imbalances lead to correlative rights violations and waste as the gas migrates from areas of high pressure (shut-in or reduced production) to areas of low pressure (producing wells). See *supra* note 27.

gas produced from the Harper Sand, Coastal asked the State Oil and Gas Board of Mississippi to enforce its ratable take regulation.⁸⁴ Following an investigative hearing, Transco was found in violation of the regulation and was ordered, if it was to take gas at all, to take gas ratably from all owners in the Harper Sand pool.⁸⁵

Transco appealed to the Circuit Court of the First Judicial District of Hinds County, Mississippi, arguing that the ratable take order was preempted by the NGA and the NGPA,⁸⁶ and that the order violated the Commerce Clause of the United States Constitution.⁸⁷ The circuit court affirmed the ratable take order and Transco subsequently appealed to the Supreme Court of Mississippi.⁸⁸

The Mississippi Supreme Court, in upholding the circuit court, ruled that were it not for the enactment of the NGPA, the Mississippi order would assuredly be preempted just as the Kansas order in *Northern Natural*⁸⁹ was preempted.⁹⁰ The court, however, reasoned that the NGA had been superseded by the NGPA, whereby regulatory authority of wellhead sales of "high-cost" gas was now entrusted to each producing state.⁹¹ In addition, the court concluded that the NGA and the FERC's jurisdiction under it never applied to deregulated gas.⁹² Consequently, Transco's preemption argument was precluded.⁹³ Transco's Commerce Clause argument, that the order violated the Commerce Clause because compliance with it would impermissibly burden interstate commerce, was likewise rejected.⁹⁴ The court, utilizing the balancing test enunciated in *Pike v. Bruce Church, Inc.*,⁹⁵ held that the legitimate local interest of the order, protecting correlative rights and preventing waste, outweighed

84. *Transco*, 474 U.S. at 414. The regulation, Statewide Rule 48, provided: "Each person now or hereafter engaged in the business of purchasing oil or gas from owners, operators, or producers shall purchase without discrimination in favor of one owner, operator, or producer against another in the same common source of supply." *Id.*

85. *Id.*

86. *See supra* notes 9-10 and accompanying text.

87. *Transco*, 474 U.S. at 414-15.

88. *Id.* at 415.

89. *See supra* notes 45-63 and accompanying text.

90. *Transco*, 474 U.S. at 415. *See also* Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd., 457 So. 2d 1298 (Miss. 1984) *rev'd* 474 U.S. 409 (1986).

91. *Transco*, 474 U.S. at 415 (citing 457 So. 2d at 1316). *See supra* note 69.

92. *Id.* (quoting 457 So. 2d at 1316).

93. *Id.*

94. *Id.* at 416-17 (citing 457 So. 2d at 1318-21).

95. 397 U.S. 137 (1970). "[W]hen a state law 'regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Transco*, 474 U.S. at 416 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

its incidental effect on interstate commerce.⁹⁶

The United States Supreme Court, like the Mississippi Supreme Court, recognized that the order's validity depended upon whether the NGPA altered the federal regulatory scheme enough to avoid the same result as *Northern Natural*.⁹⁷ The Court commented that the *Northern Natural* decision was based on preserving the federal regulatory role and on protecting consumers by ensuring the availability of less costly natural gas.⁹⁸ Furthermore, the FPC was then also authorized to control artificially natural gas prices from the producer to the customer.⁹⁹ However, in the early 1970's, Congress, upon realizing that the federal regulatory scheme was contributing to natural gas shortages and related problems, enacted the NGPA.¹⁰⁰

The Mississippi State Oil and Gas Board argued that producing states were granted regulatory authority over high-cost natural gas by virtue of the NGPA's having removed such authority from the FERC.¹⁰¹ The Supreme Court, while conceding that the FERC lacked authority to regulate pipeline purchases of high-cost gas, reasoned that the ratable take order frustrated the ability of market forces to set the supply, demand, and price of high-cost gas.¹⁰² The Court further stated that the precise question at issue was whether Congress, in removing from the FERC the authority to regulate the price at which pipelines purchase high-cost gas, gave such authority to the states.¹⁰³ The Court held that Congress had no such intention and, therefore, the order was preempted by the NGPA.¹⁰⁴

The Court also invalidated the ratable take order on grounds that it was preempted by the NGA as well.¹⁰⁵ This was because the Court believed that the order would increase the cost of natural gas paid by consumers,¹⁰⁶ and because it disrupted the uniform federal scheme¹⁰⁷ by

96. *Transco*, 474 U.S. at 416.

