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2016]

*ONEOK, INC. V. LEARJET, INC.*: THE SUPREME COURT  
NARROWS THE PREEMPTIVE SCOPE OF THE  
NATURAL GAS ACT AND EXTRACTS A  
WIN FOR STATE COURTS

I. INTRODUCTION

As one of the primary sources of energy in the United States, the transportation and sale of natural gas is a major concern for both the federal and state governments.<sup>1</sup> Consequently, all stages of the production, transportation, and sale of natural gas are highly regulated.<sup>2</sup> Congress passed the Natural Gas Act (NGA) in order to uniformly regulate the natural gas industry by separating the federal authority from state authority.<sup>3</sup> Complications arise, however, when courts are faced with determining whether federal authority preempts the states' authority pursuant to the NGA.<sup>4</sup>

The Supreme Court of the United States has reviewed this preemption issue a number of times, but most recently in *ONEOK, Inc. v. Learjet, Inc.*<sup>5</sup> during the October 2014 Term.<sup>6</sup> The issue before the Court in *Oneok* was whether, in some instances, both the federal and state governments could regulate natural gas prices under the

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1. See Cathryn Neaves, Note, *Proper Legal Analysis, Improper Result: Recent History of Judicial Preemption Interpretation of the Federal Power Act and Natural Gas Act*, 23 SUFFOLK U. L. REV. 829, 829 (1989) (discussing importance of energy regulation). For a discussion of the federal and state governments' role in the natural gas industry, see *infra* notes 55-79 and accompanying text.

2. For a discussion of how the natural gas industry is regulated, see *infra* notes 55-79 and accompanying text.

3. See Neaves, *supra* note 1, at 829-30 (discussing purpose of NGA). For a discussion of what the NGA generally provides, see *infra* notes 59-61 and accompanying text.

4. See Neaves, *supra* note 1, at 830 (stating existence of continuing issues despite line drawn by NGA). For a discussion of the issue before the Court in *ONEOK* and how the Court resolved it, see *infra* notes 100-133 and accompanying text. For a discussion of the Court's precedent regarding the NGA, see *infra* notes 80-95.

5. 135 S. Ct. 1591 (2015).

6. For a discussion of the Court's precedent regarding the NGA, see *infra* notes 80-95 and accompanying text. For a discussion of the underlying facts in *ONEOK*, see *infra* notes 15-39.



362 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 361

NGA.<sup>7</sup> The Court ultimately allowed concurrent regulation to occur, thus weakening the preemptive scope of the NGA.<sup>8</sup>

First, this Note considers the underlying facts and procedural history in *ONEOK*.<sup>9</sup> Second, this Note examines the background of the Supremacy Clause, the NGA, and the Supreme Court's precedent interpreting the NGA's preemptive scope.<sup>10</sup> Third, this Note examines Justice Breyer's majority opinion, Justice Thomas's concurring opinion, and Justice Scalia's dissenting opinion.<sup>11</sup> Fourth, this Note critically analyzes both the majority and dissenting opinions in relation to the precedent regarding the NGA.<sup>12</sup> Through this analytical comparison, this Note concludes that the majority's holding runs contrary to the Court's precedent.<sup>13</sup> Lastly, this Note determines what impact the Court's decision in *ONEOK* will likely have on the natural gas industry.<sup>14</sup>

## II. FACTS

*ONEOK* originated from a number of civil actions brought in federal and state courts alleging antitrust violations by interstate pipeline companies selling natural gas.<sup>15</sup> By the time the matter reached the Supreme Court, the Court had to determine whether the plaintiffs could bring state antitrust claims when the interstate pipeline companies' alleged actions had an effect on rates within the federal government's jurisdiction.<sup>16</sup> Accordingly, the Court

7. See Neaves, *supra* note 1, at 830 (explaining issues persist despite clear line drawn by NGA). For a discussion of the issue confronting the Court in *ONEOK*, see *infra* notes 15-39 and accompanying text.

8. See *ONEOK*, 135 S. Ct. at 1594 (holding state antitrust claims are not preempted by NGA even when alleged practices impact matters within federal jurisdiction). For a discussion of the majority's opinion, see *infra* notes 100-133 and accompanying text.

9. For a discussion of *ONEOK*'s facts, see *infra* notes 15-39 and accompanying text.

10. For a discussion of the necessary background information to the Court's opinion in *ONEOK*, see *infra* notes 40-95 and accompanying text.

11. For a discussion of the majority, concurring, and dissenting opinions in *ONEOK*, see *infra* notes 100-156 and accompanying text.

12. For a critical analysis of the majority and dissenting opinions, see *infra* notes 157-187 and accompanying text.

13. For a discussion of why the majority's opinion is inconsistent with the Court's precedent, see *infra* notes 157-187 and accompanying text.

14. For a discussion of *ONEOK*'s impact on natural gas regulation, see *infra* notes 188-212 and accompanying text.

15. See *In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 727-28 (9th Cir. 2013) (explaining procedural history of *ONEOK*), *aff'd in part, rev'd in part sub nom.*, *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015).

16. See *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594 (2015) (stating issue confronting Court).

had to once again assess the preemptive scope of the NGA more than three-quarters of a century after the act was passed.<sup>17</sup>

The civil actions brought against various interstate pipeline companies were a result of the Federal Energy Regulatory Commission's (FERC) investigation following the 2000-2002 energy crisis.<sup>18</sup> This investigation uncovered reports of false information included in price indices, as well as wash sales, causing massive price increases.<sup>19</sup> As a result of these discovered practices, FERC and Congress took regulatory measures, while private consumers responded with litigation.<sup>20</sup>

The consumers that brought claims against interstate pipelines in federal and state courts across the nation were direct purchasers of natural gas from interstate pipeline companies.<sup>21</sup> In early suits, defendant-pipeline companies claimed that the plaintiffs' claims were barred by the filed-rate doctrine.<sup>22</sup> "The filed-rate doctrine 'is a judicial creation that arises from decisions interpreting federal statutes that give federal agencies exclusive jurisdiction to set rates for special utilities' and bars 'challenges under state law and federal antitrust laws to rates set by federal agencies.'"<sup>23</sup> The district courts

17. For a discussion of the Supreme Court's precedent regarding the preemptive scope of the NGA, see *infra* notes 80-95 and accompanying text.

18. See *Natural Gas Antitrust Litig.*, 715 F.3d at 724 (explaining events leading to litigation against interstate pipelines). Through these investigations, FERC found that "[s]pot gas prices rose to extraordinary levels, facilitating the unprecedented price increase in the electricity market." *Id.* (internal quotation marks omitted). For a further discussion of this investigation and its impacts, see *infra* notes 73-79 and accompanying text. FERC is the government agency authorized to set rates for sales within the federal government's jurisdiction under the NGA. See *ONEOK*, 135 S. Ct. at 1596. FERC was formally known as the Federal Power Commission (FPC). See *id.* For a further discussion of FERC's background and the delineation of jurisdiction over the natural gas industry, see *infra* notes 56-61 and accompanying text.

19. See *Natural Gas Antitrust Litig.*, 715 F.3d at 724-25 (detailing FERC's discoveries of improper practices by traders). Wash sales are "prearranged sales in which traders 'agreed to execute a buy or a sell on an electronic trading platform . . . and then to immediately reverse or offset the first trade by bilaterally executing over the telephone an equal and opposite buy or sell.'" *Id.* at 725. For a further discussion of how wholesale rates are established and FERC's discovery regarding that method, see *infra* notes 62-74 and accompanying text.

20. For a discussion of FERC and Congress's response, see *infra* notes 75-79 and accompanying text.

21. See *Natural Gas Antitrust Litig.*, 715 F.3d at 727 (describing various class actions against interstate pipelines). "Two of the earliest cases . . . alleged both Sherman Act and parallel state antitrust claims." *Id.* (citations omitted).

22. See *id.* (providing procedural history of earliest cases in antitrust class actions against interstate pipelines).

23. See *id.* at 727 n.8 (citing *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1033 (9th Cir. 2007)) (defining filed-rate doctrine). Therefore, under this doctrine, courts are not allowed to assess what rates are reasonable because FERC

364 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 361

in these earlier cases used this doctrine to dispose of state antitrust claims, but refrained from answering the presented preemption questions.<sup>24</sup> In an unrelated case involving similar facts, however, the Ninth Circuit invalidated the use of the filed-rate doctrine in this context.<sup>25</sup>

The interstate pipeline-defendants successfully removed and consolidated subsequent class actions for alleged price manipulation into a multi-district litigation (MDL) in the United States District Court for the District of Nevada.<sup>26</sup> The defendants filed motions for summary judgment, arguing that FERC had jurisdiction because the alleged practices also impacted interstate rates for natural gas.<sup>27</sup> Under this argument, the defendants claimed that the NGA preempted the state antitrust claims.<sup>28</sup>

The district court granted the defendants' motion for summary judgment.<sup>29</sup> The court based its reasoning on the word "practices" in the NGA.<sup>30</sup> The court found that because the defendants' alleged practices affected rates within FERC's jurisdiction, FERC's authority preempted that of the states.<sup>31</sup>

The plaintiffs appealed to the Ninth Circuit Court of Appeals, arguing that the district court erroneously granted the defendants' motion for summary judgment.<sup>32</sup> The appellate court reversed the lower court's decision, and held that the NGA did not preempt the

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has exclusive jurisdiction over determining what rates are reasonable. *See Texas-Ohio, Inc. v. Centerpoint Energy, Inc.*, 368 F. Supp. 2d 1110, 1114-15 (D. Nev. 2005).

