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THE SUPREME COURT'S NATURAL GAS ACT:
NORTHERN NATURAL GAS CO. v. KANSAS
COMPLETES JUDICIAL LEGISLATION

Granville Dutton*

SYNOPSIS

The recent decision by a bare majority of the Federal Supreme Court in the case of *Northern Natural Gas Co. v. Kansas*¹ struck down a Kansas conservation order requiring ratable gas production in the Kansas Hugoton Field. The five men found that the ratable-take order posed a threat to comprehensive federal regulation² under the Natural Gas Act.³

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In doing so, the Court, as dissenting Justice Harlan put it, "builds a rule that, if consistently applied, may well destroy the conservation powers of the States."⁴

The five-man opinion imputes to Congress the subjection of gas production to federal control. The fact is that Congress has stated that the Natural Gas Act "takes no authority from State commissions, and is so drawn to complement and in no matter usurp State regulatory authority."⁵ State ratable-take laws date back to 1913,⁶ twenty-five years prior to the Natural Gas Act. The Court previously had recognized that "the Act, though extending federal regulation, had no purpose or effect to cut down state power."⁷

¹—U.S.—, 83 Sup.Ct. 646, 9 L.Ed.2d *601 (1963).

² 83 Sup.Ct. at 651, 9 L.Ed.2d at *608.

³ 52 Stat. 821 (1939), as amended, 15 U.S.C. §§ 717-717w (1958).

⁴ 83 Sup.Ct. at 658, 9 L.Ed.2d at *616.

⁵ H.R. REP. No. 709, 75th Cong., 1st Sess. 2 (1937).

⁶ Okla. Sess. Laws 1913, ch. 198, §§ 2-3, 52 OKLA. STAT. §§ 232-233 (1961).

⁷ *Panhandle E. Pipe Line Co. v. Public Serv. Comm'n*, 332 U.S. 507, 517, 68 Sup.Ct. 190, 195, 92 L.Ed. 128, 138 (1947).

Stripped of the interpretation that Congress is responsible, the *Kansas* decision stands out clearly as judicial legislation. As such, it violates Article I, Section 1 of the United States Constitution which vests all legislative power in Congress and also violates the Tenth Amendment which reserves all powers not delegated to the federal government to the states, or to the people.

The decision provides the basis for centralizing all regulation of gas production in the Federal Power Commission. Such a centralization will facilitate the socialization of the gas industry by giving the federal government management of the essential means of production. Since oil is always produced jointly with gas, it is not likely that oil production can long withstand federal control if gas production is so completely subjugated to the FPC.

The *Kansas* decision, coupled with the *Phillips*⁸ case of 1954, places the oil and gas industry in the same position as the agricultural industry twenty years ago. To avoid another such colossal regulatory fiasco, Congress should act immediately to repel this latest judicial invasion of its constitutionally delegated authority. If it fails to do so, the system of checks and balances which protects all liberty from governmental tyranny will suffer a critical, if not killing, blow.

THE KANSAS CASE

Northern Natural Gas Company purchases gas from over a thousand gas wells in the Kansas Hugoton Field. Under its original purchase contracts with Republic Natural Gas Company, Northern Natural was obligated to take or pay for sufficient gas from designated Republic wells to supply sixty percent of Northern's requirements for a defined area of Iowa and Nebraska. In 1952, a decision of the Kansas Supreme Court⁹ modified that contract to obligate Northern to take only those volumes permitted to be produced under Kansas Corporation Commission gas allocation orders for the Hugoton Field. Northern's other purchase contracts in the field expressly provide that their takes from other producers are subject to the provisions of their Republic contract.

Until 1958, Northern was able to take not only the allowable production from Republic wells but also the allowable production from other wells to which it was connected. In that year, Northern could no longer take the full allowables because the Federal Power Commission refused to issue the public convenience and necessity certificates required for Northern's planned expansion of its system. Without governmental authority to expand, Northern could not increase its sale at the rate the allowables of the wells to which it was connected increased; an increase which

⁸ *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 Sup.Ct. 794, 98 L.Ed. 1035 (1954).

⁹ *Northern Natural Gas Co. v. Republic Natural Gas Co.*, 172 Kan. 450, 241 P.2d 708 (1952).

Northern has contended in a Kansas court action exceeded the actual increase in market demand.