97. *Id.* at 417. See *supra* text and accompanying notes 45-63.

98. *Transco*, 474 U.S. at 420.

99. *Id.*

100. *Id.*

101. *Id.* at 421. The Gas Board's argument was premised on 15 U.S.C. § 3431(a)(1)(B), which states: "the provisions of [the NGA] and the jurisdiction of the Commission under such Act shall not apply solely by reason of any first sale' of high-cost or new natural gas." *Id.* (quoting 15 U.S.C. § 3431(a)(1)(B) (1982)).

102. *Id.* at 422.

103. *Id.*

104. *Id.* at 422-23.

105. *Id.* at 423.

106. *Id.* The Court believed that a price increase would result because the order would force

virtue of the fact that interstate pipelines would have to conform their conduct to the whims of each producing state.¹⁰⁸ Lastly, because the Court concluded that the order was preempted by the NGA and the NGPA, it did not address Transco's Commerce Clause argument.¹⁰⁹

Justice Rehnquist,¹¹⁰ writing for the dissent, argued that because the NGPA removed the wellhead sales of high-cost gas from the coverage of the NGA, *Northern Natural* was not controlling; the order therefore did not conflict with the NGA.¹¹¹ He further stated that the issue was more properly whether the order hindered the fulfillment of the NGPA's goal.¹¹² The dissent stated that the order enhanced the NGPA in that it "merely define[d] property rights [and] establish[ed] contractual rules."¹¹³

IV. THE *NORTHWEST CENTRAL* DECISION

In a unanimous decision,¹¹⁴ the Supreme Court rejected Northwest Central's contentions that the KCC order ran afoul of the NGA and the NGPA, and that it was preempted by the Supremacy Clause. The Court further held that the order did not violate the Commerce Clause.

The Court first refuted the argument that the proration order was preempted by the NGA and the NGPA.¹¹⁵ In doing so, the Court commented that it was a settled principle that states had the authority to promulgate conservation measures to the extent that Congress had not occupied the field.¹¹⁶ While the Court also noted that the NGA gave federal authorities sole regulatory power over interstate sales and purchases of natural gas,¹¹⁷ it nonetheless reserved to the states authority over the production and gathering of natural gas.¹¹⁸ It went on to add that the terms "production and gathering" have been deemed to include

Transco to purchase noncontract gas in the Harper Sand pool, forcing cutbacks in takes elsewhere resulting in take-or-pay clauses in those contracts being activated. *Id.*

107. Remarkably, the Court did not identify what the uniform federal scheme was. *See also* Martin, *supra* note 3, at 321.

108. *Transco*, 474 U.S. at 423.

109. *Id.* at 425.

110. Now Chief Justice Rehnquist.

111. *Transco*, 474 U.S. at 429 (Rehnquist, J., dissenting).

112. *Id.* at 432.

113. *Id.* at 432-33.

114. *Northwest Central*, 109 S. Ct. 1262.

115. *Id.* at 1273.

116. *Id.* at 1274.

117. *Id.* *See* 15 U.S.C. § 717(b) (1976).

118. *Northwest Central*, 109 S. Ct. at 1274.

the power to set allowables.¹¹⁹

The Supreme Court, just as the Kansas Supreme Court had done, distinguished both *Northern Natural* and *Transco* on the grounds that the regulations involved in those cases were directed at purchasers rather than producers.¹²⁰ In *Northwest Central*, however, the order was directed at producers and thus clearly fell within the sphere of regulation explicitly reserved to the states.¹²¹ It was reasoned that the NGA's reservation to the states of authority over production would effectively be abolished if the KCC order was preempted because of its effect on purchasers.¹²² The Court stated: "there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market and contractual situations."¹²³

The Court likewise refused to preempt the order simply because some conflict existed between it and the federal scheme regulating interstate pipeline's costs.¹²⁴ It was noted that although the regulatory authority is split between state and federal authorities, the subjects of the regulations function in an interrelated manner.¹²⁵ Consequently, it was unrealistic to presume that conflicts would not occur, and when they did, that the federal scheme would always prevail.¹²⁶ This is especially so, where, as here, production is simply a reflection of purchasing decisions.¹²⁷ The Court thus found that preemption does not follow simply because Kansas's production regulation affected activities of interstate pipelines.¹²⁸

In spite of the existence of a dual regulatory scheme, state regulation of production that is merely a veiled attempt to impact purchasing decisions is nonetheless prohibited.¹²⁹ Consequently, the Court pronounced a means-end analysis whereby it held that the KCC proration order was a reasonable means intended to effect a legitimate conservation goal.¹³⁰

119. *Id.*

120. *Id.* at 1276.