24. *See Texas-Ohio*, 368 F. Supp. 2d at 1116 (stating filed-rate doctrine bars plaintiffs' claims).

25. *See E. & J. Gallo Winery*, 503 F.3d at 1048 (holding filed-rate doctrine does not bar state or federal antitrust claims).

26. *See Natural Gas Antitrust Litig.*, 715 F.3d at 727 (detailing removal and consolidation of class actions against pipelines).

27. *See In re W. States Wholesale Natural Gas Antitrust Litig.*, 2:03-CV-1431-PMP-PAL, 2011 U.S. Dist. LEXIS 83062, at \*47-48 (D. Nev. July 18, 2011) (stating grounds for defendants' motion for summary judgment).

28. *See ONEOK*, 135 S. Ct. at 1598 (explaining defendants' preemption argument).

29. *See Natural Gas Antitrust Litig.*, 2011 U.S. Dist. LEXIS 83062, at \*108 (granting defendants' motion).

30. *See id.* at \*100 (focusing on practices leading to energy crisis). "[T]he term 'practices' is 'limited to those methods or ways of doing things on the part of the [natural gas company] that directly affect the rate or are closely related to the rate, not all those remote things beyond the rate structure that might in some sense indirectly or ultimately do so.'" *Id.* at \*92 (quoting *Cal. Indep. Sys. Operator Corp. v. Fed. Energy Regulatory Comm'n*, 372 F.3d 395, 403 (D.C. Cir. 2004)).

31. *See id.* at \*103-04 (stating FERC maintains jurisdiction since alleged practices affected rates within their jurisdiction).

32. *See Natural Gas Antitrust Litig.*, 715 F.3d at 728 (stating grounds for appeal).



state law claims.<sup>33</sup> The appellate court found the district court's interpretation of the NGA and FERC's jurisdiction overly expansive.<sup>34</sup> The court found that Congress intended to give FERC only limited jurisdiction when it passed the NGA.<sup>35</sup> Further, the court held that the claims were outside FERC's jurisdiction because the claims pertained to direct, rather than wholesale, sales.<sup>36</sup> The court further reasoned that the state law claims were not preempted because the relevant transactions were within the jurisdiction of the states.<sup>37</sup> The Ninth Circuit, therefore, ultimately held that it was improper for the district court to grant summary judgment.<sup>38</sup> The defendants subsequently appealed to the Supreme Court of the United States, and the Court granted certiorari.<sup>39</sup>

### III. BACKGROUND

First, this section of the Note examines the Supremacy Clause of the United States Constitution, as well as preemption of state law by federal law.<sup>40</sup> Second, this section details the history of the natural gas industry in the United States.<sup>41</sup> Third, this section explains a number of Supreme Court cases examining the scope of the NGA's preemptive effect on state regulation over the natural gas industry.<sup>42</sup>

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33. *See id.* at 729 (reversing district court's ruling).

34. *See id.* (holding district court's reading of NGA to be contrary to Congress's intent).

35. *See id.* (citing *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947)) (stating NGA only grants limited jurisdiction to FERC).

36. *See id.* at 731 (finding transactions at issue to be outside of FERC's jurisdiction).

37. *See Natural Gas Antitrust Litig.*, 715 F.3d at 731 (holding claims to be properly within states' jurisdiction).

38. *See id.* at 747 (reversing District Court of Nevada's grant of summary judgment).

39. *See ONEOK*, 135 S. Ct. at 1599 (granting certiorari in order to settle dispute amongst lower courts over preemptive scope of NGA). "The pipelines. . . asked us to resolve confusion in the lower courts as to whether the Natural Gas Act pre-empts retail customers' state antitrust law challenges to practices that also affect wholesale rates." *Id.* (differentiating *Natural Gas Antitrust Litig.*, 715 F.3d at 729-36, from *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843 (Tenn. 2010)).

40. For a discussion of how federal law preempts state law in some instances, see *infra* notes 43-54 and accompanying text.

41. For a history of the natural gas industry, see *infra* notes 55-79 and accompanying text.

42. For a discussion of the Court's precedent regarding the NGA, see *infra* notes 80-95 and accompanying text.

366 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 361

### A. The Supremacy Clause and Preemption

The Supremacy Clause of the United States Constitution provides that federal law is always supreme to state and local laws.<sup>43</sup> The legal authority of the states, however, is far from obsolete.<sup>44</sup> This dual regulatory authority is often a conductor for extensive constitutional debate.<sup>45</sup>

Congress can preempt state laws either expressly or implicitly.<sup>46</sup> State laws are expressly preempted when a federal statute is drafted with a provision excluding states from regulating a particular area covered by the federal statute.<sup>47</sup> Despite clear congressional intent in these instances, the Supreme Court has held consistently that courts should “apply some version of a presumption against preemption.”<sup>48</sup>

Contrastingly, courts may find federal law to preempt state law without the express will of Congress.<sup>49</sup> Federal law may implicitly preempt law in two ways: through field preemption or through conflict preemption.<sup>50</sup> Field preemption occurs when a state law is preempted from regulating a particular “field” that the federal government is already regulating.<sup>51</sup> Conflict preemption applies when federal and state law conflict to such an extent as to make it impossible to comply with both.<sup>52</sup> Federal law preempts state or

43. U.S. CONST. art. VI, cl. 2 (stating general constitutional principle that federal law trumps state law). More specifically, the clause states, “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” *Id.*

44. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225 (2000) (emphasizing that state governments maintain authority over many areas of law also regulated by federal government).

45. See *id.* (stating importance of relationship between federal and state law).

46. See *id.* at 225-29 (explaining different types of preemption).

47. See *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) (defining express preemption).

48. Nelson, *supra* note 44, at 227 (citing *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516, 518 (1992); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (providing that courts narrowly read express preemption clauses).

49. See *id.* (stating courts may infer Congress’s intent to preempt state law). “[A] federal regulatory scheme may be ‘so pervasive’ as to imply ‘that Congress left no room for the States to supplement it.’” *Id.* (citing *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

50. See *ONEOK*, 135 S. Ct. at 1595 (reviewing sub-sets of implicit preemption).

51. See *id.* (stating states may not regulate same field as federal law). “[T]he ‘federal interest’ in the field that a federal statute addresses may be ‘so dominant’ that federal law ‘will be assumed to preclude enforcement of state laws on the same subject.’” Nelson, *supra* note 44, at 227 (citing *Rice*, 331 U.S. at 230).

52. See *ONEOK*, 135 S. Ct. at 1595 (citing *California v. ARC Am. Corp.*, 490 U.S. 93, 100, 101 (1989)) (describing two ways in which conflict preemption

local law under either theory of implied preemption.<sup>53</sup> Due to the interstate nature of the natural gas industry, therefore, complex preemption issues tend to arise.<sup>54</sup>

#### B. The Natural Gas Industry in the United States and (De)regulation

The natural gas industry has three distinct components: natural gas extraction from the ground, wholesale transactions by interstate pipelines to distributors, and natural gas distributor retail sales.<sup>55</sup> States were originally the sole regulatory bodies controlling all three components of the natural gas industry.<sup>56</sup> By the twentieth century, however, the Supreme Court held that the Commerce Clause prevented states from regulating the interstate shipment and sale of natural gas.<sup>57</sup> Then, in 1938, Congress passed the NGA, which granted power to the federal government to regulate interstate sales and other related activities.<sup>58</sup>

The NGA “gives rate-setting authority to [FERC].”<sup>59</sup> It limits this authority, however, to the rates of natural gas being trans-

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arises); *see also* *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 373-77 (1988) (holding state inquiry into FERC’s determination of fair and reasonable rates because of highly probable potential for conflict); *Fed. Power Comm’n v. La. Power & Light Co.*, 406 U.S. 621, 633-35 (1972) (holding state regulation is preempted because of “unavoidable conflict” with federal regulation).

53. *ONEOK*, 135 S. Ct. at 1595 (stating ways state law may be preempted by federal law).

54. *See id.* at 1601 (stating that there is no clear line between state and federal law in natural gas industry). *But see id.* at 1607 (Scalia, J., dissenting) (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986)) (stating Congress intended for there to be clear line between federal and state power over natural gas industry).

55. *See id.* at 1603-04 (Scalia, J., dissenting) (detailing primary components of natural gas industry).