Unable to increase takes sufficiently to allow all wells to produce their allowables, Northern interpreted its contractual obligations to require taking the published allowables of the Republic wells and allocating the remainder of its market to the other Kansas Hugoton wells to which it was connected. Northern's action under this interpretation resulted in the Republic wells being produced at a substantially higher rate than the other wells delivering to Northern's system, thereby failing to meet the statutory requirement of "ratable taking."

Ratable taking generally refers to purchasers and pipelines permitting the wells to which they are connected to produce at relative rates which afford each owner the opportunity of producing his share of the oil and gas. Where production from wells is restricted by operation of proration regulations, ratable taking is generally administered by taking from each well the same proportion of the allowables assigned to the wells. In the subject case, ratable taking would have been accomplished had Northern taken from each well to which it was connected the proportion of such well's allowable equal to a fraction, the numerator of which would have been Northern's requirements and the denominator the sum of the allowables of the wells to which it was connected.

The first ratable taking statute was enacted by Oklahoma in 1913. It provided that any person taking gas from a gas field "shall take ratably from each owner of the gas in proportion to his interest in the gas."¹⁰ Kansas first passed a ratable take statute in 1935, three years prior to the Federal Natural Gas Act of 1938. This statute provided that the state corporation commission "shall so regulate the taking of natural gas from any and all such common sources of supply within this state so as to prevent the inequitable or unfair taking from such common source of supply . . ."¹¹ Other major gas producing states now have, and did have in 1938, statutes with similar provisions.¹²

The stricken Kansas Corporation Commission order was a typical ratable-take order for gas which stated that "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."¹³ This order of statewide application superseded an earlier order which had required Northern to take gas ratably from all wells to which it is connected in the Kansas Hugoton Field.

The rule announced by the five-man majority in the *Kansas*

¹⁰ 52 OKLA. STAT. § 233 (1961).

¹¹ KAN. GEN. STAT. § 55-703 (1935).

¹² LA. STAT. ANN.—R.S. 30:41 (West 1950). N. MEX. STAT. ANN. § 65-3-13 (c and d) and § 65-3-15 (d) (Smith 1953). TEX. CIV. STAT. ANN. art. 6008, §§ 10, 12, 13, 14 and art. 6049a, § 8a (Vernon 1962).

¹³ K.C.C. Rule 82-2-219, effective February 8, 1960.

case carries implications far beyond the invalidated ratable-take order, as is shown in the following opinion:

"The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas or for state regulations which would indirectly affect the ability of the Federal Power Commission to regulate comprehensively and effectively the transportation and sale of natural gas and to achieve the uniformity of regulation which was an objective of the Natural Gas Act. They therefore invalidly invade the federal agency's exclusive domain."¹⁴

Enforcement of such a broad rule would effectively terminate the historical state control over oil and gas conservation. Virtually every state conservation order—whether it applies to safe drilling practices, protection of fresh water, measurement and storage standards, production rules, or routine reporting regulations—indirectly affects the regulated price of natural gas. Such orders all involve some expense or alter in some manner the supply of gas. This is true even if the state conservation order concerns an oil well or reservoir since the FPC insists upon allocation of joint oil and gas production costs in determining the regulated price of gas.

The majority does not stop with striking down state orders indirectly regulating the price of gas, but find no sanction for orders acknowledged to be within the scope of a state's power if those means threaten effectuation of the federal regulatory scheme.¹⁵

The five justices required but one short paragraph to dispose of the first ground upon which the Kansas Supreme Court had upheld the order under attack. The Kansas court had found the ratable-take order constituted state regulation of the "production of gathering" of gas, which is specifically exempt from FPC jurisdiction by Section 1(b) of the Natural Gas Act.¹⁶

The prevailing opinion of the federal court refers to another five-man federal decision—*Phillips Petroleum Co. v. Wisconsin*,¹⁷ which first subjected independent producers to federal regulation—to reject the applicability of the exempting language on the grounds Northern was not involved in "production and gathering in the sense that those terms are used in 1(b)."¹⁸

The second ground relied upon by the Kansas court was that the contested order in no way involves the price of gas. In rejecting this argument, Justice Brennan, writing for himself and

¹⁴ 83 Sup.Ct. at 650, 9 L.Ed.2d at *607.

¹⁵ *Id.* at 652, 9 L.Ed.2d at *609.

