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### The Road Less Travelled: The Maine Energy Cost Reduction Act, Economic Federalism, and a Modern Approach to Preemption Analysis Under the Natural Gas Act of 1938

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# THE ROAD LESS TRAVELLED: THE MAINE ENERGY COST REDUCTION ACT, ECONOMIC FEDERALISM, AND A MODERN APPROACH TO PREEMPTION ANALYSIS UNDER THE NATURAL GAS ACT OF 1938

*Benjamin T. McCall*

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## THE ROAD LESS TRAVELLED: THE MAINE ENERGY COST REDUCTION ACT, ECONOMIC FEDERALISM, AND A MODERN APPROACH TO PREEMPTION ANALYSIS UNDER THE NATURAL GAS ACT OF 1938

*Benjamin T. McCall\**

### I. INTRODUCTION

The saying “you can’t get there from here” is as authentically Maine as blueberries or lobster. Made famous in the mid-20<sup>th</sup> century by the storytelling troupe *Bert and I*, the colloquial phrase typifies the quirkiness and wit that one often encounters north and east of the New Hampshire border.<sup>1</sup> Despite the attempt at humor, the saying is apropos when one considers Maine’s position in both New England and the country. Being at the end of the line certainly has its advantages, among them being hundreds of square miles of untamed forest, and a bevy of natural resources that provide both sustenance and stunning vistas. However, isolation is a double-edged sword. For many years, Maine has struggled to revive a once vibrant manufacturing sector<sup>2</sup> and following the “Great Recession”<sup>3</sup> Maine’s economic growth has been sluggish, especially when compared to the rest of New England.<sup>4</sup> In this struggle, the high price of energy, especially for industrial customers, has been a cause for concern.<sup>5</sup> The recent closing of Verso’s paper mill

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\* J.D. Candidate, 2016, University of Maine School of Law. The author wishes to thank Professor Jeffrey Thaler for plugging the numerous gaps in my knowledge and for his incredible eye for the missing comma. In addition, many thanks go to Tim Schneider for his mentorship and for being an invaluable source of information and motivation. Last, but certainly not least, my eternal gratitude to Meg for resisting the urge to roll her eyes at every mention of energy law over the past year.

1. Comprised of Marshall Dodge, Bob Bryan, and later Tim Sample, the troupe travelled all over Maine and beyond, giving voice to the rare type of humor that one finds “Down East.” The famous saying “well you can’t get there from here” (recited in the traditional accent) was originally included in the story “Which Way to Millinocket?”

2. See Ariel Sabar, *Maine Struggling to Revive Ailing Economy*, N.Y. TIMES (June 29, 2006), [http://www.nytimes.com/2006/06/29/us/29maine.html?\\_r=0](http://www.nytimes.com/2006/06/29/us/29maine.html?_r=0); *Our View: As Mills Lose Value, Maine Towns Lose Tax Revenue*, PORTLAND PRESS HERALD (Sept. 22, 2014), <http://www.pressherald.com/2014/09/22/our-view-as-mills-lose-value-maine-towns-lose-tax-revenue/>.

3. *Definition of ‘The Great Recession’*, INVESTOPEDIA, <http://www.investopedia.com/terms/g/great-recession.asp> (last visited Jan. 30, 2014).

4. *Statistics: Economic Growth in Connecticut, Maine Slowest in New England Since Recession*, ASSOCIATED PRESS (Aug. 21, 2014, 5:37 PM), <http://www.ctpost.com/news/article/Statistics-Economic-growth-in-Connecticut-Maine-5704104.php>.

5. Nell Gluckman, *LePage Says Cost of Energy Keeps Wages Low, Drives Business from Maine*, BANGOR DAILY NEWS (Sept. 3, 2014, 7:24 PM), <http://bangordailynews.com/2014/09/03/politics/lepage-says-cost-of-energy-keeps-wages-low-drives-business-from-maine/>; Lori Valigra, *Oil, Propane Expected to Remain Stalwarts as Mainers Try New Energy Sources*, MAINEBIZ (Sep. 8, 2014), <http://www.mainebiz.biz/article/20140908/CURRENTEDITION/309049987/oil-propane-expected-to-remain-stalwarts-as-mainers-try-new-energy-sources>.

in Bucksport,<sup>6</sup> and the Chapter 11 bankruptcy filing of Great Northern Paper Company in Millinocket,<sup>7</sup> with both companies blaming high energy costs as a precipitating factor in their demise, highlights the ongoing problem.<sup>8</sup>

The winter of 2013 brought Maine's energy issues front and center. Maine's energy bills already outpaced national averages,<sup>9</sup> due in part to the State's heavy reliance on oil to heat homes during the cold winter months.<sup>10</sup> Yet it was not the cost of heating oil, but the cost of the "cheaper alternative," natural gas, that proved most problematic. Over the past fifteen years, Maine and New England have become reliant on natural gas to generate the lion's share of its electricity,<sup>11</sup> with Maine using natural gas as its primary fuel for generating nearly half of its daily electricity needs.<sup>12</sup>

However, despite a new abundance of natural gas resources in Pennsylvania and New York,<sup>13</sup> New England currently faces a significant lack of transportation infrastructure to bring needed natural gas to the region.<sup>14</sup> Without the necessary pipelines, natural gas prices in New England continue to outpace those in the rest

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6. Kevin Miller, *Energy Costs Among Chief Culprits in Bucksport Mill's Demise*, PORTLAND PRESS HERALD (Oct. 3, 2014), <http://www.pressherald.com/2014/10/03/energy-costs-among-chief-culprits-in-bucksport-mills-demise/> ("The Bucksport mill remained idle for most of January and February [2014] to ride out the worst of the energy costs").

7. J. Craig Anderson, *Critical Concerns Arise in Great Northern Bankruptcy Case*, PORTLAND PRESS HERALD (Oct. 2, 2014), <http://www.pressherald.com/2014/10/02/critical-concerns-arise-in-great-northern-bankruptcy-case/>.

8. See Miller, *supra* note 6 and accompanying text; Anderson, *supra* note 7 and accompanying text.

9. *Maine: State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN. (last visited Jan. 31, 2015), <http://www.eia.gov/state/?sid=ME#tabs-5>. Maine ranks 30th in the United States in terms of energy consumption per capita; however, Maine ranks 11th in the United States in terms of energy expenditures per capita.

10. See *id.* Over 70% of Maine households heat their homes with heating oil, the highest percentage of any state in the country.

11. *Northeast Grows Increasingly Reliant on Natural Gas for Power Generation*, U.S. ENERGY INFO. ADMIN. (Nov. 12, 2013), <http://www.eia.gov/todayinenergy/detail.cfm?id=13751>.

12. *Id.*; see also ISO-NEW ENGLAND, INC., *Maine: 2013-2014 State Profile* (Feb. 2014), [http://www.iso-ne.com/static-assets/documents/nwsiss/grid\\_mkts/key\\_facts/final\\_me\\_profile\\_2014.pdf](http://www.iso-ne.com/static-assets/documents/nwsiss/grid_mkts/key_facts/final_me_profile_2014.pdf). Maine uses natural gas in numerous ways. Many Maine homes heat with natural gas in the winter. Additionally, large mechanical and industrial plants power their operations with natural gas. These uses would potentially benefit from the influx of new natural gas supply. However, the primary issue is the lack of natural gas to power Maine – and New England's – electricity generators, which leads directly to higher electricity generators.

13. *Here's Why Marcellus Shale Play Is So Important for Chesapeake*, FORBES (Sep. 26, 2014, 1:45 PM), <http://www.forbes.com/sites/greatspeculations/2014/09/26/heres-why-marcellus-shale-play-is-so-important-for-chesapeake/>; see also Kathryn Skelton, *As Natural Gas Brings Down Electricity and Heating Costs, Maine Can't Get Enough*, LEWISTON SUN JOURNAL (Feb. 3, 2013, 7:55 AM), <http://bangordailynews.com/2013/02/03/business/as-natural-gas-brings-down-electricity-and-heating-costs-maine-cant-get-enough/>. Located underneath parts of New York, Pennsylvania, West Virginia, and Ohio, the Marcellus Shale is the largest natural gas reserve in the United States. Recent estimates state that the formation holds 141 trillion cubic feet of recoverable reserves. Production has steadily increased over the last seven years, from less than 2 billion cubic feet per day in 2007, to 16 billion cubic feet per day in 2014.

14. *Short Term Energy Outlook Supplement: Constraints in New England Likely to Affect Regional Energy Prices This Winter*, U.S. ENERGY INFO. ADMIN. (Jan. 18, 2013), [http://www.eia.gov/forecasts/steo/special/pdf/2013\\_sp\\_01.pdf](http://www.eia.gov/forecasts/steo/special/pdf/2013_sp_01.pdf).

of the country.<sup>15</sup> For example, while the Henry Hub<sup>16</sup> price, rose thirty-five percent<sup>17</sup> in 2013, the price at the Algonquin Citygate Exchange,<sup>18</sup> which services New England, rose sixty-five percent.<sup>19</sup> This problem was most evident in January of 2013, as a number of cold snaps forced New England's electricity generators into overdrive.<sup>20</sup> Even so, the pipeline bottleneck to the South ensured that available gas was purchased at a significant premium.<sup>21</sup> As a consequence, Maine ratepayers bore the brunt of the price increase. Some residential ratepayers saw their bills rise by nearly fifty percent (from the previous winter).<sup>22</sup> Additionally, large industrial customers saw prices rise so high that some were forced to cease operating during peak demand times.<sup>23</sup>

As the snow melted, Maine decided to take action. The Omnibus Energy Bill of 2013<sup>24</sup> was seen by many to be the most significant piece of energy legislation passed by the Maine Legislature in a generation.<sup>25</sup> The key component of the bill

15. *New England and New York Have Largest Natural Gas Price Increases in 2013*, U.S. ENERGY INFO. ADMIN. (Jan. 7, 2014), <http://www.eia.gov/todayinenergy/detail.cfm?id=14491#>; see also Randy Billings, *LePage Urges Federal Regulators to Fast-Track Natural Gas Pipelines*, PORTLAND PRESS HERALD (Sept. 30, 2014, 12:44 AM), <http://www.pressherald.com/2014/09/30/lepage-urges-federal-regulators-to-fast-track-natural-gas-pipelines/> (noting that while Maine has the lowest electricity rates in New England, the region far outpaces the rest of the country, paying 15.08 cents per kWh in July 2014, compared to 11.01 cents per kWh for the rest of the country).