56. *See id.* at 1595 (citing 1 *Regulation of the Natural Gas Industry* § 1.03 W. Mogel ed. 2008)) (stating origins of jurisdiction over natural gas industry).

57. *See ONEOK*, 135 S. Ct. at 1595 (citing *Pub. Util. Comm’n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89-90 (1927); *Mo. ex rel. Barrett v. Kan. Natural Gas Co.*, 265 U.S. 298, 307-08 (1924)) (explaining limitations on state regulatory power over natural gas industry). Under the Commerce Clause, the power to regulate commerce between states is given to the federal government. *See* U.S. CONST. art. I, § 8, cl. 3.

58. *See ONEOK*, 135 S. Ct. at 1596 (citations omitted) (introducing federal regulation of natural gas industry); *see also* 15 U.S.C. § 717 (2012) (giving federal jurisdiction over interstate sales of natural gas).

59. *See ONEOK*, 135 S. Ct. at 1596 (explaining power held by FERC under NGA). “That authority allows FERC to determine whether ‘any rate, charge, or classification . . . collected by any natural-gas company in connection with any transportation or sale of natural gas, *subject to the jurisdiction of [FERC],*’ or ‘any rule, regulation, practice, or contract affecting *such* rate, charge, or classification is un-



368 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 361

ported and sold in interstate commerce.<sup>60</sup> States, therefore, are left to regulate intrastate transportation, retail sales, and the production or gathering of natural gas.<sup>61</sup>

The federal government's rate-setting method for interstate sales has changed over time, emphasizing its push towards deregulation of the natural gas industry.<sup>62</sup> Initially, FERC determined rates according to the costs interstate pipelines put into providing their services.<sup>63</sup> In the 1954, however, the Supreme Court held in *Phillips Petroleum Co. v. Wisconsin*<sup>64</sup> that "the [NGA] required regulation of prices at the interstate pipelines' buying end-*i.e.*, the prices at which field producers sold natural gas to interstate pipelines."<sup>65</sup> By the 1970s, natural gas shortages led Congress to favor "deregulation designed to rely upon competition, rather than regulation, to keep field prices low."<sup>66</sup> FERC thereafter followed Congress's intent and implemented less strict regulation emphasizing competition.<sup>67</sup> Under this system, FERC issued blanket certificates that allowed interstate sellers, otherwise known as jurisdictional sellers, "to charge market-based rates for gas, provided that FERC had first determined that sellers lacked market power."<sup>68</sup> As a result of deregulation, many natural gas consumers chose to buy their supply directly

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just, unreasonable, unduly discriminatory, or preferential.'" *Id.* (alteration in original) (quoting 15 U.S.C. § 717d(a)).

60. *See id.* (quoting 15 U.S.C. § 717(b)) (stating limitations of FERC's jurisdiction). Specifically, FERC's jurisdiction is limited to "the transportation of natural gas in interstate commerce," "the sale in interstate commerce of natural gas for resale," and "natural gas companies engaged in such transportation or sale." 15 U.S.C. § 717(b).

61. *See* *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 507 (1989) (stating what jurisdiction NGA maintains for states to regulate).

62. *See ONEOK*, 135 S. Ct. at 1596-97 (detailing rate-setting authority of FERC over time).

63. *See id.* at 1596 (citing FERC, *Cost-of-Service Rates Manual* 6 (June 1999)) (explaining FERC's "cost-of-service" method of setting interstate rates).

64. 347 U.S. 672 (1954).

65. *ONEOK*, 135 S. Ct. at 1596 (alterations in original) (citing *Phillips Petroleum Co.*, 347 U.S. at 682, 685) (noting shift in federal regulation over natural gas).

66. *Id.* at 1597 (citing Natural Gas Policy Act of 1978, 92 Stat. 3409 (codified in part at 15 U.S.C. § 3301 (2015))); Natural Gas Wellhead Decontrol Act of 1989, Pub L. No. 101-60, 103 Stat. 157) (introducing concept of deregulation of natural gas industry).

67. *See id.* (stating FERC's change in how it regulated interstate rates). "FERC's oversight of the natural-gas market largely consisted of (1) ex ante examinations of jurisdictional sellers' market power, and (2) the availability of a complaint process under § 717(d)(a)." *Id.* (citing Brief for United States as Amicus Curiae at 4, *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) (No. 13-271)).

68. *Id.* (citing Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol; Order Denying Rehearing and Clarifying Order Nos. 636 and 636-A, 57 Fed. Reg. 57957, 57957-58 (Aug. 3, 1992)) (detailing issuances of blanket certificates to jurisdictional sellers).

from interstate pipelines for their own consumption, rather than from distributors.<sup>69</sup>

Deregulation, however, was not without its flaws.<sup>70</sup> The consumers who directly bought their supply of natural gas from interstate pipelines relied on private indices to determine reasonable prices for natural gas.<sup>71</sup> These indices were based on information provided by natural gas sellers, such as interstate pipelines.<sup>72</sup> In 2003, FERC discovered that false information was being provided to these indices, causing prices to skyrocket.<sup>73</sup> These practices impacted not only federally controlled wholesale rates, but also retail rates, which are left to the states.<sup>74</sup>

In response to these discoveries, FERC issued a Code of Conduct, which prohibited blanket certificates to interstate sellers “engaging in actions without a legitimate business purpose that manipulate or attempt to manipulate market conditions, including wash trades and collusion.”<sup>75</sup> FERC also responded by establishing a policy on publishing and reporting information to private indices.<sup>76</sup> Further, FERC terminated blanket certificates given to those they discovered were engaged in wash trades.<sup>77</sup> Congress re-

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69. *See id.* (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 284 (1997)) (explaining impact deregulation had on natural gas consumption). In fact, the plaintiffs who brought lawsuits leading up to *ONEOK* directly bought their natural gas from interstate pipelines. *See id.* at 1594.

70. *See ONEOK*, 135 S. Ct. at 1597-98 (discussing issues with deregulation of natural gas industry).

71. *See id.* at 1597 (explaining method by which natural gas consumers determined what rates were reasonable).

72. *See id.* (stating how private indices obtain data).

73. *See id.* (citing *Final Report on Price Manipulation in Western Markets*, FED. ENERGY REGULATORY COMM’N 88, 89 (Mar. 2003), <https://www.ferc.gov/legal/majord-reg/land-docs/PART-I-3-26-03.pdf>) (detailing false reporting to private indices). FERC discovered practices involving false information included fabrications of data and wash sales. *Id.* (citing *Final Report on Price Manipulation in Western Markets*, *supra* note 73, at 215). For a discussion of FERC’s discoveries and the definition of wash sale, see *supra* notes 18-20 and accompanying text.

74. *See ONEOK*, 135 S. Ct. at 1597 (quoting *Final Report on Price Manipulation in Western Markets*, *supra* note 73, at 85-86) (explaining impact of false information practices on interstate and intrastate sales).

75. Amendments to Blank Certificate Sales, 68 Fed. Reg. 66323-01, 66324 (Nov. 26, 2003) (to be codified at 18 C.F.R. pt. 284) (amending process by which blanket certificates are granted to jurisdictional sellers). FERC also required “accurate and factual information” be provided to the private indices. *Id.* at 66337.

76. *See Price Discovery in Natural Gas and Elec. Mkts.*, 104 FERC ¶ 61,121, 61,407-08 (2003) (setting forth policy guidelines regarding private indices).

77. *See Enron Power Mktg., Inc.*, 103 FERC ¶ 61,343, 62,303 (2003) (terminating blanket certificates to certain interstate sellers).

370 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 361

sponded by passing the Energy Policy Act of 2005,<sup>78</sup> which increased FERC's ability to prevent price manipulation and other practices negatively impacting the services within FERC's jurisdiction.<sup>79</sup>

### C. Courts' Interpretation of the Preemptive Scope of the Natural Gas Act

The Supreme Court of the United States has debated the preemptive scope of the NGA for decades.<sup>80</sup> One of the earliest cases was *Public Utilities Commission of Ohio v. United Fuel Gas Co.*,<sup>81</sup> which the Court decided just after the inception of the NGA.<sup>82</sup> In that case, the Court examined the legislative history of the Act and found that it was "meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states."<sup>83</sup> The Court further noted Congress's intent for there to be a "harmonious, dual system of regulation of the natural gas industry" by both the federal and state governments.<sup>84</sup>

This principle of harmonious regulation becomes complicated, however, when particular practices affect both the interstate and intrastate levels of the natural gas industry.<sup>85</sup> For example, subsequent cases established that the federal government could regulate interstate wholesale transactions even if the federal government knowingly impacted intrastate prices.<sup>86</sup> As the Court would discuss in *ONEOK*, however, it is questionable whether states

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78. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (providing FERC with greater regulatory abilities).

79. See 15 U.S.C. § 717c-1 (2012) (allowing FERC to promulgate rules and order targeting price manipulation).

80. For more information on the Supreme Court's stance on the preemptive scope of the NGA, see *infra* notes 82-95 and accompanying text.