121. *Id.*

122. *Id.*

123. *Id.* This statement is especially significant in that the *Transco* court had suggested that it would strike any state regulation that had the potential to impact the purchasing decisions of interstate pipelines. *Transco* 474 U.S. at 422.

124. *Northwest Central*, 109 S. Ct. at 1276.

125. *Id.* (citing *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 488 (1950)).

126. *Id.* (citing *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 375 (1986)).

127. *Id.*

128. *Id.* at 1277.

129. *Id.* at 1278.

130. Consequently, the following test was given: "[w]here state law impacts on matters within

Northwest Central's last preemption argument centered on the fact that, under the NGA, producers are required to continue providing gas in the interstate market until the FERC permits abandonment.¹³¹ Northwest Central claimed that if underages were cancelled, under-produced parties would essentially be forced to abandon reserves dedicated to interstate commerce. Northwest Central also felt that the order hindered the purpose of having an abandonment authorized by the FERC.¹³² The Court found the reasoning unpersuasive in that once the underages were cancelled, the right to produce that gas no longer existed, therefore, it could not be characterized as abandonment.¹³³ Furthermore, because this right was terminated if the production did not occur in a timely manner, the FERC abandonment requirements simply did not apply.¹³⁴ The Court, in rejecting the claim that the KCC order would thwart the purpose of the abandonment requirements, noted that the aim of the KCC order was in line with the goal of the federal abandonment provision: to maintain a dependable supply of gas.¹³⁵

Lastly, Northwest Central's argument that the KCC order violated the Commerce Clause because Kansas was effectively forcing interstate pipelines to purchase more gas from the Hugoton Field at the expense of other producing states or, alternatively, because it failed the balancing test enunciated in *Pike v. Bruce Church, Inc.*,¹³⁶ also failed to persuade the Court.¹³⁷

FERC's control, the State's purpose must be to regulate production or other subjects of state jurisdiction, and the means chosen must at least plausibly be related to matters of legitimate state concern." *Id.*

131. *Id.* at 1279. 15 U.S.C. § 717f(b) (1976) reads:

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the [FERC], or any service rendered by means of such facilities, without the permission and approval of the [FERC] first had and obtained, after due hearing, and a finding by the [FERC] that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

Id. at 1279 n.17.

132. *Id.* at 1279-80. The purpose of requiring FERC's authorization of an abandonment is "to assure the public a reliable supply of gas." *Id.* (quoting *United Gas Pipe Line Co. v. McCombs*, 442 U.S. 529, 536 (1979)).

133. *Id.* at 1279.

134. *Id.* at 1279-80.

135. *Id.* at 1280.

136. 397 U.S. 137 (1970). *See supra* note 95.

137. *Northwest Central*, 109 S. Ct. at 1280-82.

The Court found that the order was valid on its face in that it applied equally to producers selling to intrastate and interstate purchasers.¹³⁸ This was so because the order was designed, "to effectuate a legitimate local public interest" and because "its effects on interstate commerce [were] only incidental" without excessively burdening such commerce "in relation to the putative local benefits"; it passed the scrutiny of the *Pike v. Bruce Church, Inc.* test.¹³⁹

V. ANALYSIS

The *Northwest Central* opinion undeniably is a significant victory for states in their battle to protect property rights. Because it is an especially lucid opinion, one is even tempted to conclude that it is the final word on the legality of such conservation measures. Such a conclusion, however, is premature in that the Court has addressed the issues presented in *Northwest Central* in the most narrow of ways.¹⁴⁰

The *Northwest Central* decision is correct in that the KCC order clearly fell within the area allowing for state regulation. Had the Court not upheld the order, the ability of the states to protect correlative rights and prevent waste would be seriously impaired. This portion of the note will examine the Court's analysis and suggest perhaps a more appropriate method for determining preemption. In addition, the analysis will also examine recent proposals for evaluating conservation regulations under the NGA.