16. Located in Erath, Louisiana, the Henry Hub Index is generally regarded to represent the benchmark price for wholesale natural gas in the United States, as it serves as the interconnection point for over a half dozen pipelines from the Gulf of Mexico, delivering natural gas to much of the southern and western portions of the country.

17. U.S. ENERGY INFO. ADMIN., *supra* note 14. The price increased to \$3.73 per million British thermal units (MMBtu).

18. The Algonquin Citygate index is a key trading point for natural gas supply to Boston and the greater New England region. It takes its name from the Algonquin Pipeline, owned by Spectra Energy, which represents a significant source of natural gas for New England. SUSSEX REPORT, *infra* note 212 at 12.

19. U.S. ENERGY INFO. ADMIN., *supra* note 14.

20. *Winter Natural Gas Price Spikes in New England Spur Generation from Other Fuels*, U.S. ENERGY INFO. ADMIN. (Apr. 12, 2013), <http://www.eia.gov/todayinenergy/detail.cfm?id=10791#>.

21. *Id.*

22. Whit Richardson, *Natural Gas Prices in Maine 'Volatile at Times' this Winter*, BANGOR DAILY NEWS (Jan. 25, 2013, 2:56 PM), <http://bangordailynews.com/2013/01/25/business/natural-gas-prices-in-maine-volatile-at-times-this-winter/>.

23. Tux Turkel, *Some Maine Mills Forced to Idle Lines as Price of Power Soars*, PORTLAND PRESS HERALD (Dec. 19, 2013), [http://www.pressherald.com/2013/12/19/mills\\_forced\\_to\\_idle\\_lines\\_as\\_price\\_of\\_power\\_soars/](http://www.pressherald.com/2013/12/19/mills_forced_to_idle_lines_as_price_of_power_soars/); see also Whit Richardson, *Verso Paper Mills in Maine Experience Massive Increase in Natural Gas Costs*, BANGOR DAILY NEWS (May 10, 2013), <http://bangordailynews.com/2013/05/10/business/verso-paper-mills-in-maine-experience-massive-increase-natural-gas-delivery-costs/>.

24. L.D. 1559 (126th Legis. 2013).

25. See John Cleveland, Barry Hobbins & Kenneth Fredette, *How the Omnibus Energy Bill Will Cut Costs for Consumers*, BANGOR DAILY NEWS (June 3, 2013, 10:42 AM), <http://bangordailynews.com/2013/06/03/opinion/contributors/how-the-omnibus-energy-bill-will-cut-costs-to-consumers/>

("Our historic, bipartisan omnibus energy legislation directly attacks one of the biggest problems facing the Maine economy: We pay too much for energy in Maine."); see also Scot Thistle, *Legislature Passes Energy Measure, Bill to Allow UMaine to Compete for Wind Power Project*, LEWISTON SUN JOURNAL (June 27,

addressed Maine's lack of natural gas pipeline capacity.<sup>26</sup> Noting the resulting burden on ratepayers, The Maine Energy Cost Reduction Act ("ERCA" or "the Act") authorized the Maine Public Utilities Commission to "execute an energy cost reduction contract . . . for the transmission of [no more than 200 million] cubic feet of natural gas per day or for [no more than] \$75,000,000 annually."<sup>27</sup> In doing so, the Legislature hoped that the "expansion of natural gas transmission capacity into [Maine would] result in lower natural gas prices and, by extension, lower electricity prices for consumers in [Maine]."<sup>28</sup> Speaking on the floor of the Maine House of Representatives, House Republican Leader Kenneth Fredette stressed the impact that such legislation could have: "[This Bill has the potential to] reduce the cost of energy in Maine by at least \$200 million a year by erasing what's called the basis differential."<sup>29</sup> It will help protect jobs in our mills, keep people employed and allow for future economic development here in the State of Maine."<sup>30</sup> The Legislature agreed with this sentiment. The Bill was moved out of the Joint Standing Committee on Energy, Utilities, and Technology with a 12-1 "ought to pass" report,<sup>31</sup> and despite the veto by Governor LePage,<sup>32</sup> became law on June 26, 2013.<sup>33</sup> On March 20, 2014, the Maine Public Utilities Commission ("PUC") initiated an adjudicative proceeding to study the feasibility of entering into an energy cost reduction contract ("ECRC") as allowed under the ECRA.<sup>34</sup>

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2013), <http://bangordailynews.com/2013/06/27/politics/state-house/legislature-passes-energy-measure-bill-to-allow-umaine-to-compete-for-wind-power-project/>.

26. L.D. 1559, Part B, ch. 19 (126th Legis. 2013).

27. *Id.* § 1904. It is important to note that § 1904(1) imposes two significant conditions precedent to the execution of a contract. First, the Maine PUC must pursue rule changes that could potentially reduce the basis differential. *Id.* § 1904(1)(A). If the Commission decides that these rule changes would have "substantially the same cost reduction effects [as the introduction of new pipeline capacity]" then those must be pursued. *Id.* If not, the Commission must "[e]xplore all reasonable opportunities for private participation" in securing additional pipeline capacity. *Id.* § 1904(1)(B). Of course, private investment in this area has certain advantages, and arguably fewer drawbacks, than public intervention would. If neither of these options is available, then the PUC was allowed to hire an independent consultant to study the feasibility and potential impact of the public purchase of pipeline capacity. *Id.* § 1904(1)(C). There were many groups who argued that an expansion of reliance on natural gas was poor environmental planning. *See, e.g.,* Tux Turkel, *Group Challenges Maine, New England Gas-Line Expansion Plan*, PORTLAND PRESS HERALD (May 30, 2014), <http://www.pressherald.com/2014/05/29/gas-pipeline-plan-for-maine-and-new-england-gets-pushback/>. Nonetheless, despite this opposition, the Examiners' Report in the ensuing PUC proceeding concluded that no future market reform or private involvement could effectively solve this basis differential problem. Examiners' Report, *infra* note 218, at 31-32 (noting that it is impossible to tell at this juncture whether the combination of market rule changes and private investment would be sufficient to solve the problem, therefore concluding that under the precepts of the ECRA, the Commission would entertain proposals from interested pipeline companies).

28. *Id.* § 1903(2).

29. *Id.* § 1902(1) ("'Basis differential' means the difference between the so-called Henry Hub spot price for natural gas and the corresponding cash spot price for natural gas in New England.").

30. 3 Legis. Rec. H-1155 (1st Reg. Sess. 2013) [hereinafter Fredette Testimony].

31. *Id.*

32. *Id.*

33. P.L. 2013, ch. 369, § B-1 (emergency, effective June 26, 2013).

34. *Public Utilities Commission*, Investigation of Parameters for Exercising Authority Pursuant to the Maine Energy Cost Reduction Act, 35-A M.R.S. § 1901, No. 2014-71, Notice of Investigation and Opportunity to Intervene (Me. P.U.C. Mar. 20, 2014).

The process that ensued has been contentious.<sup>35</sup> Natural gas pipeline companies were eager to utilize the Maine PUC's newfound authority to subsidize the cost of pipeline expansion.<sup>36</sup> Conversely, many environmental groups remained skeptical that expanding Maine's natural gas usage is a sound long-term investment, both in terms of costs to ratepayers, and the effect on the State's carbon emissions.<sup>37</sup> Despite these disagreements, the general consensus among lawmakers was that *something* needed to be done to lower Maine's energy prices and make the state more competitive for business.<sup>38</sup> The risks were far outweighed by the rewards.<sup>39</sup>

Up to this point, no state had endeavored to intervene in a natural gas market in this fashion.<sup>40</sup> As such, the passage of the ECRA, and its subsequent implementation, operated in uncharted territory, leaving many questions unanswered—primarily whether Maine possessed the constitutional authority needed to implement an energy cost reduction contract.<sup>41</sup> As such, this Comment explores the Act and presents it as a test case for analyzing the constitutionality of state-sponsored purchases of new energy supply through the dual microscope of

35. See, e.g., Stephen Singer, *Portland Lawyer Makes Case Against Conservation Law Foundation*, PORTLAND PRESS HERALD (Sep. 7, 2014, 4:00 AM), <http://www.pressherald.com/2014/09/08/portland-lawyer-makes-case-against-conservation-law-foundation/>.

36. See, e.g., Darren Fishell, *Maine Regulators Asked to Decide Whether to Charge Electricity Ratepayers for Natural Gas Expansion*, BANGOR DAILY NEWS (Sept. 18, 2014, 5:42 PM), <http://bangordailynews.com/2014/09/18/energy/maine-regulators-asked-to-decide-whether-to-charge-electricity-ratepayers-for-natural-gas-expansion/> (“Kinder Morgan and Spectra are seeking to sign up a mix of local gas distribution companies and both likely will seek to have the state (of Maine) commit to capacity to support pipeline expansion plans.”).