81. 317 U.S. 456 (1942).

82. See *id.* 460-61 (stating how NGA was passed during litigation process).

83. *Id.* at 467 (establishing legislative intent of NGA).

84. *Id.* (making claim for harmonious regulation). "Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other." Fed. Power Comm'n v. Panhandle E. Pipe Line Co., 337 U.S. 498, 513 (1949) (describing delineation of authority between state and federal governments under NGA).

85. For a discussion of how the complications associated with "harmonious regulation" arise, see *supra* note 74 and accompanying text.

86. See *Colo. Interstate Gas Co. v. Fed. Power Comm'n*, 324 U.S. 581, 602-03 (1945) (ruling FPC may set wholesale rates encouraging conservation from natural gas producers); see also *Fed. Power Comm'n v. Conway Corp.*, 426 U.S. 271, 276-80 (1976) (holding FPC may regulate interstate sales in order to simmer anticompetitive activities in retail market). *But see* *Scheidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 n.11 (1988) (stating NGA does not preempt traditional areas of state regulation).

can regulate areas that impact interstate sales.<sup>87</sup> It must be determined, therefore, whether the line separating federal and state authority is clear and distinct or unclear and therefore subject to case-by-case determinations.<sup>88</sup>

*Northern Natural Gas Co. v. State Corp. Commission of Kansas*<sup>89</sup> and *Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*<sup>90</sup> were two important cases wherein the Court examined state regulation to determine whether or not federal law preempted it.<sup>91</sup> In *Northern Natural Gas Co.*, the state regulatory commission's order required interstate pipelines to purchase their supply from wells located within the state at rates established by the state.<sup>92</sup> The Court invalidated the state orders, holding that they "necessarily deal[t] with matters which directly affect[ed] the ability of the [FPC] 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 [NGA]."<sup>93</sup> In *Northwest Central Pipeline Corp.*, however, the Court upheld a state regulation restricting when producers may extract gas because the activity being regulated was "the physical act[ ] of drawing gas from the earth," an activity within states' jurisdiction.<sup>94</sup> Both of these cases were central to the dispute before the Court in *ONEOK*: whether courts searching for

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87. For a discussion of how this complicated issue arose, see *supra* note 74 and accompanying text.

88. See *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (quoting *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964)) (describing existence of bright line separating state and federal jurisdiction over natural gas regulation).

89. 372 U.S. 84 (1962).

90. 489 U.S. 493 (1989).

91. For a discussion of the Court's analyses of these cases, see *infra* notes 112-114 and accompanying text. To see how the dissent's interpretation differed, see *infra* notes 150-153 and accompanying text.

92. See *N. Natural Gas Co.*, 372 U.S. at 88-89 (providing factual background of dispute between interstate sellers and state commission).

93. *Id.* at 91-92 (holding state order impeded on FPC's jurisdiction and was therefore preempted). In a similar case, the Supreme Court invalidated a state's requirement that pipelines obtain state approval before issuing stocks by holding that the requirement was a direct regulation of interstate activities. See *Schneidewind*, 485 U.S. at 306-09.

94. *Nw. Cent. Pipeline Corp.*, 489 U.S. at 510 (quoting *N. Natural Gas Co.*, 372 U.S. at 90) (internal quotation marks omitted) (holding state regulation is not preempted). In ruling, the Supreme Court has stated that "our cases have consistently recognized a significant distinction . . . between conservation measures aimed directly at interstate purchasers and wholesales . . . and those aimed at producers and production." *N. Natural Gas Co.*, 372 U.S. at 94.

372 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 361

preemption should examine what the state is regulating or why the state is regulating it.<sup>95</sup>

#### IV. NARRATIVE ANALYSIS

This section of the Note examines the three opinions in *ONEOK*.<sup>96</sup> First, it discusses Justice Breyer's majority opinion ruling in favor of the respondents.<sup>97</sup> Second, this section looks at Justice Thomas's brief concurring opinion.<sup>98</sup> Finally, this section explores Justice Scalia's dissent.<sup>99</sup>

##### A. Justice Breyer's Majority Opinion

Justice Breyer began his analysis by limiting the scope by which the Court could assess the petitioners' claims.<sup>100</sup> The petitioners argued that "Congress implicitly occupied *the field of matters* related to wholesale transactions and transportation of natural gas in interstate commerce," therefore, the Court limited its review to deciding whether there was field preemption.<sup>101</sup> The Court, thus, refrained from examining whether the state antitrust claims were preempted because they conflicted, or would possibly conflict with, the NGA.<sup>102</sup>

Because the alleged activities had an effect on both wholesale and retail rates, the petitioners argued that the state claims invaded a field already being regulated by the federal government.<sup>103</sup> Further, the petitioners argued that, "letting these actions proceed

95. For a discussion of how the majority uses these two cases, see *infra* notes 110-111 and accompanying text. To see how the dissenting opinion contrarily looks at these cases, see *infra* note 142 and accompanying text.

96. For a discussion of the opinions in *ONEOK*, see *infra* notes 100-156 and accompanying text.

97. For a discussion of the majority's opinion, see *infra* notes 100-133 and accompanying text.

98. For a discussion of the concurring opinion, see *infra* notes 134-137 and accompanying text.

99. For a discussion of the dissenting opinion, see *infra* notes 138-156 and accompanying text.

100. See *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) (limiting review to whether there was field preemption).

101. *Id.* (emphasis in original) (citation omitted) (internal quotation marks omitted) (excluding review of explicit or conflict preemption regarding state antitrust claims).

102. For a definition of conflict preemption, see *supra* note 52 and accompanying text.

103. See *ONEOK*, 135 S. Ct. at 1595 (citation omitted) (citing Brief for Petitioners at 18, *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) (No. 13-271)) (detailing argument by petitioners that state claims are preempted because alleged practices impacted matters with FERC's exclusive jurisdiction).

w[ould] permit state antitrust courts to reach conclusions about that conduct that differ from those that FERC might reach or has already reached.”<sup>104</sup>

The Supreme Court rejected all of the petitioners’ arguments.<sup>105</sup> In doing so, the Court emphasized that the NGA was not passed to decrease the regulatory power of the states.<sup>106</sup> Further, contrary to the petitioners’ arguments and Justice Scalia’s dissent, the Court stated that there was no “clear division between areas of state and federal authority in natural-gas regulation.”<sup>107</sup> According to the Court, accepting the petitioners’ argument would essentially nullify state regulatory authority.<sup>108</sup> Under the Court’s reasoning, if states were unable to regulate activity because it would have an impact on rates regulated by the federal government, they would not be able to regulate the natural gas industry at all.<sup>109</sup>

In establishing a test for determining when federal law preempts state law, the Court stated that “precedent[ ] emphasis[ed] the importance of considering the *target* at which the state law *aims* in determining whether the law is pre-empted.”<sup>110</sup> The Court, therefore, distinguished between two situations: the state aiming regulations directly at an area primarily in the jurisdiction of the federal government and the state aiming its power at

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104. *Id.* at 1599 (providing petitioners’ argument that upholding state law claims will impact uniform natural gas regulation).

105. *See id.* (rejecting petitioners’ conclusions despite having “forceful” arguments).

106. *See id.* (quoting *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm’n of Ind.*, 332 U.S. 507, 517-18 (1947)) (clarifying that NGA does not weaken power of states). The Supreme Court held that “the [NGA] ‘was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.’” *Id.* (quoting *Panhandle*, 332 U.S. at 517-18). Therefore, the Court gave the matter more detailed, cautious review in order to not violate states’ authority under the NGA. *Id.*

107. *Id.* at 1601 (noting lack of clear distinction between federal and state jurisdiction over natural gas industry). The majority stated, “that Platonic ideal does not describe the natural gas regulatory world.” *Id.*

108. *See ONEOK*, 135 S. Ct. at 1601 (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kan.*, 489 U.S. 493, 514 (1989)) (stating implications of petitioners’ argument). The Court hypothesized that, “[s]uppose FERC . . . had denied cost recovery for pipelines’ failure to recycle. Would that fact deny States the power to enact and apply recycling laws? These state laws might well raise pipelines’ operating costs, and thus the costs of wholesale natural gas transportation.” *Id.*

109. *See id.* (describing impact on state regulation if states could not regulate areas affecting wholesale natural gas rates).

110. *Id.* at 1599 (emphasis in original) (establishing field preemption test).