¹⁶ 15 U.S.C. § 717(b) (1958).

¹⁷ 347 U.S. 672, 74 Sup.Ct. 794, 98 L.Ed. 1035 (1954).

¹⁸ *Northern Natural Gas Co. v. Kansas*, —U.S.—, 83 Sup.Ct. 646, 649, 9 L.Ed.2d *601, *606.

the other four men making up the majority, formulated the broad rules referred to above. As justification for such rules, he writes: "The 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."¹⁹ The internal quote is not from the Natural Gas Act or any congressional report but is once again from the *Phillips* decision.

The holding also states that "Congress has given the Federal Power Commission paramount and exclusive authority" over the "intricate relationship between the purchasers' cost structure and eventual costs to wholesale consumers." To require purchasers now taking unratably to take ratably "could seriously impair FPC's authority to regulate."²⁰

The opinion further holds that the ratable-take order must be nullified to assure the effectuation of the comprehensive regulation ordained by Congress. Again Justice Brennan finds that "the state regulation must be subordinated when Congress has so plainly occupied the regulatory field."²¹ The majority also find strength in the footnoted statement that persistent legislative efforts to narrow the scope of the broader exclusive federal jurisdiction conferred by the statute have been unavailing.²²

The decision also rejects a suggestion of the FPC to remand the case to the Kansas Supreme Court to resolve the effect of the conservation order on the take-or-pay provisions of Northern Natural's so-called Republic "A" contract. This provision had been interpreted by the Kansas Supreme Court in 1952 to mean that Northern was in compliance if it took the volumes permitted under Kansas proration orders. Therefore, FPC took the position that the ratable-take order would not affect price structure if it relieved Northern of the obligation to take full allowables from Republic "A" wells. The five-man majority refused to remand for three reasons: (1) the Kansas court chose to decide the federal question in favor of the validity of the orders; (2) the contract was not in issue in the case; and (3) the real question is whether the state orders may stand in the face of the pervasive scope of federal occupation of the field.²³

Justice Harlan wrote the dissenting opinion for himself, Stewart, and Goldberg. He endorsed the FPC suggestion to remand, pointing out that in 1958 the Supreme Court dismissed for want of a substantial federal question an appeal presenting substantially the same broad federal question decided by the majority.

The dissent notes the historical application of ratable-take

¹⁹ *Id.* at 650, 9 L.Ed.2d at *607.

²⁰ *Id.* at 651, 9 L.Ed.2d at *608.

²¹ *Ibid.*

²² *Id.* at 650, 9 L.Ed.2d at *607.

²³ *Id.* at 654, 9 L.Ed.2d at *611.

orders to purchasers and finds such application to be the only practical one since an individual producer cannot require ratable production by others over whom he has no control. Justice Harlan could not reconcile the majority's recognition of the state's right to adopt valid conservation measures with the holding that such measures should be struck down if they merely threaten comprehensive federal regulation. He points out that all such conservation orders carry the possibility of affecting costs and warns that "on this insecure foundation the Court builds a rule that, if consistently applied, may well destroy the conservation powers of the states."²⁴

The dissenting opinion documents congressional intent in passing the Natural Gas Act. Referencing the house committee report that the act "takes no authority from State commissions and is so drawn to complement and in no manner usurp State regulatory authority,"²⁵ this opinion notes that:

" . . . it is beyond dispute that when Congress enacted the Natural Gas Act in 1938 it did not intend to deprive the states of any regulatory powers they were then deemed to possess under the constitution. Rather, the act was intended only to fill the 'gap . . . thought to exist at the time the Natural Gas Act was passed' by providing for federal regulation of those aspects of the natural gas business that the States were at that time believed to be constitutionally incapable of regulating."²⁶

Justice Harlan points out that ratable-take statutes date back prior to the Natural Gas Act and, "since the state had the power to issue an order at the time the Natural Gas Act was passed, nothing in the act can now be considered to withdraw it."²⁷

The dissent also notes that the majority opinion is based upon the premise that Northern's Republic contractual obligations are unaffected by the Kansas Commission's ratable-take order. Should the contract's take-or-pay provisions be modified by the valid application of the state's police powers under a fundamental principle of contract law, obviously there would be no conflict with FPC pricing authority. Under another—or perhaps, former—fundamental principle of constitutional law, a remand to the Kansas Supreme Court to determine that question of state law would obviate the necessity of the Federal Supreme Court deciding at the time any question of federal law.