37. See, e.g., Darren Fishell, *Environmental Group Challenges Basis for New England Natural Gas Pipeline Buildout*, BANGOR DAILY NEWS (Jun. 27, 2014, 3:00 PM), <http://bangordailynews.com/2014/06/27/business/environmental-group-challenges-basis-for-new-england-natural-gas-pipeline-buildout/>; Greg Cunningham, *Maine energy bill is “ill-advised gamble,”* BANGOR DAILY NEWS (May 27, 2013), <http://bangordailynews.com/2013/05/27/opinion/contributors/maine-energy-bill-is-ill-advised-gamble/>.

38. 3 Legis. Rec. H-831 (1st Reg. Sess. 2013) (“This bill represents an unprecedented bipartisan solution to one of Maine’s most pressing issues, the cost of energy. It will do great things to reduce the costs we all pay to power our homes and heat them, and our businesses that do business in the State of Maine.”).

39. 2 Legis. Rec. S-1060 (1st Reg. Sess. 2013) (“Is there [*sic*] risk in voting for this? Absolutely. There is [also] risk in not voting for this. There is risk if we don’t do this in losing some of our most substantial employers in the state of Maine that are hanging by their fingernails, waiting for some energy relief . . .”).

40. See, e.g., Darren Fishell, *Maine Utility Regulators Split on New Fee for Natural Gas Pipeline Capacity*, BANGOR DAILY NEWS (Nov. 17, 2014, 6:43 PM), <https://bangordailynews.com/2014/11/17/business/maine-utility-regulators-split-on-new-fee-for-natural-gas-pipeline-capacity/> (quoting Maine PUC Commissioner David Littell) (“No commission or state has ever done a gas pipeline contract such as this . . .”); Jack Cashman, *Maine Voices: PUC Must Proceed Cautiously When Investing in Pipeline Infrastructure*, PORTLAND PRESS HERALD (May 13, 2014), [http://www.pressherald.com/2014/05/13/maine\\_voices\\_puc\\_must\\_proceed\\_cautiously\\_when\\_investing\\_in\\_pipeline\\_infrastructure/](http://www.pressherald.com/2014/05/13/maine_voices_puc_must_proceed_cautiously_when_investing_in_pipeline_infrastructure/) (“This is uncharted territory. No commission in the country has committed electric ratepayers to own natural gas pipeline capacity.”).

41. *Public Utilities Commission*, Investigation of Parameters for Exercising Authority Pursuant to the Maine Energy Cost Reduction Act, 35-A M.R.S. § 1901, No. 2014-71, Brief of the Conservation Law Foundation (Me. P.U.C. Aug. 22, 2014) at 23-24 [hereinafter CLF Brief]. This issue was first brought to the author’s attention by the Conservation Law Foundation in their brief submitted to the Public Utilities Commission in this ongoing matter.

*preemption* and the *dormant Commerce Clause*. This Comment concludes that the ECRA—and analogous future state actions—pass both tests.<sup>42</sup>

First, Part II of the Comment explores the history of federal regulation of the natural gas industry. Beginning in the early parts of the 20<sup>th</sup> century, this Comment surveys how early courts attempted to draw the bounds of federal regulation of natural gas, a decidedly *interstate commodity*, and balance these interests with the attempts of States to better protect their own citizens. Next, in Parts II(b) and II(c), this Comment looks at the Natural Gas Act of 1938.<sup>43</sup> The NGA remains the controlling document in this area of law, solidifying the regulatory jurisdiction of the Federal Energy Regulatory Commission (“FERC” or “the FERC”) with regard to interstate sales of natural gas.<sup>44</sup> Due to the NGA’s pervasive reach, significant questions remain as to whether Maine may pass laws and enter into contracts that have the potential to impact a sphere of influence typically controlled by the federal government. To this point, some detractors have argued that Maine should not go forward with procuring an energy cost reduction contract,<sup>45</sup> as such action is almost certainly preempted.<sup>46</sup>

Part III explores the concept of preemption in the context of the NGA. To be sure, the authority of the NGA is extensive; however, it is not absolute. The legislative history of the NGA is explicit that the Act is meant to supplement, not

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42. The scope of this Comment’s analysis is limited to actions subject to Congress’s grant of jurisdiction to FERC under the Natural Gas Act. While it is possible to extrapolate this analysis to a state action subject to federal regulatory action under the Federal Power Act, as the history and purpose of both acts are considered similar, it would be inappropriate to posit that this analysis is applicable to *any and all* state energy actions – it is not. Nevertheless, the themes and modes of analysis explored in this Comment could prove useful in analyzing future problems in this area.

43. Pub. L. No. 75-688, 52 Stat. 821 (codified at 15 U.S.C. §§ 717-717(z) (2010)). Although this Comment focuses on natural gas, it is important to note that in the development of subsequent case law, courts have often treated the regulation of natural gas in the same way as they do the regulation of electricity under the Federal Water Power Act (41 Stat. 1063 (codified at 16 U.S.C. §§ 791a-828(c) (2010)). In fact, Part III deals with recent decisions of the United States Court of Appeals in regard to electricity generation with the assumption that principles regarding preemption and the scope of regulatory ability of FERC to be theoretically identical under the power granted to them under both the FPA and NGA. Many scholars have highlighted the historical fact that the NGA and FPA were passed months apart, each hoping to provide the FPC with the same ability to regulate the wholesale markets for these two pivotal fuels. See, e.g., DeVane, *infra* note 284, at 31; David S. Bell, *Jurisdiction of the Federal Power Commission Under the Natural Gas Act—Comingled Gas*, 24 LA. L. REV. 600, 600 n.1 (1964). As such, this Comment confidently presents recent cases involving the procurement of additional *electricity capacity* and strong authority for the constitutionality of analogous actions involving the procurement of additional natural gas capacity.

44. *Maryland v. Louisiana*, 451 U.S. 725, 748 (1981) (FERC has the exclusive authority “to regulate the wholesale pricing of natural gas in the flow of interstate commerce from wellhead to delivery to consumers.”); see also *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682 (1954) (“[T]he [FPC has] jurisdiction over the rates of all wholesales of natural gas in interstate commerce . . . .”). For the purposes of clarity, this Comment will refer to the federal regulatory agency as the FPC in all cases occurring before 1977, when the agency was dissolved and reconstituted as FERC.

45. See, e.g., CLF Brief, *supra* note 41, at 23-24.

46. See U.S. CONST. art. VI, cl. 2.; see also *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (internal citations omitted) (“[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, ‘any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.’”).



overwrite, the authority of the states.<sup>47</sup> In that light, this Comment explores how states are able to affect local energy policies without frustrating federal purposes. Drawing from scholarship and case law,<sup>48</sup> this Comment defines and applies a more nuanced approach to the topic of NGA preemption that is particularly useful in analyzing the ECRA. Dubbed “the modern theory of NGA preemption,” this Comment distinguishes state actions that affect wholesale energy rates—expressly preempted by the NGA—and actions that merely affect a commodity price by increasing demand for that particular commodity. These actions are *not* expressly preempted by the NGA, nor do they come into conflict with the NGA’s field of authority, or overall purpose.

Part IV of this Comment explores Maine’s ECRA from two distinct angles. First, the modern theory of NGA preemption is applied. This Comment proposes that despite affecting the interstate price of natural gas, the ECRA is not preempted, as this effect is both limited to the “law of supply-and-demand” and congruent with stated Congressional priorities. Second, Part IV explores the interconnected issues posed by the ECRC relating to the dormant Commerce Clause.<sup>49</sup> The ECRA attempts to reduce the price of natural gas consumed in Maine, by increasing the available supply. The question Part IV explores is whether such action discriminates against out-of-state interests in a way that conflicts with the sole authority of Congress to regulate interstate commerce.<sup>50</sup> This Comment argues that in contrast to the seminal cases in this area, Maine’s potential purchase of pipeline capacity via an ECRC does not violate the dormant Commerce Clause. This is the case because in the context of the Act, Maine operates as a participant in an otherwise defunct market, *not* as state regulator. Such action falls within the clause’s *market participant exception*,<sup>51</sup> and is not subject to Commerce Clause analysis.

Finally, Part V of this Comment will explore the next steps in the legal and market processes. Maine is operating in new legal territory, never before attempted by a state.<sup>52</sup> Although the ability to directly effect such change has profoundly beneficial ramifications for Maine and New England, this is an area of law that requires vigilance on the behalf of state and federal regulators. Part V will explore these possibilities and suggest ways to ensure that states are able to affect change in a way that is responsive to the market, while still protecting the interests of citizens and ratepayers.

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47. See DeVane, *infra* note 284 and accompanying text.

48. See *infra* notes 135, 186, and 252 and accompanying text.

49. U.S. CONST. art. I, § 8, cl. 3.

50. See, e.g., *Gibbons v. Ogden*, 22 U.S. 1 (1824); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

51. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (“Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over states.”).