374 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 361

activities within its own jurisdiction.<sup>111</sup> The Court used the regulation at issue in *Northwest Central Pipeline Corp.*, where the state regulated “the timing of gas production from a gas field within the State, even though the regulation might have affected the costs of and the prices of interstate wholesale sales,” in order to highlight the mechanics of this test.<sup>112</sup> By contrast, in *Northern Natural Gas Co.*, because state regulations were “directed at purchasers,” rather than producers, the Court found that field preemption was triggered.<sup>113</sup> In the case at issue, the Court stated that the state antitrust claims were directed at practices related to their effects on *retail* rates, and thus more in line with *Northwest Central Pipeline Corp.*, rather than with *Northern Natural Gas Co.*<sup>114</sup>

The Supreme Court further distinguished the state antitrust claims from *Schneidewind v. ANR Pipeline Co.*,<sup>115</sup> where the state required interstate pipelines to obtain state approval prior to issuing securities.<sup>116</sup> *Schneidewind*, therefore, aligned more with *Northern Natural Gas Co.* because the state attempted to directly regulate the rates of interstate pipelines.<sup>117</sup>

The Court then clarified its “target” test.<sup>118</sup> According to the Court, “the ‘target’ to which our cases refer must mean more than just the physical activity that a State regulates.”<sup>119</sup> Thus, if the test were merely looking at the physical activity being regulated, the fed-

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111. *See id.* (quoting *N. Natural Gas Co. v. State Corp. Comm’n of Kan.*, 372 U.S. 84, 94 (1963)) (stating importance of what state seeks to regulate in finding existence of preemption).

112. *See id.* at 1600 (citing *Nw. Cent. Pipeline Corp.*, 489 U.S. at 514) (providing example of how field preemption test works).

113. *See ONEOK*, 135 S. Ct. at 1600 (citing *N. Natural Gas Co.*, 372 U.S. at 92) (distinguishing *Northwest Central Pipeline Corp.* from *Northern Natural Gas Co.* based on target of state regulation).

114. *See id.* (stating that state antitrust claims are not directly aimed at wholesale rates). For a discussion of *Northwest Central Pipeline Corp.* and *Northern Natural Gas Co.*, see *supra* notes 89-94 and accompanying text.

115. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1987).

116. *See id.* at 306-09 (stating state regulation interferes with field left for federal government to regulate).

117. *See ONEOK*, 135 S. Ct. at 1600 (distinguishing state regulation at issue from state regulation in *Schneidewind*). The Court stated, “[i]ndeed, the Court [in *Schneidewind*] expressly said that the state law was pre-empted because it was ‘directed at . . . the control of rates and facilities of natural gas companies,’ ‘precisely the things over which FERC has comprehensive authority.’” *Id.* (emphasis in original) (quoting *Schneidewind*, 485 U.S. at 308).

118. For a discussion of Justice Scalia’s criticism of the majority’s test, see *infra* notes 141-146 and accompanying text.

119. *ONEOK*, 135 S. Ct. at 1600 (clarifying test does not just refer to physical activity being regulated).

eral government would have authority over all activities impacting wholesale rates.<sup>120</sup>

Justice Breyer then attempted to rebut the dissent's test for field preemption.<sup>121</sup> Under the dissenting opinion's test, state law is preempted whenever it attempts to regulate what the federal government is already regulating.<sup>122</sup> In order to rebut this, the Court looked to *Schneidewind*, where the Court held "that the Natural Gas Act does not pre-empt 'traditional' state regulation, such as state blue sky laws (which, of course, raise wholesale—as well as retail—investment costs)."<sup>123</sup> The Court, therefore, drew comparisons between antitrust laws and blue-sky laws, stating that neither is "aimed at natural-gas companies in particular, but rather all businesses in the marketplace."<sup>124</sup> Further, "[s]tates have a 'long history of' providing 'common-law and statutory remedies against monopolies and unfair business practices.'"<sup>125</sup> According to the Court, the broad applicability of antitrust claims and states' history in regulating antitrust matters prevented the NGA from preempting the state law claims.<sup>126</sup>

The Supreme Court further examined two cases that the petitioners pointed to in support of their argument.<sup>127</sup> The Court, noted, however, that both cases involved conflict preemption,

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120. *See id.* (reemphasizing implications of preempting state claims just because practices also affect wholesale rates). "After all, a single physical action . . . could be the subject of many different laws. . . . [N]o one could claim that FERC's regulation of this physical activity for purposes of wholesale rates forecloses every other form of state regulation that affects those rates." *Id.*

121. For a discussion of Justice Scalia's test, see *infra* note 142 and accompanying text.

122. For a discussion of the dissent's test, see *infra* text accompanying note 142.

123. *ONEOK*, 135 S. Ct. at 1600 (citing *Schneidewind*, 485 U.S. at 308 n.11) (clarifying Court's holding in *Schneidewind*).

124. *Id.* (citing *Schneidewind*, 485 U.S. at 308 n.11) (drawing comparisons between antitrust laws and blue sky laws).

125. *Id.* (quoting *Cal. v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989)) (noting states' long antitrust regulation history).

126. *See id.* at 1601 (adopting broad application of antitrust claims preventing preemption of state claims). According to the Court, "[t]hey are far broader in their application than, for example, the regulations at issue in *Northern Natural Gas Co.*, which applied only to entities buying gas from fields within the State." *Id.* (citing *N. Natural Gas Co.*, 372 U.S. at 85-86) (distinguishing antitrust claims from state regulation at issue in *Northern Natural Gas Co.*).

127. *See id.* (stating petitioners claimed two additional cases purportedly in support of their position). The two cases petitioners asserted were *Mississippi Power & Light Co. v. Mississippi ex rel. Moore* and *Federal Power Commission v. Louisiana Power & Light Co.* *Id.*



376 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 361

rather than field preemption.<sup>128</sup> The Court, therefore, rejected the petitioners' argument under both of these cases because it had limited its review to field preemption.<sup>129</sup> Rather, the Court left it to the lower courts to decide whether conflict preemption can potentially apply under similar circumstances.<sup>130</sup>

Finally, the Court rejected the petitioners' argument that it should defer to FERC in finding that the NGA preempts state antitrust claims.<sup>131</sup> The Court stated that petitioners failed to "point to a specific FERC determination that state antitrust claims fall within the field pre-empted by the Natural Gas Act."<sup>132</sup> Thus, the Supreme Court affirmed the Ninth Circuit's decision and held that the NGA did not preempt the state antitrust claims.<sup>133</sup>

#### B. Justice Thomas's Concurring Opinion

Justice Clarence Thomas concurred in the judgment to express his view that implied preemption is unconstitutional.<sup>134</sup> According to Justice Thomas, federal laws are only supreme to state and local law if they fall within one of the powers expressly given to Congress

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128. See *ONEOK*, 135 S. Ct. at 1601 (distinguishing cases pointed to by petitioners). In *Mississippi Power & Light Co.*, the Court found that federal law pre-empted "a state inquiry into the reasonableness of FERC-approved process for the sale of nuclear power to wholesalers of electricity." *Id.* (citing *Miss. Power & Light Co.*, 487 U.S. at 373-77). Therefore, the *ONEOK* Court found it to be a conflict preemption case. See *id.* (citing *Miss. Power & Light Co.*, 487 U.S. at 377). The Court further stated that the regulation at issue in *Mississippi Power & Light Co.* involved a state regulation directly targeting sales under federal jurisdiction. See *id.* at 1602. Moreover, *Louisiana Power & Light Co.* involved a federal law giving the federal government "the authority to allocate natural gas during shortages by ordering interstate pipelines to curtail gas deliveries to all customers, including retail customers." *Id.* (emphasis in original). The *ONEOK* Court stated, however, that "[t]he Court's finding of pre-emption in *Louisiana Power* rested on its belief that the state laws in question conflicted with federal law." *Id.* (emphasis in original).

129. See *id.* at 1602 (rejecting cases asserted by petitioners). The Court decided that "[b]ecause petitioners have not argued this case as a conflict pre-emption case, *Louisiana Power* [and *Mississippi Power*] do[ ] not offer them significant help." *Id.*

130. See *id.* (leaving question of law to lower courts). The Court held that "[t]o the extent any conflicts arise between state antitrust law proceedings and the federal rate-setting process, the doctrine of conflict pre-emption should prove sufficient to address them." *Id.*

131. See *id.* (refusing deference to FERC).

132. See *id.* (stating FERC never claimed that NGA preempted state law claims).

133. See *ONEOK*, 135 S. Ct. at 1602 (affirming decision by Ninth Circuit).

134. See *id.* at 1603 (Thomas, J., concurring) (stating grounds for concurring in judgment). According to Justice Thomas, "I write separately to reiterate my view that 'implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution.'" *Id.* (quoting *Wyeth v. Levine*, 555 U.S. 555, 583 (2009)) (Thomas, J., concurring).

in the Constitution.<sup>135</sup> Therefore, Justice Thomas expressed doubts about the Supreme Court precedent holding state law to be implicitly preempted in some instances.<sup>136</sup> Because this precedent was not challenged in *ONEOK*, however, Justice Thomas agreed with the majority's decision.<sup>137</sup>

### C. Justice Scalia's Dissenting Opinion

The late Justice Antonin Scalia, joined in his dissent by Chief Justice Roberts, expressed great concern over the majority's ruling and its impact on the interpretation of the NGA.<sup>138</sup> Unlike the majority, Justice Scalia emphasized maintaining state authority under the NGA to a lesser extent.<sup>139</sup> According to Justice Scalia, the NGA was passed to keep the state and federal governments within their own spheres of regulatory authority, with a sharp and distinct line separating those spheres.<sup>140</sup>

Justice Scalia sharply disagreed with the majority's "target" test for finding preemption.<sup>141</sup> Unlike the majority's test, Justice Scalia stated that the test for finding preemption was "whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act."<sup>142</sup> Under the dissent's test, because the NGA gives FERC the power to regulate activity affecting wholesale rates,

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135. *See id.* at 1602 (stating only way federal law can preempt state law). "The Supremacy Clause of our Constitution 'gives 'supreme' status only to those [federal laws] that are 'made in pursuance' of it.'" *Id.* (quoting *Wyeth*, 555 U.S. at 585).