THE NATURAL GAS ACT OF CONGRESS

As mentioned above, the producing states long ago enacted

²⁴ *Id.* at 658, 9 L.Ed.2d at *616.

²⁵ *Id.* at 657, 9 L.Ed.2d at *615.

²⁶ *Ibid.*

²⁷ *Ibid.*

legislation to regulate the production of natural gas in order to protect the correlative rights of the various owners of a common reservoir and to prevent waste. The states at an even earlier date regulated gas distributing companies as utilities granted monopolistic franchises. A number of these companies grew to interstate proportions which made it difficult for states to determine actual costs upon which rates for such companies were to be based. The commerce clause of the Constitution²⁸ provided an additional limitation on the authority of the state. In fact, the Supreme Court specifically held that transportation of gas through pipe lines to another state for sale to distributing companies is interstate commerce over which state authorities have no rate control.²⁹ A Senate resolution³⁰ requested the Federal Trade Commission to conduct an investigation. In 1936 the FTC issued a report recommending federal legislation in this field. At the next session of Congress the Natural Gas Act³¹ was passed. The legislative history³² indicates that Congress intended federal regulation to be confined to interstate transportation of gas, to complement the power of the states and produce a harmonious regulation of the industry without usurping the state regulatory powers or encroaching upon their jurisdiction.

The Congressional Act declared that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."³³ It provides that all rates and charges by any natural-gas company shall be just and reasonable and that rates which are not just and reasonable are unlawful.³⁴ The Act does not define *just and reasonable* but defines a natural-gas company as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale"³⁵ and defines interstate commerce as "commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof."³⁶ The Act states that its provisions "shall not apply to any other transportation or sale of natural gas . . . or to the produc-

²⁸ U.S. CONST. art. I, § 8, cl. 3.

²⁹ *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298, 44 Sup.Ct. 544, 68 L.Ed. 1027 (1924).

³⁰ S. Res. No. 83, 70th Cong., 1st Sess., 69 CONG.REC. 3054 (1928).

³¹ 52 Stat. 821 (1939), *as amended*, 15 U.S.C. §§ 717-717w (1958).

³² S. Doc. No. 92, 70th Cong., 1st Sess., pt. 84-A (1936); H.R. REP. No. 2651, 74th Cong., 2d Sess. (1936); H.R. REP. No. 709, 75th Cong., 1st Sess. (1937). See Comment, 44 GEO. L.J. 695 (1956).

³³ 15 U.S.C. § 717a (1958).

³⁴ 15 U.S.C. § 717c(a) (1958).

³⁵ 15 U.S.C. § 717a(6) (1958).

³⁶ 15 U.S.C. § 717a(7) (1958).

tion or gathering of natural gas."³⁷ The Federal Power Commission is charged with administration of the Act and is given the necessary administrative powers to enforce it.

In 1947, the Supreme Court, without dissent, upheld the obvious Congressional intent in the case of *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n*³⁸ where it said:

"We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority.³⁹ . . . The Act, though extending federal regulation, had no purpose or effect to cut down state power.⁴⁰ . . . The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. This appears not merely from the situation which led to its adoption and the legislative history, but most plainly from the history of Sec. 1(b).⁴¹ . . . These considerations all would lead to the conclusion that the states are not made powerless to regulate the sales in question by any supposed necessity for uniform national regulation but that on the contrary the matter is of such high local import as to justify their control, even if Congress had given no indication of its intent that state regulation should be effective."⁴²

In answer to the charge that Congress, by enacting the Natural Gas Act, had "occupied the field," i.e., the entire field of regulation, the Court replied: "The exact opposite is the fact. Congress it is true occupied a field. But it was meticulous to take in only territory which this Court has held the states could not reach."⁴³

Before the *Panhandle Eastern* case the Supreme Court had never held that states could not reach ratable-take territory. Three years later, that Court specifically upheld a gas ratable-take order in the case of *Cities Service Gas Co. v. Peerless Oil & Gas Co.*⁴⁴ Not only was there no dissent from this affirmation of state authority to institute ratable-take orders, but Justice Black was of the opinion that the appeal from the order should have been dismissed as frivolous! As late as 1958, the United States Supreme Court dismissed for want of a substantial federal question an appeal from a Texas Railroad Commission order requiring the

³⁷ 15 U.S.C. § 717(b) (1958).