52. See *supra* note 40.

## II. THE HISTORY OF THE FEDERAL REGULATION OF NATURAL GAS

A. *The Wild, Wild Midwest: Before the Natural Gas Act*

The early years of the natural gas industry in the United States saw multiple gas distributors operating in each major city.<sup>53</sup> However, the work of several theorists quickly changed the country's natural gas landscape.<sup>54</sup> In particular, John Stuart Mill, Thomas Henry Farrar, and Henry Carter Adams noticed that the burgeoning natural gas market would be more efficient and profitable if it collapsed, allowing a single, large company to displace smaller competitors.<sup>55</sup> Despite making economic sense, these theorists also recognized the inherent risks in an increasingly monopolistic industry. For example, Farrar and Adams posited that increased profits created by a natural gas monopoly would increase the personal wealth of the company's owners, instead of being passed along in the form of consumer savings.<sup>56</sup> As such, both supported a compromise solution: a "single firm structure for the gas distribution market, with that firm subject to government control to insure that the reduced costs attributable to the unusual structure were reflected in reduced prices."<sup>57</sup>

The natural gas industry also changed dramatically with the introduction of interstate pipelines. Early pipelines were built with wood; however, the genesis of steel models made the transportation of natural gas faster and far less expensive.<sup>58</sup> The benefits of these new innovations were obvious: natural gas companies were able to boost the volume of gas transported as well as the size and scale of their market impact.<sup>59</sup> Additionally, natural gas customers saw the average price per BTU<sup>60</sup> decrease.<sup>61</sup>

In the nascent stages of natural gas expansion, states became wary of the industry's increasing strength and attempted to regulate their activities, drawing upon the long history of public interest regulation enshrined in the states' police

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53. Richard J. Pierce, Jr., *Reconstituting the Natural Gas Industry from Wellhead to Burnertip*, 25 ENERGY L.J. 57, 58 (2004).

54. *Id.*

55. *Id.* at 58-60. All three found that laissez faire competition in this area would lead to unnecessarily high costs. Thus, as the natural gas industry promised massive economies of scale, this early work supported the theory that by eliminating duplicitious facilities and pipeline systems, the industry's future profits could increase dramatically.

56. *Id.* at 59.

57. *Id.*

58. NOLAN E. CLARK & GLENN W. CLARK, GOVERNMENTS, MARKETS AND GAS: PUBLIC UTILITY REGULATION OF NATURAL GAS, AND THE COMMODITY MARKET ALTERNATIVES 7 (1984). The use of steel allowed for natural gas to be transported at much higher pressures than before, thereby increasing the speed and volume transported.

59. Pierce, *supra* note 53, at 60.

60. BTU is an abbreviation for "British Thermal Unit." The BTU is a common measure of natural gas capacity in the industry and is equal to the amount of heat needed to raise the temperature of one pound of water one degree Fahrenheit. *Definition of B.T.U.*, DICTIONARY.COM, <http://dictionary.reference.com/browse/btu> (last visited Mar. 3, 2015).

61. Pierce, *supra* note 53, at 60.

powers.<sup>62</sup> Viewing natural gas as a public good, states attempted to limit company power in order to ensure that the public's interest was served.<sup>63</sup> In particular, many states passed statutes that formed utilities commissions to regulate the intrastate activities of these companies.<sup>64</sup> Most statutes empowered utilities commissions to review the rates charged by a company, imposing on each the burden of proving that such rates were *just and reasonable*.<sup>65</sup> Companies that failed to meet this burden often found their rates invalidated.<sup>66</sup>

Inevitably, state regulation led to legal challenges. In *Public Utilities Commission for Kansas v. Landon*,<sup>67</sup> two natural gas companies challenged Kansas's authority to regulate the price of natural gas charged by its local distribution affiliates to individual customers.<sup>68</sup> These two companies maintained a series of pipelines that transported gas throughout Kansas, Missouri, and Oklahoma.<sup>69</sup> Their gas was taken by local distribution companies ("LDCs"), owned by the pipeline companies, and then sold on to end users.<sup>70</sup> However, Kansas and Missouri attempted to regulate both the wholesale price charged by the companies, as well as the "burner tip" price charged by the LDCs to individual customers.<sup>71</sup> The companies sought injunctive relief to prevent the States from enforcing these regulations.<sup>72</sup> The trial court ruled for the companies, finding that their business was "interstate commerce of a national character [and] that the commissions' actions interfered with the establishment and maintenance of reasonable sale rates and thereby burdened interstate commerce and took the receivers' property without due process of law . . . ."<sup>73</sup> The United States Supreme Court agreed in part and reversed in part.<sup>74</sup> The Court agreed that the transportation of natural gas across state lines was interstate commerce, and therefore subject to review under the Commerce Clause.<sup>75</sup> However, the Court found that the sale of natural gas by LDCs to local customers was outside the stream of interstate commerce, and thus, was properly regulated by state public

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62. See *Munn v. Illinois*, 94 U.S. 113, 124-25 (1876) ("[The Constitution] does authorize the establishment of law requiring each citizen to so conduct himself . . . as [to] not unnecessarily injure another. This is the very essence of government . . . From this source come the police powers . . .").

63. *Id.* at 126 ("Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created").

64. Cathryn Neaves, *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, 832 (1989).

65. *Id.* at 833.

66. *Id.*

67. 249 U.S. 236 (1919), *vacated*, *Pub. Util. Comm'n of Kan. v. Landon*, 249 U.S. 590 (1919).

68. *Landon*, 249 U.S. at 242.

69. *Id.* at 243.

70. *Id.*

71. *Id.* at 244.

72. *Id.*

73. *Id.*

74. *Id.* at 244-45.

75. *Id.* at 245.

utilities commissions without placing a burden on interstate commerce.<sup>76</sup>

The Court revisited these issues one year later in *Pennsylvania Gas Company v. Public Service Commissioner of the Second District of New York*.<sup>77</sup> Here, a company transported natural gas from Pennsylvania into New York to sell directly to customers.<sup>78</sup> Unlike *Landon*, the company did not employ the use of an LDC, but instead sold directly off its pipeline to local consumers.<sup>79</sup> Nevertheless, the Court held that the regulation of retail rates was local in nature, and outside the realm of interstate commerce.<sup>80</sup> The *Pennsylvania Gas* decision reaffirmed the bifurcation of natural gas regulation: interstate transportation was subject to scrutiny under the Commerce Clause, but the regulation of local companies and local sales remained within the sole purview of the states.

The most significant case of the pre-NGA era, however, was *Missouri ex rel. Barrett v. Kansas Natural Gas Company*.<sup>81</sup> There, a company was producing gas in Oklahoma and transporting it by way of a pipeline that passed through Oklahoma, Kansas, and Missouri, and then reselling it to unaffiliated retail companies.<sup>82</sup> Problems arose when the company sought to increase its rates for transporting natural gas in both Kansas and Missouri without seeking the approval of either state's public utilities commission.<sup>83</sup> Both states brought suit, seeking to enjoin the company from raising its rates.<sup>84</sup> The United States Supreme Court rejected the states' argument.<sup>85</sup> In contrast to both *Landon* and *Pennsylvania Gas*, the Court held that the company's activities did not contain a 'local component' necessary for the states to impose regulation.<sup>86</sup> Despite the company selling and delivering its product to local distribution companies, the Court refused to distinguish this part of the business from its larger interstate component.<sup>87</sup> As such, the Court established that the wholesale distribution and resale market for natural gas was entirely an interstate transaction, thereby eliminating the ability for states to exercise control.<sup>88</sup> Further, and perhaps more importantly, the Court sent a clear signal to Congress that their regulatory intervention into the natural gas market was

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76. *Id.* at 245-46.

77. 252 U.S. 23 (1920) [hereinafter *Pa. Gas*].

78. *Id.* at 27-28.

79. *Id.*

80. *Id.* at 31 ("While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to local customers is required in the public interest and has not been attempted under the superior authority of Congress").

81. 265 U.S. 298 (1924) [hereinafter *Kan. Gas*].

82. *Id.* at 305.

83. *Id.*

84. *Id.* at 306.

85. *Id.* at 310.

86. *Id.* at 308.

87. *Id.* at 309 ("[H]ere the sale of gas is in wholesale quantities, not to consumers, but to distributing companies for resale to consumers in numerous cities and communities in different states. The transportation, sale and delivery constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business.").

88. *Id.*

badly needed.<sup>89</sup>

*B. The Natural Gas Act: Congress Enters the Fray*

The Court's decision in *Kansas Gas*, as well as other cases involving the interstate sale of electricity and natural gas,<sup>90</sup> began to raise red flags in Washington D.C. Congress heard concerns from all sectors of the utility industry; most were worried about the expanding influence of, and discriminatory tactics utilized by, the now unregulated interstate pipeline companies.<sup>91</sup> Congress thus directed the Federal Trade Commission to investigate.<sup>92</sup> The resulting report detailed the abuses perpetrated by a largely unregulated monopoly.<sup>93</sup>

Following this investigation, Congress enacted the Natural Gas Act of 1938 (NGA).<sup>94</sup> The Act's opening statement forcefully stated the situation being addressed:

[A]s disclosed in reports of the Federal Trade Commission [and] other reports made pursuant to the authority of Congress, it is 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 the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.<sup>95</sup>

The Act explicitly granted the Federal Power Commission ("FPC") jurisdiction over the transportation, and sale of natural gas, as well as any facilities used in this business.<sup>96</sup> In short, Congress had laid claim to the area of authority identified by the Court in *Kansas Gas* and had now staked out its role as the sole regulator of natural gas moving in interstate commerce.

*C. Defining the Scope and Bounds of the NGA*

Despite the strong claim of authority stated in the NGA's opening paragraph, the scope of federal regulation under the Act has been the subject of much debate. Given the events preceding the Act's passage, Courts have generally held that Congress intended the NGA to protect consumers from large natural gas companies

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89. *See id.* at 308 ("But Congress thus far has not seen fit to regulate [the interstate natural gas market], and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation.").