136. *See id.* (noting disagreement with Supreme Court precedent).

137. *See id.* (stating there was no challenge against Court's precedent regarding NGA's preemptive scope). Justice Thomas joined the entirety of the majority's opinion, except for Part I-A, where the majority discussed the different types of preemption. *Id.*

138. *See ONEOK*, 135 S. Ct. at 1603 (Scalia, J., dissenting) (stating grave worries with majority's approach). Justice Scalia expressed concern, stating "[t]he Court's make-it-up-as-you-go-along approach to preemption has no basis in the Act, contradicts our cases, and will prove unworkable in practice." *Id.*

139. For a discussion of the majority's emphasis on maintaining state authority, see *supra* notes 106-109 and accompanying text.

140. *See ONEOK*, 135 S. Ct. at 1603 (Scalia, J., dissenting) (stating NGA distinctly separates federal and state authority). Justice Scalia argued, "[t]he Act and our cases interpreting it draw a firm line between national and local authority over this trade: If the Federal Government may regulate a subject, the States may not. Today the Court smudges that line." *Id.*

141. For a discussion of the test used by Justice Breyer in the majority opinion, see *supra* notes 110-111 and accompanying text.

142. *ONEOK*, 135 S. Ct. at 1604 (Scalia, J., dissenting) (quoting *Schneidewind*, 485 U.S. at 310 n.13) (internal quotation marks omitted) (stating "proper" test for field preemption).

378 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 361

and because the litigation involved practices also affecting wholesale rates, federal law preempted the state antitrust claims.<sup>143</sup>

Justice Scalia also challenged the majority's test for not being as strict as precedent required.<sup>144</sup> In Justice Scalia's view, the NGA was meant to distinguish federal and state authority in a clear and distinct manner, rather than lead courts to make varying case-by-case determinations.<sup>145</sup> According to the dissent, the majority also erred because it failed to point to a single instance "in which we have sustained state regulation of behavior already regulated by [FERC]."<sup>146</sup>

In addition, Justice Scalia noted that the NGA "does not give [FERC] the power to aim at particular effects; it gives it the power to regulate particular activities."<sup>147</sup> According to Justice Scalia, FERC can consider effects on the entire natural gas industry when it exercises its authority, rather than just on interstate sales.<sup>148</sup> The federal government, therefore, can exercise its authority even if it impacts areas left to the state, but the state cannot regulate areas impacting the federal government's jurisdiction.<sup>149</sup>

Further, Justice Scalia criticized the Court's analysis of *Northern Natural Gas Co.* and *Northwest Central Pipeline Corp.*<sup>150</sup> In *Northern*

143. *See id.* (noting why NGA preempts state antitrust claims).

144. *See id.* at 1607 (arguing majority applied improper test for field preemption).

145. *See id.* (stating precedent supports existence of clear test as opposed to making case-by-case determinations).

"We have said before that 'Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction' over the gas trade. Our decisions have therefore 'squarely rejected' the theory, endorsed by the Court today, that the boundary between national and local authority turns on 'a case-by-case analysis of the impact of state regulation upon the national interest.'"

*Id.* (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986)) (internal quotation marks omitted).

146. *Id.* at 1605 (attacking majority's lack of precedent).

147. *ONEOK*, 135 S. Ct. at 1605 (Scalia, J., dissenting). (stating what NGA gives FERC power to regulate).

148. *See id.* (delineating scope of FERC's powers). Justice Scalia gave two examples where FERC regulated wholesale rates with the intention of impacting an area left to the regulation of the states: first, when FERC sets wholesale rates in order to encourage conservation, and second, when FERC regulates wholesale transactions in order to "blunt[ ] the sales' anticompetitive effects in the retail market." *Id.* (citing *Colo. Interstate Gas Co. v. Fed. Power Comm'n*, 324 U.S. 581, 602-03 (1945); *Colo. Interstate Gas Co.*, 324 U.S. at 609-10 (Jackson, J., concurring); *Fed. Power Comm'n v. Conway Corp.*, 426 U.S. 271, 276-80 (1976)).

149. *See id.* (noting that federal government has broader authority than state governments). "It is not at all unusual for an activity controlled by [ ] [FERC] to have effects in the States' field; production, wholesale, and retail are[,] after all[,] interdependent stages of a single trade." *Id.* at 1606.

150. For a discussion on how the Court used these two cases, see *supra* notes 112-114 and accompanying text.

*Natural Gas Co.*, Justice Scalia noted that the state regulations were similar to the state antitrust claims in *ONEOK*.<sup>151</sup> Justice Scalia further argued that, in *Northwest Central Pipeline Corp.*, the test was not why the state was regulating certain practices, but what the state was regulating.<sup>152</sup> While the states can regulate antitrust activity, Justice Scalia noted that states do not exclusively exercise that power; the state antitrust claims, therefore, cannot stand merely because of states' long history of regulating that activity.<sup>153</sup>

Justice Scalia also criticized the Court's focus on state power, and argued that while the NGA was not passed to remove state power, "no law pursues its purposes *at all costs*."<sup>154</sup> Justice Scalia noted that the purpose of the NGA was to pass uniform regulations, and its purpose would be diluted if state claims were allowed to regulate where the federal government already has authority.<sup>155</sup> In sum, "the Court's decision will invite state antitrust courts to engage in targeted regulation of the natural-gas industry."<sup>156</sup>

## V. CRITICAL ANALYSIS

The conflicting opinions of Justices Breyer and Scalia in *ONEOK* ultimately result from their different tests for determining the NGA's preemptive scope.<sup>157</sup> In order to properly assess the opinions, it is important to understand both tests in relation to the

151. See *ONEOK*, 135 S. Ct. at 1606 (Scalia, J., dissenting) (noting similarities between regulations at issue in *Northern Natural Gas Co.* and *ONEOK*). Justice Scalia noted that both regulations at issue involved background practices and that, unlike the majority in *ONEOK*, the Court in *Northern Natural Gas Co.* disregarded those practices and held the state regulation to be preempted because it "invade[d] the federal agency's exclusive domain." *Id.* (quoting *N. Natural Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 92 (1963)) (internal quotation marks omitted).

152. See *id.* (explaining proper test under *Northwest Central Pipeline Corp.*). "On this occasion the Court upheld the regulations—not because the law aimed at the objective of gas conservation, but because the State pursued this end by regulating 'the physical ac[t] of drawing gas from the earth[ ]'[" *Id.* (alteration in original) (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 510 (1989)).

153. See *id.* at 1607 (rebutting Court's claim that state claims are not preempted because of history of antitrust regulation). The Natural Gas Act prohibits states from fixing gas wholesale prices despite their authority to regulate public utilities. *Id.* (citing *Pub. Util. Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 468 (1943)).

154. *Id.* at 1608 (emphasis added) (stating limits of state authority under NGA).

155. See *id.* (noting additional and more important purpose of NGA).

156. *ONEOK*, 135 S. Ct. at 1607 (Scalia, J., dissenting) (describing negative consequences of Court's decision).

157. For a discussion of Justice Breyer's test, see *supra* notes 110-111 and accompanying text. For a discussion of Justice Scalia's test, see *supra* note 142 and accompanying text.

380 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 361

Court's preemption precedent.<sup>158</sup> Further, it is important to analyze the extent that the NGA protects state authority over the natural gas industry.<sup>159</sup> This examination is difficult, however, because the natural gas industry extends past state lines, and thus blurs the line between federal and state authority.<sup>160</sup> If this line is clear, it requires determining whether that clear and distinct line is advantageous to the federal or the state governments.<sup>161</sup>

A critical analysis of *ONEOK* shows that the majority's test and its conclusions are inconsistent with precedent, potentially having a damaging impact on the natural gas industry.<sup>162</sup> In the majority opinion, Justice Breyer's test for field preemption is inconsistent with the Court's precedent regarding preemption under the NGA and the Supremacy Clause of the United States Constitution.<sup>163</sup> For instance, the primary cases relied on by the Court focused on whether the states invaded federal jurisdiction by regulating what the NGA expressly provided to the federal government, not what the state was seeking to accomplish.<sup>164</sup> The Supremacy Clause's ap-

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158. For a discussion of the Supreme Court's precedent interpreting the preemptive scope of the NGA, see *supra* notes 80-95 and accompanying text.