A. *Retreat from the 'Any-Regulation-that-Might-Impact-Purchasing-Decision-is-Preempted' Rationale*

The most significant aspect of the decision, undoubtedly to the relief of the states, is that the Court appears to have abandoned the narrow, one dimensional analysis it used in deciding *Northern Natural* and *Transco*.¹⁴¹ In both *Northern Natural* and *Transco*, the Court had suggested that it would strike any state regulation, irrespective of whether it was a conservation measure or not, that had the potential to impact the

138. *Id.*

139. *Id.* at 1282 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

140. That is, the Court, rather than taking into consideration the reality that the production and purchasing of natural gas are essentially inseparable physical acts, views production and purchasing as separate and distinct. See *infra* text accompanying notes 150-56.

141. It is critical to remember that the regulations at issue in *Northern Natural* and *Transco* were directed at "purchasers", rather than "producers." See *supra* notes 45-63 and accompanying text and notes 64-113 and accompanying text.

purchasing decisions of interstate pipelines.¹⁴² Here, the Court at last recognized that it was impossible for a state to protect correlative rights by means of a production regulation without its having *some* impact on the purchasing decisions of interstate pipelines.¹⁴³ This point was, of course, emphasized in the dissenting opinion of *Northern Natural*.¹⁴⁴

In *Northwest Central*, the court altered its preemption analysis, from that in *Northern* and *Transco*, through its treatment of the NGA.¹⁴⁵ In these prior cases, the majority opinions of the Court viewed the NGA as demarcating the boundary between federal and state jurisdiction with a precision and tidiness that simply does not exist.¹⁴⁶ In contrast, the *Northwest Central* decision recognizes the reality that federal and state regulatory bodies will occasionally conflict; yet it also recognizes that such tensions do not always give rise to preemption.¹⁴⁷

Also important to the *Northwest Central* opinion is the disappearance of the "uniform federal scheme" that inexplicably appeared in *Transco*. The *Transco* majority found the Mississippi order "disturbs the uniformity of the federal scheme, since interstate pipelines will be forced to comply with varied state regulations of their purchasing practices."¹⁴⁸ Commentators have admitted being mystified as to what federal scheme the majority is referring.¹⁴⁹ This reasoning, however, carried to its logical extent would mean that any state regulation affecting interstate pipelines' purchasing practices, irrespective of its nature or aim, would be preempted unless it was identical to the regulations of all other states, which in turn would have to be identical to the federal scheme. If not, an interstate pipeline would be forced to comply with varied state regulations, a compliance which according to the *Transco* majority is unlawful.

142. "The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas [citation omitted], or for state regulations which would indirectly achieve the same result." *Northern Natural*, 372 U.S. at 91. "To the extent that Congress denied FERC the power to regulate affirmatively particular aspects of the first sale of gas, it did so because it wanted to leave determination of supply and first-sale price to the market." *Transco*, 474 U.S. at 422.

143. *Northwest Central*, 109 S. Ct. at 1276. "It is inevitable that 'jurisdictional tensions [will] arise as a result of the fact that [state and federally regulated elements coexist within] a single integrated system, [citation omitted]" *Id.*

144. *Northern Natural*, 372 U.S. at 103 (Harlan, J., dissenting).

145. It is, of course, vital to recall that the NGPA was also at issue in *Transco*.

146. Recall that in *Northern Natural* the majority found the boundary line to be so clear that it preempted the regulation upon only a finding of a "prospect of interference". *Northern Natural*, 372 U.S. at 92.

147. *Northwest Central*, 109 S. Ct. at 1276.

148. *Transco*, 474 U.S. at 423.

149. See Martin, *supra* note 3, at 321-22, for a particularly stinging critique.

Fortunately, this reasoning was not applied in *Northwest Central*, for, as demonstrated, the KCC order would also have been found to be preempted.

B. *Production v. Purchasing*

Although *Northwest Central* was decided correctly, that the Court continues to use the "production v. purchasing" test as its primary criteria in deciding such cases is troubling. It is odd and overly formalistic that a conservation measure aimed at producers is valid, while the same regulation, with the same purposes and effects, is invalid if it is directed at purchasers (interstate pipelines).