90. *See, e.g.,* Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927) (analogizing *Kan. Gas*, *supra* note 81, and holding invalid the attempt of Rhode Island to regulate prices charged for electricity in interstate commerce); *Pennsylvania v. West Virginia*, 262 U.S. 553, 600 (1923) (invalidating competing state regulations that sought to force natural gas companies to give preference of delivery to customers living within their respective state).

91. *Pierce*, *supra* note 53, at 61.

92. *Id.*

93. *Id.* (citing Report of FTC to U.S. Senate, S. Doc. No. 92, 70th Cong., 1st Sess., pt. 84-A (1936)).

94. Natural Gas Act, ch. 556, 52 Stat. 821 (1938) (codified at 15 U.S.C. §§ 717-771(z) (2005)) (citations omitted).

95. 15 U.S.C. § 717 (2005).

96. *Id.* § 717(b).

charging excessive rates for wholesale shipments.<sup>97</sup> Additionally, Courts have worked under the assumption that the NGA grants *exclusive* authority to the FPC (now FERC) to regulate the wholesale natural gas market, particularly the prices charged by pipeline and distribution companies.<sup>98</sup> Nonetheless, many regulated companies sought to challenge this wide interpretation of the NGA's grant of authority.

The authority of the FPC under the NGA was first challenged fewer than ten years after the bill's passage. In *Interstate Natural Gas Company v. FPC*,<sup>99</sup> the Court unanimously affirmed the FPC's ability to force interstate pipeline companies to reduce their rates.<sup>100</sup> Interstate owned and operated over 100 natural gas wells in northern Louisiana.<sup>101</sup> Most of the gas that Interstate produced was transported via its own system of pipelines to local distribution companies in Louisiana.<sup>102</sup> However, Interstate sold its excess supply to three pipeline companies that transported that gas to markets in other states.<sup>103</sup> Thus, when the FPC opened proceedings to examine the rates that Interstate charged these other pipeline companies, Interstate challenged the intervention as exceeding the agency's authority under the NGA.<sup>104</sup> In particular, Interstate believed that as it sold its gas supply to other companies *within* the state of Louisiana, the only state in which Interstate operated, its activities fell outside the flow of interstate commerce, and therefore the exercise of authority pursuant to the NGA would impede Louisiana's jurisdiction in this area.<sup>105</sup> The Court disagreed.<sup>106</sup> In particular, the Court held that the gas produced by Interstate moved "in a constant flow from the mouths of the wells from which it is produced through pipe lines belonging to Interstate to the compressor station of the respective purchaser and thus into and through states other than Louisiana . . . ."<sup>107</sup> While the Court recognized that Louisiana did maintain some regulatory authority over areas of local concern, it rejected the notion that concerns about overlap with state interests were sufficient to trump federal priorities.<sup>108</sup> Thus, after *Interstate*, the modus

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97. See *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959) ("The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas."); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944) (holding that the NGA was meant "to protect consumers against exploitation at the hands of natural gas companies.").

98. See, e.g., Nicholas W. Fels & Frank R. Lindh, *Lessons from the California 'Apocalypse': Jurisdiction Over Electric Utilities*, 22 ENERGY L.J. 1, 3 (2001); Pierce, *supra* note 53, at 63.

99. 331 U.S. 682 (1947) [hereinafter *Interstate*].

100. *Id.* at 693.

101. *Id.* at 684.

102. *Id.* at 684-85.

103. *Id.*

104. *Id.*

105. *Id.* at 687; Cf. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Schechter, a poultry manufacturer and packager operated exclusively in the State of New York. Like Interstate Gas Co., Schechter made the argument that its activities were conducted outside of the control of federal regulation under the Commerce Clause. However, unlike Interstate, Schechter was successful (or at least lucky) in this argument as its case was heard less than two years before appointments to the Court made by President Franklin Delano Roosevelt changed Commerce Clause jurisprudence forever.

106. *Interstate*, 331 U.S. at 687.

107. *Id.*

108. *Id.* at 691-92.

operandi in analyzing federal authority over interstate wholesales of natural gas is that “[e]xceptions to the primary grant of jurisdiction [to the FPC under the NGA] are to be *strictly construed*.”<sup>109</sup>

This view was both affirmed and cemented seven years later in *Phillips Petroleum Company v. Wisconsin*.<sup>110</sup> Phillips was a fully integrated energy company, which, among other businesses, collected and sold natural gas for resale to interstate pipeline companies.<sup>111</sup> Nonetheless, when the FPC opened an investigation into the company’s business practices and rates, Phillips argued that as it did not participate in the transportation of natural gas, rather it was exempt from federal oversight under the NGA.<sup>112</sup> The Court again disagreed,<sup>113</sup> adamant that the NGA granted oversight authority over *any* company engaged in the interstate wholesale of natural gas, regardless of what degree they participated in the movement of such product.<sup>114</sup> Further, the Court was clear that the NGA gave the federal government nearly unlimited control over the wholesale of natural gas in interstate commerce, in order to fill the gap left by state regulation that had been ruled unconstitutional.<sup>115</sup> But, above all, the Court in *Phillips* reminded the country that the NGA was created for the “[p]rotection of consumers against exploitation at the hands of natural-gas companies” and that “attempts to weaken” this result by reading the NGA narrowly would not be tolerated.<sup>116</sup>

Although *Phillips* clarified the goal and reach of the NGA, questions remained regarding what regulatory role, if any, Congress meant to leave to the states in achieving this goal. The prevailing view was that the NGA was intended to plug

109. *Id.* at 690-91 (emphasis added).

110. 347 U.S. 672 (1954) [hereinafter *Phillips*].

111. *Id.* at 674-75.

112. *Id.* at 675-77.

113. *Id.* at 677.

114. *Id.* (“In our view, the statutory language, the pertinent legislative history, and the past decisions of this Court all support the conclusion . . . that Phillips is a ‘natural-gas company’ within the meaning of that term as defined in the Natural Gas Act, and that its sales in interstate commerce of natural gas for resale are subject to the jurisdiction of and regulation by the Federal Power Commission.”).

115. *Id.* at 683-84 (internal citation omitted) (“There can be no dispute that the overriding congressional purpose was to plug the ‘gap’ in regulation of natural-gas companies . . . . A significant part of this gap was created by cases holding that ‘the regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the constitutional powers of the states.’ . . . [W]e are satisfied that Congress sought to regulate wholesales of natural gas occurring at both ends of the interstate transmission systems.”).

116. *Id.* at 685. Consumer protection was, many argue, the primary purpose behind the Natural Gas Act, with subsequent doctrines, e.g. the federal government’s exclusive control over interstate prices, flowing from this. Although modern scholarship has largely glossed over this part of the NGA’s history, some have noticed it. See, e.g., Joseph Fagan, *From Regulation to Deregulation: The Diminishing Role of the Small Consumer Within the Natural Gas Industry*, 29 TULSA L.J. 707, 712 (1994) (“Wishing to minimize any adverse effects from potentially anticompetitive practices, Congress drafted the NGA with the clear intention of protecting the individual consumer. Its main focus was to guarantee the consumer a reliable source of natural gas at a price determined to be reasonable.”); Brian D. O’Neill & George M. Knapp, *Oil Pipeline Regulation After Williams: Does the End Justify the Means?* 4 ENERGY L.J. 61, 65 (1983) (noting FERC’s holding in *Williams Pipeline Co.*, 21 FERC ¶ 61, 260 (1982), which specifies that the particular purpose of the NGA was to protect consumers); Francis J. Coleman, Jr., *FPC Natural Gas Allocation: Curtailment in Context*, 50 TEX. L. REV. 1370, 1385 (1972) (noting the unfortunate tendency of the FPC (now FERC) to shift its regulatory emphasis under the NGA away from consumer protection and towards inducing production).

the hole identified in *Kansas Gas*, thereby creating a unified scheme for national natural gas regulation in order to better protect consumers.<sup>117</sup> The federal government would regulate wholesale natural gas that traversed multiple state borders, while the states retained the ability to regulate retail rates and conditions.<sup>118</sup>

Finally, the Court's decision in *Northern Natural Gas Company v. Kansas Corporation Commission* is noteworthy.<sup>119</sup> Northern Natural Gas had entered into over 125 purchase contracts with various natural gas producers in Kansas, all of which had been approved by the FPC.<sup>120</sup> Then Kansas passed a statute whereby the state utility commission could "regulate the taking of natural gas from any and all common sources of supply . . . and to prevent unreasonable discrimination . . . in favor of or against any producer . . ." <sup>121</sup> Under this law, Kansas required Northern Natural Gas to take gas from wells at a rate no higher than any other producer, meaning that the supply it was able to purchase from each of the 1,100 wells connected to its pipeline was cut back.<sup>122</sup> The Kansas District Court and Supreme Court each upheld the order,<sup>123</sup> finding that the statute regulated the local "production and gathering" of natural gas, which was exempted from federal control under the NGA.<sup>124</sup>

Conversely, the United States Supreme Court held that the terms "production and gathering" only involved the "physical acts of drawing the gas from the earth and preparing it for the first stages of distribution."<sup>125</sup> Therefore, the Kansas order must be preempted, as it invaded the exclusive regulatory domain of the FPC.<sup>126</sup> In particular, the Court found that the Kansas order was preempted because it affected the wholesale price of interstate gas, an issue clearly under the purview of the NGA.<sup>127</sup> Despite Kansas' arguments that enforcing ratable extraction "in no way

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117. Pierce, *supra* note 53, at 63 (citing Fed. Power Comm'n v. La. Power & Light Co., 406 U.S. 621, 631 (1972) (internal citations omitted) ("The Natural Gas Act of 1938 granted FPC broad powers to protect consumers against exploitation at the hands of natural gas companies . . . Although federal jurisdiction was not to be exclusive, FPC regulation was to be broadly complementary to that reserved to the states, so that there would be no gaps for private interests to subvert the public welfare.")); *see also* Interstate Natural Gas Co. v. Fed. Power Comm'n, 331 U.S. 682, 690 (1947) (internal quotation marks omitted) ("The [NGA] takes no authority from State Commissions, and is so drawn as to complement and in no manner usurp State regulatory authority.").