³⁸ 332 U.S. 507, 68 Sup.Ct. 190, 92 L.Ed. 128 (1947).

³⁹ *Id.* at 520, 68 Sup.Ct. at 197, 92 L.Ed. at 139.

⁴⁰ *Id.* at 517, 68 Sup.Ct. at 195, 92 L.Ed. at 138.

⁴¹ *Ibid.*

⁴² *Id.* at 523, 68 Sup.Ct. at 199, 92 L.Ed. at 141.

⁴³ *Id.* at 519, 68 Sup.Ct. at 196, 92 L.Ed. at 139.

⁴⁴ 340 U.S. 179, 71 Sup.Ct. 215, 95 L.Ed. 190 (1950).

principal purchaser in a gas field to purchase ratably from operators in the field.⁴⁵

In 1947, the Court also handed down *Interstate Natural Gas Co. v. FPC*,⁴⁶ in which the following rule was set out:

“As was stated in the House Committee Report, the ‘basic purpose’ of Congress in passing the Natural Gas Act was ‘to occupy the field in which the Supreme Court has held the States may not act.’ In denying the Federal Power Commission jurisdiction to regulate the production or gathering of natural gas, it was not the purpose of Congress to free companies such as petitioners from effective public control. The purpose of that restriction was, rather, to preserve in the States powers of regulation in the areas in which the States are constitutionally competent to act. . . . Clearly among the powers thus reserved to the states is the power to regulate the physical production and gathering of natural gas in the interest of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters. Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the FPC inconsistent or a substantial interference with the exercise by the state of its regulatory function, the jurisdiction of the FPC does not attach.”⁴⁷

Two years later, the Court confirmed this ruling by holding in *FPC v. Panhandle Eastern Pipe Line Co.*⁴⁸ that the “legislative history of this act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas with the states.”⁴⁹ Copious footnotes support this statement. The decision went on to say:

“Thus for over ten years the Commission has never claimed the right to regulate dealings in gas acreages. Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed. In the light of that history we should not by an extravagant, even if abstractly possible, mode of interpretation push powers over transportation and rates so as to include production We cannot attribute to Congress the intent to grant such far-reaching powers as implicit in the Act when that

⁴⁵ *Permian Basin Pipeline Co., v. Railroad Comm'n*, 302 S.W.2d 238, appeal dismissed 358 U.S. 37, 79 Sup.Ct. 21, 3 L.Ed.2d 43 (1957).

⁴⁶ 331 U.S. 682, 67 Sup.Ct. 1482, 91 L.Ed. 1742 (1947).

⁴⁷ *Id.* at 690, 67 Sup.Ct. at 1487, 91 L.Ed. at 1748.

⁴⁸ 337 U.S. 498, 69 Sup.Ct. 1251, 93 L.Ed. 1499 (1949).

⁴⁹ *Id.* at 511, 69 Sup.Ct. at 1258, 93 L.Ed. at 1507.

body has endeavored to be precise and explicit in defining the limits to the exercise of federal power."⁵⁰

The Federal Power Commission also complied with the Congressional intent of the Natural Gas Act. Initially, the problem was presented to the Commission in the matter of *In re Columbian Fuel Corp.*⁵¹ After reviewing the legislative history of the Act, the Commission refused to claim jurisdiction over the producer and held that it was not the intent of Congress that jurisdiction be extended to persons whose only sales are made as an incident to, and immediately upon, the completion of the production and gathering process. In more than fifteen instances prior to 1950 the Commission adhered to that opinion in refusing to exercise its regulatory powers in such cases.⁵²

After the *Interstate* case, the Commission issued Order 139 which, like the Kerr Bill,⁵³ removed arm's length sales made by independent producers from federal regulation. After the Kerr Bill was vetoed,⁵⁴ the Commission rescinded Order 139. However, Order 154, the rescinding order, stated that the Commission's policy would not include investigating producers and gatherers generally but such investigations would be made only where rates appeared excessive on sales that materially affected interstate commerce.