159. For a discussion of how Justice Breyer treats state authority in light of the NGA, see *supra* note 106 and accompanying text. For a discussion of how Justice Scalia responded to Justice Breyer's interpretation, see *supra* notes 154-155 and accompanying text.

160. For a discussion of the blurry line between federal and state authority, see *supra* note 107 and accompanying text.

161. For a discussion on whether the federal government's or state government's authority is stronger, see *infra* notes 183-188 and accompanying text.

162. For a discussion on the impact of the Court's holding, see *infra* text accompanying notes 188-212.

163. See *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1602-03 (2015) (Scalia, J., dissenting) (stating majority's opinion is inconsistent with Supremacy Clause, NGA, and precedent).

164. See *N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 94 (1963) (distinguishing regulations aimed at interstate purchasers and those aimed at production). While Justice Breyer bases his test on the use of "directly aiming" in *ONEOK*, the Court's opinion in *Northern Natural Gas Co.* does not focus on what the state is attempting to accomplish through its regulatory scheme, but rather what it is actually regulating. See *id.* at 89. The Court in *Northern Natural Gas Co.* found that the state law was preempted because it "invade[d] the exclusive jurisdiction which the Natural Gas Act has conferred upon [ ] [FPC] over the sale and transportation of natural gas in interstate commerce for resale." *Id.* Therefore, the Court's decision was not based on the state's aim, but the fact that it interfered with the federal government's exclusive jurisdiction. *Id.* Further, the state regulation at issue in *Northwest Central Pipeline Corp.* was upheld not because it was aimed at retail rates, but because it was "a regulation of 'production or gathering' within Kansas' power under the NGA." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 513 (1989). Therefore, both of these heavily relied upon cases based their decisions on *what* the states regulated, rather than *why* they pursued regulation. See *ONEOK*, 135 S. Ct. at 1606 (Scalia, J., dissenting).

plication does not rest on why the state regulates certain activity but rather what the state is actually regulating.<sup>165</sup>

Under Justice Breyer's test, states may pursue otherwise unconstitutional regulations merely by stating that the regulation is aimed at fixing impacts of natural gas sales on the state.<sup>166</sup> Further, in the context of antitrust cases, such as those at the center of *ONEOK*, the shifting test established by Justice Breyer would conceivably allow litigants to avoid unfavorable federal courts by stating that their claims are simply targeting state jurisdictional matters.<sup>167</sup> Giving states and litigants these opportunities would water down the Supremacy Clause and usurp the federal government's enumerated power under the NGA.<sup>168</sup>

On the other hand, Justice Scalia's test is more consistent with the Supremacy Clause and with field preemption.<sup>169</sup> The NGA was passed to separate authority over the natural gas industry between the federal and state government.<sup>170</sup> Justice Scalia's test, therefore, ensures that state governments may regulate within their own spheres of jurisdiction.<sup>171</sup> Of course, the practices at issue affected rates on the state level, but as Justice Scalia points out, the federal

165. See *Nw. Cent.*, 489 U.S. at 510 (upholding state regulation because it regulated "[ ] physical act[ ] of drawing gas from [ ] earth[,]"; which is within states' authority); see also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 n.13 (1988) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)) (upholding state regulation).

166. See Emily Hammond, *ONEOK v. Learjet*, GEO. WASH. L. REV. DOCKET (OCT. TERM 2014) (Apr. 28, 2015), <http://www.gwlr.org/ONEOK-v-learjet/> (stating majority's test is "malleable" and "puts immense pressure on how [ ] activity is characterized[ ]").

167. See *id.* (expressing displeasure with Court's test). The background of *ONEOK* differs from previous NGA preemption cases, however, because it does not involve state laws directly regulating the natural gas industry. See, e.g., *N. Natural Gas Co.*, 372 U.S. at 88-89 (involving state measure to require pipeline to purchase natural gas from state wells). Because *ONEOK* pertained to civil litigants, rather than the state itself, it extends a lot of power to private individuals implementing state laws in court. See *ONEOK*, 135 S. Ct. at 1607 (Scalia, J., dissenting) (arguing majority's holding will give too much power to state courts).

168. For a discussion of Justice Scalia's criticism of the majority's holding, see *supra* text accompanying notes 138-156.

169. For a discussion of Justice Scalia's preemption test, see *supra* note 142 and accompanying text.

170. See *Pub. Utils. Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 467 (1943) (stating federal and state governments are to operate on their own spheres under NGA).

171. For a discussion of Justice Scalia's test, see *supra* note 142 and accompanying text. As Justice Scalia points out, the NGA gives FERC the power to regulate practices affecting wholesale rates. *ONEOK*, 135 S. Ct. at 1604 (Scalia, J., dissenting) (quoting 15 U.S.C. § 717(d) (2012)). Therefore, states may not also regulate practices affecting wholesale rates. *Id.*

382 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 361

government has more latitude in what it can regulate.<sup>172</sup> Unlike the majority's test, which blurs the line of authority established by the NGA, Justice Scalia's test results in more consistent and accurate determinations required by the Supremacy Clause and the NGA.<sup>173</sup>

Justice Scalia's dissenting opinion was also consistent with the legislative purpose of the NGA.<sup>174</sup> For example, he was correct in stating that, while the NGA was not passed with the intention of diminishing state authority, it was not meant to carry out that purpose at the expense of federal authority.<sup>175</sup> Justice Breyer placed great emphasis on this purpose, yet ignored the purpose of establishing uniform regulation of the natural gas industry.<sup>176</sup> Inconsistent regulation of the interstate sale and transportation is a more likely result of the Court's overemphasis on state authority.<sup>177</sup> A lack of uniform regulation, in turn, can have grave consequences regarding the interstate transportation and sale of natural gas.<sup>178</sup>

By leaving the authority to the lower courts to decide conflict preemption issues, the majority opinion allows potential problems stemming from the *ONEOK* holding to be prevented through other avenues.<sup>179</sup> While the majority appeared positive about how conflict preemption may address this issue, Justice Scalia was not as op-

172. See *ONEOK*, 135 S. Ct. at 1604 (Scalia, J., dissenting) (stating it is not unusual for FERC regulations to be upheld even if they have effects on states' field).

173. See *N. Natural Gas Co.*, 372 U.S. at 92 (declaring Court must "assure [ ] effectuation of [ ] comprehensive federal regulation ordained by Congress[ ]").

174. For a discussion of the legislative purpose of the NGA, see *supra* notes 57-61 and accompanying text.

175. For a discussion of how Justice Scalia responds to the majority's contention that the NGA was not passed to usurp state authority, see *supra* notes 154-155 and accompanying text.

176. For a discussion of Justice Scalia's emphasis on the other purposes of the NGA, see *supra* note 155 and accompanying text. According to Justice Scalia, "nothing in the Act[ ] suggests that federal authority over practices is a second-class power, somehow less exclusive than the authority over rates." *ONEOK*, 135 S. Ct. at 1605 (Scalia, J., dissenting).

177. See, e.g., *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 633-35 (1972) (emphasizing need for uniform federal regulation under NGA); *N. Natural Gas Co.*, 372 U.S. at 91 (declaring one of NGA's primary purposes is to create uniform federal regulation of natural gas industry).

178. For a discussion of Justice Scalia's view of how the majority's holding will impact the natural gas industry, see *supra* text accompanying note 156. For a discussion of *ONEOK*'s impact on the natural gas industry, see *infra* text accompanying notes 188-212.

179. For an explanation of the reasoning behind leaving preemption decisions to lower court, see *supra* note 130 and accompanying text.

timistic.<sup>180</sup> It is questionable, therefore, whether lower courts can maintain uniformity over the natural gas industry via conflict preemption after the Court's unclear interpretation of the NGA's preemptive scope.<sup>181</sup>

*ONEOK* ultimately brings to head the issue of determining the clarity of the division between state and federal authority, and namely, who has the greater authority under that division.<sup>182</sup> If this dividing line is easily distinguishable, then issues such as the one in *ONEOK* should not be decided on a case-by-case basis, as the Supreme Court's holding asserted.<sup>183</sup> The NGA was passed to allow the federal government to regulate where the states could not: the interstate transportation and sale of natural gas.<sup>184</sup> The NGA granted jurisdiction to the federal government over interstate sales and reserved to states only what is within their borders, thus signaling intent for a clear distinction of authority.<sup>185</sup> Further, the Constitution expressly gives the federal government superior status in areas where it regulates.<sup>186</sup> The Supreme Court's holding that the NGA did not preempt the state antitrust claims, therefore, is not consistent with precedent because the claims essentially regulated the exclusive jurisdiction of the federal government.<sup>187</sup>

## VI. IMPACT

Although *ONEOK* did not initially draw as much attention as other Supreme Court decisions during the October 2014 term, it

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180. See *ONEOK*, 135 S. Ct. at 1608 (Scalia, J., dissenting) (stating reservations that conflict preemption will address preemption issue). "Conflict preemption will resolve only discrepancies between state and federal regulations, not the discrepancies among differing state regulations to which today's opinion subjects the industry." *Id.*

181. For a discussion of *ONEOK*'s impact on natural gas regulation, see *infra* text accompanying notes 188-212.

182. Compare *ONEOK*, 135 S. Ct. at 1601 (stating there is no clear dividing line between federal and state authority over natural gas industry), with *id.* at 1604 (Scalia, J., dissenting) (stating NGA was passed with intent to maintain clear division of federal and state authority).