118. *See* Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 970 (1986); *see also* Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 610 (internal quotation marks omitted) (holding that the NGA was designed to "take no authority from State commissions and was so drawn as to complement and in no matter usurp State regulatory authority."); Fed. Power Comm'n v. Panhandle E. Pipe Line Co., 337 U.S. 498, 502-03 (1949) ("[S]uffice it to say that the [NGA] did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution.").

119. 372 U.S. 84 (1963) [hereinafter *Northern*].

120. *Id.* at 87.

121. *Id.* at 88 (internal quotation marks omitted).

122. *Id.* at 89-90.

123. *Id.*

124. *See* 15 U.S.C. § 717(b) (2009).

125. *Northern*, 372 U.S. at 89.

126. *Id.* at 93.

127. *Id.* at 90; *see also* Fels & Lindh, *supra* note 98, at 3.



involves the price of gas,”<sup>128</sup> the Court ruled that even the *indirect* regulation of contractual matters was preempted by the NGA.<sup>129</sup> The Court clearly stated that the NGA instituted “a comprehensive scheme by 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.’”<sup>130</sup> Furthermore, “the federal regulatory scheme leaves no room either for state regulation of price of interstate wholesales of natural gas, or for state regulations which would *indirectly achieve the same result*.”<sup>131</sup>

Here, the Court found that Kansas’s regulatory action *had* impeded the ability of the federal government to regulate the interstate flow and the wholesale price of natural gas.<sup>132</sup> In particular, Kansas’s action interrupted the “intricate balance” that the federal government hoped to achieve in the interstate market.<sup>133</sup> Although a conflict between the state regulation and the federal scheme was not inevitable, the Court held that state regulations (such as the Kansas order) that were aimed at interstate wholesale purchasers “must be declared a nullity in order to assure the effectuation of the *comprehensive* federal regulation ordained by Congress.”<sup>134</sup>

*D. The Natural Gas Policy Act of 1978 and the Natural Gas Wellhead Control Act of 1989*

Complete federal control can have its downsides. Nearly forty years after the passage of the NGA, policy makers and energy analysts began to realize that federal control over natural gas wellhead prices had, in fact, precipitated a shortage of supply.<sup>135</sup> In response, Congress passed the Natural Gas Policy Act of 1978 (“NGPA”).<sup>136</sup> Among other outcomes, the NGPA partially deregulated wellhead prices of “new” natural gas deposits, meaning that certain categories of natural gas sold at the wellhead would no longer be subject to direct price regulation.<sup>137</sup> Unfortunately, while many commentators saw Congress’s intention to be the

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128. *N. Natural Gas Co. v. State Corp. Comm’n*, 364 P.2d 668, 668 (Kan. 1961) (“As we tried to point out in the opinion as filed, this case in no way involves the price of gas.”).

129. *Northern*, 372 U.S. at 91.

130. *Id.* (citations omitted).

131. *Id.* (emphasis added).

132. *Id.* at 98.

133. *Id.* at 92.

134. *Id.* (emphasis added).

135. Stephen F. Williams, *Federal Preemption of State Conservation Laws After The Natural Gas Policy Act: A Preliminary Look*, 56 U. COLO. L. REV. 521, 524 (1985); see also *Natural Gas Policy Act of 1978*, U.S. ENERGY INFO. ADMIN., [http://www.eia.gov/oil\\_gas/natural\\_gas/analysis\\_publications/ngmajorleg/ngact1978.html](http://www.eia.gov/oil_gas/natural_gas/analysis_publications/ngmajorleg/ngact1978.html) (last visited Feb. 14, 2015, 8:47 PM) (“Gas produced for interstate commerce [under the NGA regime] was subject to price ceilings that arguably were becoming an increasingly strong constraint that prevented market clearing.”) It is worth noting that less than a year after the publication of this article then Professor Williams was appointed by President Reagan to the United States Court of Appeals for the District of Columbia Circuit, the court primarily charged with reviewing the actions of federal regulatory agencies, including FERC. Judge Williams assumed senior status in 2001.

136. Pub. L. No. 95-621, 92 Stat. 3350 (1978) (codified as amended at 15 U.S.C. §§ 3301-3432 (1988)).

137. Williams, *supra* note 135, at 524-25 (citing 15 U.S.C. §§ 3312-3313 (1982)).

eventual return of a free market for wellhead sales,<sup>138</sup> the NGPA's division of natural gas supply into separate regulated and unregulated categories created a great amount of confusion and uncertainty.<sup>139</sup> In part noticing these classification issues, Congress repealed significant portions of the NGPA by way of passage of the Natural Gas Wellhead Decontrol Act of 1989 ("NGWDA").<sup>140</sup> The NGWDA completely eliminated price controls on first sales of natural gas,<sup>141</sup> beginning in 1993,<sup>142</sup> rather than beginning on January 1, 2000, as called for by the NGPA.<sup>143</sup> Despite the elimination of wellhead price controls, both Congress and the courts were clear that the passage of the NGPA "did not compromise the comprehensive nature of federal regulatory authority over interstate gas transactions,"<sup>144</sup> although it did not foreclose the ability of the states to set *maximum* prices for the first sale of natural gas produced within its borders.<sup>145</sup>

### III. ENERGY POLICY LABORATORIES: THE POSSIBLE ROLE OF STATES UNDER THE NGA

#### *A. E Pluribus Unum: The New Role of States in Large-Scale Energy Purchases*

As this Comment discusses above, the central purpose of the NGA was to bridge the gap between the states' ability to regulate intrastate energy production and sale, and their collective inability to regulate energy passing in interstate commerce.<sup>146</sup> Without effective federal regulation, the possibility existed that consumers would face increasing prices, while monopolistic energy companies profited.<sup>147</sup> Today, high energy prices continue to be of concern.<sup>148</sup> However, the responses from both state and federal bodies differ from those of past decades. Although the United States functions as one nation, each region has its own

138. *See id.* at 524, n. 25.

139. Richard G. Morgan & Martha P. Patterson, *The Natural Gas Policy Act of 1978: Four Years of Practice and Two Years to Make Perfect*, 71 KY. L.J. 105, 105 (1982) ("[T]he NGPA's deregulation provisions have caused, and will continue to cause, substantial problems and heated debate.").

140. Pub. L. No. 101-60, 103 Stat. 157 (1989) (codified at 15 U.S.C. §§ 3331-3432 (1989)).

141. 15 U.S.C. § 3331 (1989) (repealed 1993).

142. *Natural Gas Wellhead Decontrol Act of 1989: Description and Impact*, U.S. ENERGY INFO. ADMIN., [http://www.eia.gov/oil\\_gas/natural\\_gas/analysis\\_publications/ngmajorleg/ngact1989.html](http://www.eia.gov/oil_gas/natural_gas/analysis_publications/ngmajorleg/ngact1989.html) (last visited Oct. 5, 2014, 1:23 PM).

143. *Id.*

144. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 2930, 3000 n. 6 (1988); *see also Transcon. Gas Pipe Line Corp. v. Oil & Gas Bd. of Miss.*, 474 U.S. 409, 421 (1986) ("The NGPA . . . does not constitute a federal retreat from a comprehensive gas policy.").

145. 15 U.S.C. § 3432(a) (2009). In sum, the NGPA eased the extent of federal control, but attempted to do so in a way that would not cede any of its exclusive control over interstate wholesale prices. The NGPA is not central to the issue explored in this Comment, but is instructive when looking at the scope of federal control of the natural gas industry over time.

146. *See generally Phillips Petroleum Co. v. Wisconsin.*, 347 U.S. 672 (1954).

147. *See Pierce supra* note 53, at 62.

148. *See, e.g., Ralph Vartabedian, U.S. Electricity Prices May Be Going Up for Good*, L.A. TIMES (Apr. 25, 2014, 8:47 PM), <http://www.latimes.com/nation/la-na-power-prices-20140426-story.html#page=1>; James Taylor, *Electricity Prices Soaring in Top Wind Power States*, FORBES (Oct. 17, 2014, 8:12 AM), <http://www.forbes.com/sites/jamestaylor/2014/10/17/electricity-prices-soaring-in-top-10-wind-power-states/>.

individual energy challenges and priorities. For some regions, a focus on household energy efficiency has been effective in reducing overall demand.<sup>149</sup> For other regions, a focus on renewable energies has helped alleviate burdens on the local electric grid.<sup>150</sup> Yet for others, experimenting with renewable fuels and efficiency measures is insufficient; instead, states and municipalities have sought to incentivize the purchase of additional capacity for certain fuels, or the construction of additional generation assets in order to meet their unique challenges. In particular, New England's high dependence on natural gas for electricity generation has necessitated the development of innovative strategies to keep prices from jumping to untenable levels.