THE SUPREME COURT'S NATURAL GAS ACT

The Supreme Court's early decisions involving the Natural Gas Act were in the field of rate determinations for interstate pipeline companies. In 1942, the Court overturned "fair value" rate determinations in *FPC v. Natural Gas Pipeline Co.*⁵⁵ by holding that there is a zone of reasonableness within which the Commission is free to act to decrease rates which are not the lowest reasonable rates without being subject to court authority to set aside as being too low. The Court further broadened the Commission's rate-making discretion in 1944 with their decision in *FPC v. Hope Natural Gas Co.*⁵⁶ which recognized the validity of "pragmatic adjustments" and ended judicial inquiry if the total effect of the rate order cannot be said to be unjust and unreasonable. This effectively transformed the Commission's rate-making power into a price-fixing one.

The Supreme Court first used judicial fiat to expand the jurisdiction of the FPC in the case of *Colorado Interstate Gas Co. v.*

⁵⁰ *Id.* at 513, 69 Sup.Ct. at 1260, 93 L.Ed. at 1509.

⁵¹ 2 F.P.C. 200 (1940).

⁵² Jacobs, *Problems Incident to the Marketing of Gas*, 5th ANN. INST. ON OIL AND GAS LAW AND TAX 271, 281 (1954).

⁵³ H.R. REP. No. 1758 & S. REP. No. 1498, 81st Cong., 1st Sess. (1949).

⁵⁴ 96 CONG.REC. 5304 (1950).

⁵⁵ 315 U.S. 575, 62 Sup.Ct. 736, 86 L.Ed. 1037 (1942).

⁵⁶ 320 U.S. 591, 64 Sup.Ct. 281, 88 L.Ed. 333 (1944).

FPC,⁵⁷ a rate case in which the Commission included the production properties of the regulated natural-gas company in its rate base. Four justices dissented and a fifth wrote a concurring opinion upholding the result of the case under the *Hope* total effect doctrine but describing as fantastic the Commission's method of including such properties worth three million dollars in the rate base at less than five thousand dollars.

In *FPC v. East Ohio Gas Co.*,⁵⁸ the Court held that a wholly intrastate natural-gas company was subject to federal regulation because the intrastate company continued the movement of gas through lines continuing the high pressures of the interstate lines. Further Congressional action overturned this decision with a specific amendment removing any federal jurisdiction over intrastate operations subject to state regulation. The amendment also provided that a certification from the state agency that it has regulatory jurisdiction which it is exercising over such operations shall constitute conclusive evidence of such regulatory power or jurisdiction.⁵⁹

In the *Interstate*⁶⁰ case the Court, although recognizing that the Congressional intent of the production and gathering exemption was to preserve the states' powers of regulation, held that *Interstate's* production and gathering had been completed at the time of the sale and therefore regulation was of national rather than local concern. It relied heavily upon the fact that *Interstate* had used its interstate natural-gas company classification to avoid regulation by the State of Louisiana.

The most shocking example of judicial legislation in the natural gas field was enacted on June 7, 1954, when the Supreme Court upheld in the case of *Phillips Petroleum Co. v. Wisconsin*⁶¹ the reversal by the District of Columbia Court of Appeals of the Commission order finding it had no jurisdiction over an independent producer. The Commission had found as a fact that Phillips' relevant operations consisted of production and gathering within the express exemption of the Natural Gas Act and that rate regulation by a federal agency would be inconsistent and a substantial interference with state regulatory functions. Such fact findings, heretofore binding upon an appellate court, were breezily dismissed as "without adequate basis at law" by the five-man majority. The bare majority attempted to use the *Interstate* case to justify their position on the exemption, but in that case the state did not oppose the federal regulation whereas in *Phillips* the producing states had actively opposed the Court of Appeals' action in reversing the Commission. As a matter of fact, the Court partially repudiated the *Interstate* case by holding that "the jurisdiction of

⁵⁷ 324 U.S. 581, 65 Sup.Ct. 829, 89 L.Ed. 1206 (1945).

⁵⁸ 338 U.S. 464, 70 Sup.Ct. 266, 94 L.Ed. 268 (1950).

⁵⁹ 68 Stat. 36, as amended, 15 U.S.C. § 717c (1958).

⁶⁰ 331 U.S. 682, 67 Sup.Ct. 1482, 91 L.Ed. 1742 (1947).