183. See *id.* at 1607 (Scalia, J., dissenting) (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986)) (arguing precedent rejects case-by-case analysis of preemption issues under NGA).

184. See 15 U.S.C.A. § 717(b) (West 2015) (giving FERC exclusive jurisdiction over interstate transportation and sale of natural gas).

185. See *Nantahala Power & Light Co.*, 476 U.S. at 966 (holding Congress intended clear distinction between federal and state jurisdiction).

186. For a discussion of the Supremacy Clause of the United States Constitution, see *supra* notes 43-54 and accompanying text.

187. See *ONEOK*, 135 S. Ct. at 1604 (Scalia, J., dissenting) (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 n.13 (1988)) (stating state law is preempted if it regulates what is being regulated by FERC).



384 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 361

will bring major regulatory consequences to the natural gas industry.<sup>188</sup> First, the decision impacts the state's authority over the natural gas industry.<sup>189</sup> Second, the Court's holding can potentially increase the flexibility of state legislatures to regulate the natural gas industry.<sup>190</sup> The Court's holding, however, leaves a potential avenue for interstate pipelines to challenge state regulation.<sup>191</sup> Third, *ONEOK* may impact the interpretation of the preemptive scope of similar federal statutes.<sup>192</sup>

Primarily, Justice Breyer's majority opinion provides states with greater latitude in regulating interstate pipeline companies.<sup>193</sup> Even more so, it allows private litigants seeking damages from interstate pipelines to successfully bring state antitrust claims.<sup>194</sup> The filing of these claims is possible even if the alleged actions on the part of interstate pipelines have an effect on wholesale rates for natural gas.<sup>195</sup> The caveat, pursuant to Justice Breyer's test, however, is that the claims brought must target the effect on *retail* rates.<sup>196</sup> Litigants bringing state antitrust claims can easily satisfy this test.<sup>197</sup> For example, an attorney for a retail purchaser of natural gas would only have to claim that the wholesale seller negatively impacted the rate of natural gas to the retail seller, even though those same actions had consequences on *wholesale* rates of natural gas.<sup>198</sup> Justice Breyer's flexible test may not only have ramifications on interstate

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188. See Jim Rossi, *Opinion Analysis: Scaling Back Federal Preemption in the Energy Markets*, SCOTUSBLOG (Apr. 22, 2015, 12:25 PM), <http://www.scotusblog.com/2015/04/opinion-analysis-scaling-back-federal-preemption-in-energy-markets/> (analyzing Court's opinion in *ONEOK*).

189. For a discussion of the state's authority over the natural gas industry after *ONEOK*, see *infra* text accompanying note 193-199.

190. For a discussion of how *ONEOK* may impact the authority of state legislatures, see *infra* text accompanying notes 200-204.

191. For a discussion of how future challenges to the bringing of state antitrust claims in the context of the natural gas industry can be brought, see *infra* text accompanying notes 205-209.

192. For a discussion of future cases that may be impacted by *ONEOK*, see *infra* note 210 and accompanying text.

193. For a discussion of how the majority's holding will unduly strengthen the authority of state courts, see *supra* note 156 and accompanying text.

194. For a discussion of potential claims brought by litigants, see *supra* notes 166-168 and accompanying text.

195. For a discussion of the underlying facts in *ONEOK*, see *supra* notes 15-39 and accompanying text.

196. For a discussion of Justice Breyer's test, see *supra* notes 110-111 and accompanying text.

197. For a discussion on the test's effect on future challenges regarding state antitrust claims, see *supra* notes 166-168 and accompanying text.

198. For a discussion of how this test will impact litigants, see *supra* notes 166-168 and accompanying text.

pipelines that sell directly to consumers, but also on wholesale rates which will likely be impacted by the consequences of private litigation against interstate pipelines.<sup>199</sup>

The overall impact of *ONEOK* also depends on whether it is limited to state laws providing causes of action, or if it also applies to direct regulatory measures made by states, which the Court does not address.<sup>200</sup> If it does apply to direct regulatory measures, it would give state legislators more latitude in regulating natural gas sales within their states.<sup>201</sup> After *ONEOK*, state legislatures would be free to regulate practices impacting retail transactions, even if the same practices impact wholesale transactions.<sup>202</sup> As Justice Scalia pointed out, however, precedent would not allow this because it would involve the state impermissibly invading a field being regulated by the federal government.<sup>203</sup> Regardless of whether the opinion stretches to the legislatures or is limited to state or federal courts deciding state law claims, *ONEOK* provides greater leeway in how states can regulate the natural gas industry.<sup>204</sup>

Justice Breyer's opinion was certainly narrow in terms of limiting review solely to field preemption as opposed to conflict preemption.<sup>205</sup> By leaving it to the lower courts to decide the question of conflict preemption, the Court puts litigants, particularly interstate pipelines, on notice that they may challenge state law claims because they conflict with federal regulation.<sup>206</sup> A pipeline defendant would only need to show that the effect of state law claims on practices affecting both retail and wholesale rates of natural gas con-

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199. For a discussion of how *ONEOK* affects private litigation in the natural gas industry, see *supra* note 156 and accompanying text.

200. *ONEOK* involved state antitrust causes of action, rather than direct regulation of the state. For a discussion of the facts in *ONEOK*, see *supra* notes 15-39 and accompanying text.

201. For a discussion of Justice Breyer's test, see *supra* notes 110-111 and accompanying text. For a discussion of this test's impact, see *supra* notes 193-195 and accompanying text.

202. For a discussion of how state antitrust claims were allowed to move on despite alleged activities having an impact on wholesale and retail rates, see *supra* text accompanying notes 15-39.

203. For a discussion of Justice Scalia's test and how he would apply it, see *supra* notes 142-143 and accompanying text.

204. For a discussion of how states can regulate the natural gas industry, see *supra* notes 166-168 and accompanying text.

205. For a discussion of Justice Breyer's analysis, see *supra* notes 100-102 and accompanying text.

206. For a discussion of conflict preemption, see *supra* note 52 and accompanying text.

386 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 361

licts with federal regulation of wholesale rates.<sup>207</sup> The Court's holding in *ONEOK* also creates a possibility for state law claims to clash with federal authority over wholesale rates.<sup>208</sup> Interstate pipelines, therefore, have an additional avenue to successfully establish that the Natural Gas Act may preempt state law claims.<sup>209</sup>

Lastly, the *ONEOK* decision has a major impact on imminent litigation regarding the preemptive scope of the Federal Power Act (FPA), a federal energy statute that shares many structural similarities with the NGA.<sup>210</sup> Thus, the Supreme Court's decision in *ONEOK* has an increased potential to have spillover effects on the industries regulated under the FPA.<sup>211</sup> The greatest impact *ONEOK* has, however, is that it allows for the concurrent, rather than exclusive, regulation of the natural gas industry.<sup>212</sup>

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207. For a discussion of the impact of conflict preemption on future litigants, see *supra* note 52 and accompanying text.

208. For a discussion of how *ONEOK* increases state authority over the natural gas industry, see *supra* note 156 and accompanying text.

209. Because the NGA does not explicitly say that it preempts state law in instances where wholesale rates are affected, express preemption does not apply. For a discussion of express preemption, see *supra* note 47 and accompanying text.

210. See Rossi, *supra* note 188 (discussing *ONEOK*'s impact on other preemption cases involving FPA for Court's 2015 term). There are three cases slated for the October 2015 Term that involve FERC's authority under the FPA: *Federal Energy Regulatory Commission v. Electric Power Supply Association*, *EnerNOC v. Electric Power Supply Association*, and *Hughes v. Talen Energy Marketing*. See October Term 2015, SCOTUSBLOG, <http://www.scotusblog.com/case-files/terms/ot2015/> (last visited Jan. 5, 2016).

211. For an analysis of the Court's opinion, see *supra* notes 157-187 and accompanying text. In addition, the Court's holding can potentially impact how courts examine the Supremacy Clause and its tolerance for concurrent regulation. For a discussion of the Supremacy Clause and preemption, see *supra* notes 43-54 and accompanying text.

212. For a discussion of the majority's opinion in *ONEOK*, see *supra* notes 100-133 and accompanying text. By allowing the state antitrust claims to stand despite the activities impact on wholesale rates, the Court leaves it open to both FERC and state courts to regulate activities that have an impact on wholesale rates. See *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1607 (2015) (Scalia, J., dissenting) (predicting negative impact of allowing state courts to address issues within federal jurisdiction).

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