The central challenge is allowing each region to address its individualized needs, while maintaining a federal energy policy that recognizes the need for more centralized control over certain policies and resources. This was the challenge that Congress recognized in passing the Natural Gas Act. The regulation of each individual state was no longer practical, nor was it effective to prevent large-scale industry from taking advantage of consumers.<sup>151</sup> This primary purpose of the NGA is still alive today. Yet it is difficult to mesh this overarching priority with allowing individual states, like Maine, to take action that may bolster some federal priorities while hindering others. This section thus explores the concept of preemption, first generally, and then in the context of natural gas regulation, in hopes of identifying what role, if any, may be maintained for states in this pivotal area of law.

### B. A Preemption Primer

The Supremacy Clause, found in Article VI of the Constitution, states that both the laws and treaties passed by Congress are the supreme law of the land.<sup>152</sup> The concept of preemption naturally flows from this dictate, as Chief Justice John Marshall famously articulated in the seminal case, *Gibbons v. Ogden*.<sup>153</sup> Here, the State of New York had awarded a local company a virtual monopoly for operating

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149. *California's Energy Efficiency Success Story: Saving Billions of Dollars and Curbing Tons of Pollution*, NATURAL RESOURCES DEFENSE COUNCIL (July 2013), <http://www.nrdc.org/energy/ca-efficiency-success-story.asp> (citing both the Governor of California, and the U.S. Energy Information Administration in concluding that California's energy efficiency initiatives had helped lower the average California electricity bill to 25 percent below the national average).

150. *Green Power Program: Frequently Asked Questions*, NEW YORK POWER AUTHORITY, [http://www.nypa.gov/doingbusiness/Customers\\_FAQsV.pdf](http://www.nypa.gov/doingbusiness/Customers_FAQsV.pdf) (last visited Oct. 17, 2014, 10:47 AM). New York provides renewable energy credits, or RECs, to any customer who is willing to purchase electricity generated by renewable sources. The credits will make up the difference between the often-higher price of renewable energy, and standard offer rates that are predominately generated by more traditional fuel types; see also *Renewable Energy In Hawai'i*, HAWAII CLEAN ENERGY INITIATIVE, <http://www.hawaii-cleanenergyinitiative.org/renewable-energy/> (last visited Oct. 17, 2014, 11:01 AM). This is a joint venture of the State of Hawai'i and the United States Department of Energy to create incentives and incubator programs that will hopefully lead to Hawai'i producing 70% of its electricity needs from renewable sources by 2030.

151. See generally *Phillips*, 347 U.S. at 672.

152. U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .").

153. 22 U.S. (9 Wheat.) 1 (1824).

steamboats between New York City and neighboring ports in New Jersey.<sup>154</sup> However, a rival boat company that possessed a federal license to operate in the same waters, was cited in violation of the statute.<sup>155</sup> The Court struck down the New York law, as it violated Congress's exclusive power to regulate interstate commerce.<sup>156</sup> In so doing, Justice Marshall declared that "acts of the State legislatures . . . [that] interfere with, or are contrary to the laws of Congress [are to be invalidated because] in every such case, the act of Congress . . . is supreme; and the law of state, though enacted in the exercise of powers not controverted, must yield to it."<sup>157</sup>

The United States Supreme Court's default position has been to assume that federal and state laws are compatible.<sup>158</sup> To reduce the possibility that state and local authority might be unnecessarily superseded, the Court first looks to Congressional intent to determine whether a particular area of law was reserved exclusively for federal control.<sup>159</sup> Should such intent be identified, preemption can be found in two distinct ways. First, *express* preemption can be found if Congress has clearly indicated this intent by the inclusion of preemptive language within the bill itself.<sup>160</sup> For example, the federal government has complete authority with regards to radiation safety around nuclear power plants,<sup>161</sup> and more notably, over all aspects of immigration policy.<sup>162</sup> Second, *conflict preemption* can be found where a state law frustrates or prevents the achievement of a federal objective.<sup>163</sup> In some

154. *Id.* at 1-2.

155. *Id.* at 2.

156. *Id.* at 168.

157. *Id.* at 211.

158. *See* *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal citations omitted) ("[We] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

159. *Id.* (internal citations omitted) ("The purpose of Congress is the ultimate touchstone . . ."); *see also* *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (a preemption analysis starts "with the assumption that the history powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the clear and manifest purpose of Congress."); *Gade v. Natl. Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (internal citations omitted) ("The question of whether a certain state action is preempted by federal law is one of congressional intent."); *N.Y. Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 413 (1973) (citation omitted) ("Congress . . . should manifest its intention clearly . . . the exercise of federal supremacy is not lightly to be presumed.").

160. *See, e.g.*, The Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a) (2014) (requiring that this law "supersedes any and all State laws insofar as they may not or hereafter relate to any employee benefit plan.").

161. Donald E. Jose & Michael A. Garza, *The Complete Federal Preemption of Nuclear Safety Should Prevent Scientifically Irrational Jury Verdicts in Radiation Litigation*, 26 TEMP. ENVTL. L. & TECH. J. 1, 9 n.53 (2007) (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 208 (1983) ("[T]he safety of nuclear technology was the exclusive business of the federal government.")).

162. *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (emphasis added) ("[T]he supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution . . .").

163. *See* *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (alteration in original) (citations omitted) (Conflict preemption applies "where under the circumstances of [a] particular case, the [challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

instances, discerning a conflict is rather simple.<sup>164</sup> However, in many more instances, Congressional intent is murky, and thus, finding whether an impermissible conflict exists is far from simple.<sup>165</sup> In these cases, determining whether a conflict exists often depends on how the court characterizes the federal purpose involved.<sup>166</sup>

In the field of energy, preemption analyses have become exceedingly complicated. It is common wisdom that “if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject,”<sup>167</sup> and “[e]ven where state regulation operates within its own field, it may not intrude indirectly on areas of exclusive federal authority.”<sup>168</sup> Today, FERC’s primary activities reside in regulating the interstate flow of electricity, including the activities of interstate transmission companies.<sup>169</sup> In this area, FERC’s exclusive jurisdiction is clear.<sup>170</sup>

However, as noted above, the line between federal and state authority under the NGA is far fuzzier. Early cases interpreting the NGA were quick to point out that the clear Congressional purpose of the Act was to complement existing state regulations in order to better protect consumers, *not* to usurp areas of traditional state authority, including the regulation of production within state borders, and of local distribution companies.<sup>171</sup> However, this issue is often revisited and the nuances are striking.

Within the federal government’s reserved powers has been the regulation of wholesale natural gas pricing.<sup>172</sup> Beginning with *Northern* and continuing into the present day, very few have challenged this authority. Yet what remains unclear is the extent to which complimentary state laws may reside within this realm, as *Northern* failed to identify any limiting principle to Congress’ influence.<sup>173</sup> Some recent decisions have found that the entire *field* of wholesale natural gas pricing is

164. *See, e.g.*, *McDermott v. Wisconsin*, 228 U.S. 115, 135-36 (1913). A Wisconsin law prohibited the labeling of maple syrup in a manner mandated by federal law. The United States Supreme Court held that Congress maintained the express authority to require certain labels be affixed to products in order to protect citizens from harmful products.

165. EDWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 391 (2d ed. 2002).

166. *Id.* at 398.

167. *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring).

168. *Pub. Utils. Comm’n of Cal. v. FERC*, 900 F.2d 269, 274 n.2 (D.C. Cir. 1990) (citation omitted) (internal quotation marks omitted).

169. Federal Power Act, 48 Stat. 863 (1920), §§ 201, 205, 206 (codified at 16 U.S.C. § 824(b), (d), (e) (2013)). FERC also maintains oversight in the areas of hydroelectric dams, as well as the interstate transportation and rates of oil and natural gas.

170. *See, e.g.*, *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964); *Appalachian Power Co. v. Pub. Serv. Comm’n of W. Va.*, 812 F.2d 898, 904 (4th Cir. 1987); *Cal. ex rel. Lockyer v. Dynergy, Inc.*, 375 F.3d 831, 851 (9th Cir. 2004) (citation omitted) (internal quotation marks omitted) (“[Wholesale energy rates set by FERC] must be given binding effect by state authorities. . .”).

171. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 609-10 (1944).

172. *N. Natural Gas Co. v. Kan. Corp. Comm’n*, 372 U.S. 84, 91-92 (1963).

173. *See* BLACK’S LAW DICTIONARY 1369 (10th ed. 2014) (obstacle preemption (or conflict preemption): “The principle that federal or state statute can supersede or supplant state or local law that stands as an obstacle to accomplishing the full purposes and objectives of the overriding federal or state law.”) I use “complimentary” in this context to denote a state law that would not pose an obstacle or conflict to the federal government’s achievement of a power or duty denoted in the NGA.

the dominion of FERC,<sup>174</sup> while others are wary of granting exclusive power for fear of trampling on traditional state authority.<sup>175</sup> This level of disagreement suggests, as Professor Chemerinsky warns, that discerning Congressional intent, and thus the need for preemption can be complicated.<sup>176</sup>

*C. Murky at Best: What Effect May States Have on Wholesale Price?*

Under traditional rules of preemption, the Court's decision in *Northern* suggests that FERC had either preempted the *field*<sup>177</sup> of the regulation of wholesales of natural gas, or at least that any statute with an effect on these prices would pose an inherent *conflict* with federal priorities.<sup>178</sup> Yet the evolution of federal wellhead price controls following enactment of the NGPA and the NGWDA suggests that this rule is more nuanced than it is absolute, as Congress has indicated a willingness to allow states to take on more of a regulatory role. This void potentially leaves space for state regulations that attempt to benefit citizens (within the entire ethos of the NGA) while avoiding conflicts with existing federal priorities.