⁶¹ 347 U.S. 672, 74 Sup.Ct. 794, 98 L.Ed. 1035 (1954).

the Federal Power Commission was not intended to vary from state to state, depending upon the degree of state regulation and of state opposition to federal control."⁶²

But the real repudiation of stare decisis was of the *Panhandle Eastern* case. Compare the language of that case as set out above with these pervasive words of the five-man *Phillips* decision: ". . . [W]e believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates 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."⁶³

A strong dissent by Justice Clark characterized the majority opinion as contrary to the intention of Congress and the understanding of the states as well as the Commission. Justice Douglas filed a separate dissent emphasizing the factual aspects of the case showing *Phillips* operations to be local and the sales to be incidental to those operations.

Congress responded in the next session with the Harris Bill, which was designed to eliminate the confusion caused by the *Phillips* judicial legislation. Unfortunately, President Eisenhower vetoed this bill which he described as good legislation for allegedly improper lobbying.

The *Phillips* case represents the bootstrap by which the Supreme Court seeks to legislate state control over gas conservation out of existence. Upon this shaky foundation of a five-man, congressionally-repudiated decision, another five men have sought to deprive the states of their regulatory power in the *Kansas* case.

The effect of this decision upon the states and the industry can be gauged by the fact that fifteen major oil and gas producing states submitted for the court's consideration a brief which warned that chaos would result from striking down ratable-take orders upon which conservation for protection of correlative rights is built. The Mid-Continent Oil and Gas Association also filed a "friend-of-the-court" brief stressing the necessity of state ratable-take authority for efficient and equitable conservation.

Subsequent to the decision, former Texas Railroad Commissioner Murray testified before the FPC in the *Permian Basin Area Rate* case that as he understood the majority opinion the Railroad Commission no longer has the "power to compel an interstate pipeline to purchase gas ratably. . . ." He added "if pipeline companies are permitted to selectively purchase producers' allowables, it may very well develop that the effectiveness of state regulatory proration authority has been critically impaired."⁶⁴

In addition, the Kansas Corporation Commission applied for

⁶² *Id.* at 681, 74 Sup.Ct. at 798, 98 L.Ed. at 1047.

⁶³ 347 U.S. at 682, 74 Sup.Ct. at 799, 98 L.Ed. at 1047.

⁶⁴ Dallas Morning News, March 24, 1963.

and was denied a rehearing before the U. S. Supreme Court.⁶⁵ Mincing no words, the motion for rehearing charged that the holding violates congressional intent, that the majority misunderstood the facts and that the assumption the ratable-take order would impair FPC authority was without basis in fact. The Kansas Commission concluded: "The decision, if allowed to stand, substantially impairs, if it does not destroy, state regulation of gas conservation in its historic sense. All state control will fall . . . if the reasoning of the majority opinion is consistently applied."⁶⁶

CONSTITUTIONAL CONSIDERATIONS

Where do federal courts find authority to legislate long-recognized state conservation powers out of existence? Certainly it is not Article I, Section 1 of the United States Constitution, which states: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

And it certainly is not the 10th Amendment, which clearly specifies that "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."

In the *Northern Natural* case, five justices claim that if state authority cannot practically regulate a given area, "then we are impelled to decide that federal authority governs."⁶⁷ The Natural Gas Act passed by Congress contains no such language. Apparently these five men believe lack of regulation is illegal and that state ratable-take regulations which have existed for fifty years are impractical.

No constitutional citation is given for this claim; indeed, the Constitution is not mentioned in the decision. The commerce clause is referred to in *Champlin Refining Co. v. Corporation Comm'n*⁶⁸ in which a state proration order was upheld against a challenge under that clause. Yet it is the commerce clause from which must spring whatever power the federal government has to regulate gas. The clause—one of 18 under Article I, Section 8—grants Congress power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." It granted no power to the Supreme Court.

Congress remained within its delegated power by limiting the 1938 Natural Gas Act to the transportation and sale for resale of natural gas in interstate commerce and by specifically exempting production or gathering. It remained for five Supreme Court members to find in the 1954 *Phillips* case "congressional intent to give the Commission jurisdiction over the rates of all wholesales

⁶⁵ *Northern Natural Gas Co. v. Kansas*, —U.S.—, 83 Sup.Ct. 1011, 10 L.Ed.2d *14 (1963).

⁶⁶ *Supra* note 64.

⁶⁷ 83 Sup.Ct. at 651, 9 L.Ed.2d at *608.