Examining a regulation only in terms of whether it is directed at producers or purchasers demonstrates a failure to fully understand the nature of natural gas production. Because natural gas cannot be stored at the surface in large quantities, as oil can be, its production and movement into interstate commerce is essentially "one and the same physical operation."¹⁵⁰ Thus, an order regulating the takes of a pipeline merely amount to regulation of the production of a given well,¹⁵¹ especially in situations where, as in the Hugoton field, gas is produced under contracts that leave it to the purchaser to set the rate of production through its decision on takes.¹⁵²

Because the purpose of the three different conservation measures discussed in this note, regardless of to whom each is directed, is to regulate the physical act of taking gas from a reservoir, a more appropriate method of examining such measures would be to evaluate the effect of the order in light of the intent of the NGA and the NGPA.

The NGA was enacted to create a comprehensive federal scheme for governing the transportation and rates of natural gas in interstate commerce,¹⁵³ and the purpose of the NGPA was to allow market conditions, rather than artificial price ceilings, to control the price of natural gas.¹⁵⁴ Conversely, then, the NGA and the NGPA prevent states from directly

150. *Northern Natural*, 372 U.S. at 100 (Harlan, J., dissenting).

151. *Id.* Initially, the FPC interpreted § 717(b) as applying only to sales at the downstream end of interstate pipelines and not to sales by producers to pipelines. *Transco*, 474 U.S. at 430 (Rehnquist, J., dissenting) (citing *Phillips Petroleum Co.*, 10 F.P.C. 246 (1951) and *Natural Gas Pipeline Co.*, 2 F.P.C. 218 (1940)). In 1954, the Court gave § 717(b) a broader reading to extend the NGA coverage to both downstream and local sales. *Id.* (citing *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954)).

152. See *supra* text accompanying notes 124-28.

153. *Northwest Central*, 109 S. Ct. at 1275 (citation omitted).

154. *Transco*, 474 U.S. at 431 (Rehnquist, J., dissenting).

regulating the wholesale prices of gas sold in interstate commerce. Yet federal authority does not exist to the exclusion of state authority, and the Court has now recognized that jurisdictional tensions in the context of regulating producers do not instantly give rise to preemption.¹⁵⁵ Thus, one is justified in asking what effect the *Northwest Central* order would have if it were directed at purchasers rather than producers. The answer is, of course, that the order would have had the same impact as the order directed at producers has. Thus, because the production of natural gas and its transportation into interstate commerce are inseparable physical acts, a conservation measure that has as its goal protecting correlative rights and preventing waste, with no intent to regulate the price of interstate sales of natural gas, should be allowed even if it is directed at the purchaser.¹⁵⁶ The focus of inquiry should be, irrespective of to whom the action is directed, whether the state action is a legitimate conservation attempt. The same general principle, albeit from a more learned and experienced perspective, has recently been proposed and is worthy of brief discussion.¹⁵⁷

C. Section 11 of the NGA

It has been suggested that section 1(b) of the NGA¹⁵⁸ has been misapplied in the battle to conserve natural gas and to protect correlative rights, while the portion of the NGA more appropriately designed to address conservation matters, section 11,¹⁵⁹ has been ignored.¹⁶⁰ It is Professor David E. Pierce's contention that section 1(b) was intended to address only the jurisdictional authority over pricing and transportation

155. See *supra* text accompanying notes 143-47.

156. This of course presumes that the conservation measure is truly such and is not a veiled attempt to manipulate the purchasing practices of pipelines. At this point it is important to note that neither regulation of producers nor purchasers is as effective at addressing correlative rights issues as is unitization of a field. Unitization is the joint operation of all or a portion of a producing reservoir where the owners designate one party as the unit operator and production of the reservoir is shared in accordance with each owners correlative rights. See H. WILLIAMS & C. MEYERS, *supra* note 46, at 938; and Pierce, *State Regulation of Natural Gas in a Federally Deregulated Market: The Tragedy of the Commons Revisited*, 73 CORNELL L. REV. 15, 23-26 (1987).

157. See Pierce, *Reconciling State Oil and Gas Conservation Regulation with the Natural Gas Act: New Statutory Revelations*, 1989 B.Y.U. L. REV. 9.

158. Codified at 15 U.S.C. § 717(b) (1982).

159. Codified at 15 U.S.C. § 717(j) (1982). The section reads:

In case two or more States propose to the Congress compacts dealing with conservation, production, transportation, or distribution of natural gas it shall be the duty of the Commission to assemble pertinent information relative to the matters covered in any such proposed compact, to make public and to report to the Congress information so obtained, together with such recommendations for further legislation as may appear to be appropriate or necessary to carry out the purposes of such proposed compact and to aid in the

of natural gas,¹⁶¹ while section 11 demarcates jurisdictional authority over conservation issues.¹⁶² This interpretation is especially interesting in that section 11 appears on its surface to be nothing more than an invitation to the states to propose compacts to Congress in order to promote their conservation efforts.¹⁶³ Furthermore, section 11 contains no grant of jurisdictional authority.¹⁶⁴

Pierce's thesis, however, is derived from examination of the legislative history and consideration of the state of Commerce Clause jurisprudence when Congress was constructing the NGA.¹⁶⁵ At the time the NGA was being put together,¹⁶⁶ the United States Supreme Court read the Commerce Clause as allowing the states jurisdiction over such activities as mining and manufacturing.¹⁶⁷ It is especially pertinent that the Court also considered the production of oil, like coal, to be "essentially a mining operation and therefore . . . not part of interstate commerce even though the product obtained is intended to be and in fact is immediately shipped in such commerce."¹⁶⁸ Clearly, then, just prior to the 1938 enactment of the NGA, production was not subject to Commerce Clause scrutiny, as it was considered to be "a step in preparation for commerce," rather than commerce itself.¹⁶⁹ Furthermore, during the NGA deliberations investigating conservation issues, Congress utilized reports by both the Federal Trade Commission (FTC) and the House

conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas.

It shall be the duty of the Commission to assemble and keep current pertinent information relative to the effect and operation of any compact between two or more States heretofore or hereafter approved by the Congress, to make such information public, and to report to the Congress, from time to time, the information so obtained, together with such recommendations as may appear to be appropriate or necessary to promote the purposes of such compact.

In carrying out the purpose of this chapter, the Commission shall, so far as practicable, avail itself of the services, records, reports, and information of the executive departments and other agencies of the Government, and the President may, from time to time, direct that such services and facilities be made available to the Commission.

Id.

160. Pierce, *supra* note 157, at 11.

161. Pierce, *supra* note 157, at 41.

162. Pierce, *supra* note 157, at 32-35.

163. See *supra* note 159.

164. See *supra* note 159.

165. Pierce, *supra* note 157, at 35-41.

166. The pertinent time being the late 1920's through the late 1930's. Pierce *supra* note 157, at 32 n.129.

167. Pierce *supra* note 157, at 36-37.

168. Pierce, *supra* note 157, at 37 (citing *Carter v. Carter Coal, Co.*, 298 U.S. 238, 303 (1936), (quoting *Champlin Rfg. Co. v. Corporation Comm'n*, 286 U.S. 210, 235 (1932)).

169. Pierce *supra* note 157, at 37 (citing *Carter v. Carter Coal, Co.*, 298 U.S. 238, 303 (1936), (quoting *Champlin Rfg. Co. v. Corporation Comm'n*, 286 U.S. 210, 235 (1932)).

Subcommittee on Interstate and Foreign Commerce.¹⁷⁰ Both reports recommended that producing states take appropriate measures to prevent waste and to protect correlative rights.¹⁷¹ The FTC report further recommended that because production was not regarded as commerce, conservation matters should be left to the producing states.¹⁷²

Based on the foregoing discussion, Pierce contends that any preemption analysis should begin by examining those state conservation measures that were accepted and promoted by Congress when it enacted the NGA.¹⁷³ Furthermore, under section 11 analysis, whether a pipeline's purchasing practices are influenced by a state regulation is of no importance.¹⁷⁴ For the legislative history of section 11 indicates that Congress' only concern with state regulatory actions was whether the regulation violated the Commerce Clause, not whether purchasing decisions could be affected.¹⁷⁵ Therefore, when the issue is whether an alleged conservation regulation is valid, one simply has to examine the types of conservation measures accepted by Congress when the NGA was enacted.¹⁷⁶ Not surprisingly, prorationing and ratable take regulations were among the conservation measures then employed.¹⁷⁷

Section 11 analysis, therefore, leads to the same conclusion that is reached if the rigid "producer v. purchaser" test of section 1(b) is abandoned.¹⁷⁸ That is, under both section 1(b) and section 11, the issue would be whether the state regulation involves a conservation matter. Therefore, ratable take orders, such as those at issue in *Northern Natural*¹⁷⁹ and *Transco*,¹⁸⁰ examined in either suggested manner, are not preempted by the NGA and are otherwise valid as long as there are no Commerce Clause or other constitutional conflicts.¹⁸¹