⁶⁸ 286 U.S. 210, 52 Sup.Ct. 559, 76 L.Ed. 1062 (1932).

of natural gas in interstate commerce . . . whether occurring before, during or after transmission by an interstate pipeline company."⁶⁹

How does gas get into interstate commerce before transmission? Physically, of course, it cannot. Rhetorically, the Supreme Court concocted an explanation in *Wickard v. Fillburn*,⁷⁰ a 1942 case approving a fine imposed by the Federal Agriculture Department upon a man for planting more wheat for his own consumption than the Department permitted. The Court there held that even if an "activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."⁷¹ In another case, *United States v. Darby*,⁷² the Federal Supreme Court pulled out all the stops: "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states."⁷³ Comparing such language with the constitutional language forebodes the further assertion that such power "extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end"⁷⁴—briefly, the end justifies the means. From there the court found it a small step to ruling that the "federal commerce power is as broad as the economic needs of the nation."⁷⁵ All could agree that, judged by our debt, such need is more than \$300 billion broad, but as a legal principle, who is to decide the "economic needs of the nation"—the Supreme Court? Not by any authority of the U. S. Constitution!

To claim that the power to regulate commerce among the states is not confined to the regulation of commerce among the states is not only nonsense, it is usurpation—particularly in view of the stringent limitations of the 10th Amendment. These prior usurpations were made by the Court to extend congressional power; the *Northern Natural* case extends not the power of Congress—Congress specifically denied such an extension—but extends the federal commerce power by unconstitutional judicial legislation.

REMEDIAL ACTION

A system of checks and balances is inherent within our constitutional system of government. This system has already proved its worth in conjunction with the Natural Gas Act. In 1950, the

⁶⁹ 347 U.S. 672, 682, 74 Sup.Ct. 794, 799, 98 L.Ed. 1035, 1047-48 (1954).

⁷⁰ 317 U.S. 111, 63 Sup.Ct. 82, 87 L.Ed. 122 (1942).

⁷¹ *Id.* at 125, 63 Sup.Ct. at 89, 87 L.Ed. at 135.

⁷² 312 U.S. 100, 61 Sup.Ct. 451, 85 L.Ed. 609 (1941).

⁷³ *Id.* at 118, 61 Sup.Ct. at 459, 85 L.Ed. at 619.

⁷⁴ *Ibid.*

⁷⁵ *American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 104, 67 Sup.Ct. 133, 141, 91 L.Ed. 103, 115 (1946).

United States Supreme Court extended federal regulation to an intrastate distribution company on the theory that the commerce power was not restricted to the constitutional regulation of commerce "among the several states."⁷⁶ Congress rectified this mistake of the court by enacting the Hinshaw Amendment⁷⁷ which expressly exempted all state-regulated gas distributors.

It is within the power of Congress to free gas producers from federal regulation never intended by Congress. An amendment which clearly and expressly exempts independent producers and state regulatory orders from FPC jurisdiction would reaffirm the constitutional mandate vesting exclusive legislative power in Congress.

Such congressional action would have far-reaching effects even more beneficial than freeing the petroleum industry to resume developing fuel supplies necessary to meet the demands of both the national economy and the national defense. Of still greater importance, such action would reassure us that our government is to remain one of laws and not of men, that no branch of government may yet usurp powers constitutionally granted another and that unconstitutional, socialistic control of production and distribution by government will not be tolerated.

Congress does not bear sole responsibility for upholding our system of government. Every lawyer has taken an oath to support the Constitution of the United States; indeed the first object of the American Bar Association is "to uphold and defend the Constitution of the United States and maintain representative government . . ."⁷⁸ The Constitution can be upheld and representative government maintained only so long as the legislative power remains in the hands of the Congress elected by the people. The *Kansas* decision is one that should provoke all lawyers—and particularly those associated with the petroleum industry—to petition their representatives to restore and reassert Constitutional legislative authority with respect to the Natural Gas Act.

⁷⁶ F.P.C. v. East Ohio Gas Co., 338 U.S. 464, 70 Sup.Ct. 266, 94 L.Ed. 268 (1950).

⁷⁷ 68 Stat. 36, as amended 15 U.S.C. § 717c (1958).

⁷⁸ 49 A.B.A.J. 1031 (1963).