170. Pierce *supra* note 157, at 32-33 (citing *Utility Corporations, Final Report Federal Trade Comm'n Pursuant to S.J. Res. No. 83, S. Doc. No. 92, 70th Cong., 1st Sess., pt. 84-A (1936)* [hereinafter FTC Report] and *Report on Pipelines, H.R. Rep. No. 2192, 72nd Cong., 2d Sess., pt. 1, at LXXVIII-LXXIX (1933)* [hereinafter House Report]).

171. Pierce, *supra* note 157, at 33.

172. Pierce, *supra* note 157, at 37-42.

173. Pierce, *supra* note 157, at 37-42.

174. Pierce, *supra* note 157, at 37-42.

175. Pierce, *supra* note 157, at 37-42.

176. Pierce, *supra* note 157, at 42.

177. Pierce, *supra* note 157, at 42-43 (citing FTC Report, *supra* note 170, pt. 84-A, at 104).

178. See *supra* text accompanying notes 150-57.

179. See *supra* text accompanying notes 45-63.

180. See *supra* text accompanying notes 64-113.

181. *Northern Natural* was decided solely on the issue of preemption. *Northern Natural*, 372 U.S. 84, 86 (1963). The *Transco* majority, because it found the Mississippi order to be preempted, did not address whether the order violated the Commerce Clause. *Transco*, 474 U.S. 409, 425 (1986). Justice Rehnquist, in finding no Commerce Clause violation stated: "the statute regulates

The KCC order governing the timing of production at issue in *Northwest Central*¹⁸² passes section 11 scrutiny.¹⁸³ As has been stated, the issue is simply whether the order is a conservation measure. If it is, the Constitution, rather than the NGA or the NGPA, serves as the standard by which the order is measured.¹⁸⁴ Although the Supreme Court used section 1(b) analysis, it found the order to be a valid conservation regulation and well within the bounds of the Constitution's Commerce Clause limitations.¹⁸⁵ Even though the KCC prorationing order is valid under both section 1(b) and section 11 analysis, the latter is preferable; if it had been directed at "purchasers,"¹⁸⁶ with no greater impact than when directed at "producers," *Northern Natural/Transco* analysis would preempt the order.¹⁸⁷

VI. CONCLUSION

Although *Northwest Central* puts to rest the fear that the Supreme Court would strike any state production regulation that might impact purchasing decisions, still unsettling is the idea that the Court approaches the issue of preventing waste and protecting correlative rights from its rigid producer/purchaser point of view. However, of some import, since *Transco* was decided in 1986, there has been a change in the complexion of the Court — Chief Justice Burger, who joined the five-justice majority opinion, and Justice Powell, who joined the dissent — have retired. Thus, with their replacements — Justices Scalia and Kennedy — seemingly tilting the Court to a more conservative course, it is not inconceivable that, had push come to shove, Chief Justice Rehnquist's analysis in *Transco* might now command a majority of the Court.

Nonetheless, with environmental concerns over such problems as acid rain and urban smog steadily growing, and no immediate prospects of the nuclear power industry overcoming its negative image, the demand for cleaner burning natural gas will undoubtedly increase. The Court

evenhandedly to effectuate a legitimate local public interest — the interest in both fair dealing on the part of joint owners and conservation — and its effects on interstate commerce are incidental at most." *Transco*, 474 U.S. at 435 (Rehnquist, J., dissenting).

182. See *supra* text accompanying notes 114-39.

183. See Pierce, *supra* note 157, at 51-52.

184. See Pierce, *supra* note 157, at 51-52.

185. *Northwest Central*, 109 S. Ct. at 1278, 1280-82.

186. The cynic may conclude, quite understandably, that "purchasers" were precisely the target of the order, i.e., "take the gas according to this timetable or lose your right to take it at all."

187. See Pierce, *supra* note 157, at 52.

should move beyond the strict, illogical *Northern Natural/Transco* analysis and return to the states the authority to regulate the takes of purchasers, particularly when the purchasing decisions of interstate pipelines cause waste and correlative rights violations. Returning such authority to the producing states, can be accomplished through both the modified section 1(b) analysis and section 11 analysis.

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