For example, Judge Williams has suggested that the NGPA indicated willingness by Congress to allow benign state regulations to withstand preemption, despite indirectly affecting the wholesale price of natural gas.<sup>179</sup> He conceived of a situation where a state action ordering natural gas producers to take more supply for sale would *not* be preempted under the NGPA, despite the Court's past decision in *Northern*.<sup>180</sup> While such an order could conceivably raise the price of natural gas for local consumers, Judge Williams posited that it would be very difficult for a court to find implied preemption, as the regulation would remain consistent with

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174. *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 243 (D.C. Cir. 2013) (") (citation omitted) (internal quotation marks omitted) ("Congress intended to occupy the field to the exclusion of state law by establishing through the NGA a comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce; *see also* *State ex rel. Johnson v. Reliant Energy, Inc.*, 289 P.3d 1186, 1193 (Nev. 2012) ("From a practical standpoint, if each state intervened in [the natural gas regulation] field with different regulation, the result would be a maelstrom of competing regulations that would hinder FERC's oversight of the natural gas market. We cannot conclude that this is what Congress intended through the use of purposeful deregulation [under the NGPA].").

175. *Nw. Cent. Pipeline Corp. v. Kan. Corp. Comm'n*, 489 U.S. 493, 515 (1989) ("[C]onflict preemption analysis must be applied sensitively in [the area of natural gas regulation], so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role.").

176. CHEMERINSKY, *supra* note 165, at 391-93.

177. *See* 15 U.S.C. § 717(b) (2005). State actions are *not* expressly preempted by the NGA. The history of the NGA's passage, both legislative and otherwise, makes this clear. When analyzing a state action for preemption issues, the question is whether it affects wholesale pricing in a way that is not accepted by *Northern*, or whether the state action is in conflict with the law's consumer-protection aim. Judge Williams, *supra* note 135, at 535, begins to carve out exceptions to the general rule proposed by the Supreme Court in *Northern*.

178. *N. Natural Gas Co. v. Kan. Corp. Comm'n*, 372 U.S. 84, 91 (1963).

179. Williams, *supra* note 135, at 535.

180. *Id.* at 534-35.

the federal objectives identified in the NGA and NGPA.<sup>181</sup>

In this vein, Judge Williams proposed a new test for implied preemption under the NGA. Rather than declaring that “any state action that risked increasing the price of natural gas for ultimate consumers was necessarily preempted,”<sup>182</sup> he argued that “[t]he primary standard should now be whether the state action is *congruent with the development of the sort of market that Congress sought to achieve.*”<sup>183</sup> Combining these thoughts with the NGA’s purpose,<sup>184</sup> it seems reasonable to conclude that if state regulation furthers this dual purpose *locally*, in a manner that does not interfere with the federal government’s achievement of this goal on a national scale, courts may be hesitant to pull the preemption trigger. Furthermore, this theory suggests a role for states in ongoing regulation of natural gas specifically, and the creation of energy supply policy generally. This role would allow states to experiment with various local energy procurement policies, whether they help to produce renewable fuels, or increase investment in existing commodities. The only difficulty with this theory would be ensuring that these state regulations are not wholly inconsistent with the goals of Congress expressed in the NGA—or the FPA in the case of electricity.<sup>185</sup>

Although this premise has not been tested before the United States Supreme Court, or in the context of natural gas, two recent Federal Court of Appeals decisions have put Judge Williams’ premise into action. First, the United States Court of Appeals for the Third Circuit found that the Federal Power Act preempted a New Jersey law that had incentivized the increased production of electricity.<sup>186</sup> The State of New Jersey had adopted the “Long Term Capacity Pilot Program Act,”<sup>187</sup> which called for the New Jersey Board of Public Utilities to “promote the construction of new generating facilities in the state” in hopes of increasing the amount and reliability of the state’s electricity supply.<sup>188</sup> However, New Jersey did not pay for these facilities itself, but instead promised any interested supplier the

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181. *Id.* at 535 (“The NGPA’s premise, that a healthy, competitive wellhead market can and ought to be achieved, might give rise to an inference that state legislation facilitating the development of such a market is generally welcome.”).

182. *Id.* at 536.

183. *Id.* (emphasis added).

184. *See* 15 U.S.C.A. § 717(b) (2014) (stating that the purpose of the Act as a whole is to protect end-consumers from being exploited by natural gas behemoths, while keeping rates at a just and reasonable level).

185. In my opinion, Judge Williams’ theory highlights the best mode of analysis available regarding interpretation of the NGA. The history of the NGA highlights Congress’ intent to bridge the gap between state regulations in order to protect consumers. To that end, the law has been successful, as producers and transporters are subject to the same regulation regardless of the destination of their product. As Judge Williams makes clear, it was not the intent of Congress to prevent states from taking independent action to affect change within their borders, or even within a region. As such, preempting *any* action that affects price is not congruent with Congressional purpose. Instead, the dual-purpose of the NGA: protecting consumers, and uniformly regulating market participants, need to be considered equally when conducting a preemption analysis in this area.

186. *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 253 (3d Cir. 2014); *see also supra* note 43 (explaining why cases involving the federal regulation of electricity are analogous to this Comment’s discussion of natural gas).

187. *Id.* at 245-46.

188. *Id.* at 246.

ability to charge a set rate for their supply for the subsequent fifteen years.<sup>189</sup> The Third Circuit declared that the Federal Power Act preempted the law, as the federal government “has exclusive control over interstate rates for wholesales of electric capacity.”<sup>190</sup> Despite being achieved in a unique fashion, the court concluded that by *guaranteeing* the price of that any intrastate producer could charge, the effect was to augment the federally regulated clearing price, thereby creating a *different* price than what FERC intended.<sup>191</sup>

Second, the United States Court of Appeals for the Fourth Circuit found a similar program in Maryland also to be preempted by the FPA.<sup>192</sup> As in *Solomon*, Maryland was concerned with the low volume of electricity being generated within its borders.<sup>193</sup> As such, Maryland sought to incentivize an increase in production by promising to pay a generator the difference between their clearing price, and a fixed twenty-year rate set by the Maryland Public Service Commission.<sup>194</sup> These contracts for differences (“CfDs”) would be paid for by ratepayers, via long-term contracts that the state would compel some of its local electric distribution companies to enter.<sup>195</sup> Similar again to *Solomon*, the Fourth Circuit invalidated the program, finding that it impinged on the federal government’s exclusive authority to regulate interstate wholesale rates.<sup>196</sup> In language familiar to this area of law, the court stated that despite doing so indirectly, the Maryland program had violated the bright line between federal regulation of wholesale rates, and state regulation of local distribution and generation.<sup>197</sup>

*D. “Enlarging the Supply of Capacity”: A Glimmer of Hope for State Interventions into Generation and Capacity Markets*

Following *Solomon* and *Nazarian*, it may appear that Judge Williams’ earlier thesis rings hollow. How can a state hope to affect a downward trend in rates, either for electricity or natural gas, without frustrating federal goals? Especially in New England, where energy costs continue to rise,<sup>198</sup> both decisions seem to reiterate that a nearly impenetrable wall surrounds the federal government’s jurisdiction on this issue. However, one avenue to affect change appears to remain open.

A background in economics is not necessary to see the proper equation. Both

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189. *Id.*

190. *Id.*

191. *Id.* at 252-53.

192. PPL Energyplus, LLC v. Nazarian, 753 F.3d 467, 480 (4th Cir. 2014).

193. *Id.* at 473.

194. *Id.*

195. *Id.* at 473-74.

196. *Id.* at 475-76. The court also rejected Maryland’s argument that the program was not preempted because it did not interrupt the market price of electricity as set by federal auctions. Despite this being factually accurate, the court held that by guaranteeing a certain price for generated electricity, regardless of what price a generator may receive at auction, Maryland was “superseding” federal regulatory authority.

197. *Id.* (quoting Pub. Utils. Comm’n v. FERC, 900 F.2d 269, 274 n. 2 (D.C. Cir. 1990) (“Even where state regulation operates within its own field, it may not intrude indirectly on areas of exclusive federal authority.”)).

198. See *supra* notes 9, 14, and 15.



*Solomon* and *Nazarian* involved scenarios where a state regulatory body sought to increase the generation of electricity by creating financial incentives for generators.<sup>199</sup> The hope was that by increasing generation assets, and thus the overall supply of electricity, the price would fall. Unfortunately for both Maryland and New Jersey, this outcome was achieved by paying generators to generate, thereby changing the federally regulated price that a generator could receive. These actions stepped over the line. However, in his *Solomon* opinion, Judge Julio Fuentes skillfully points out an exception to this general rule.

First, Judge Fuentes noted the unprecedented nature of the decision, mainly the fact that the New Jersey law presented one of the first times that a state action had attempted to solve a prevailing energy shortage by way of a ratepayer funded program.<sup>200</sup> Yet while the incentivizing of generation was preempted by the federal government's exclusive jurisdiction over interstate rates, the Third Circuit rejected FERC's argument that a state would also be field preempted if its regulations had an incidental effect on a market price simply because it increased supply.<sup>201</sup> In fact, the Court draws a strong distinction between the two: "[t]he law of supply-and-demand is not the law of preemption. When a state regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation invalid."<sup>202</sup> This incidental effect is contrasted with the actions analyzed in *Nazarian* and *Solomon*, both of which sought to change incentives in a way that directly overrode the price-setting authority of the federal government. In contrast, Judge Fuentes found that states certainly maintain the authority to select types of generation to be built and where they will be built as well. These are places where states have always maintained authority, and "FERC's authority over interstate rates does not carry with it exclusive control over any and every force that influences interstate rates."<sup>203</sup>

This statement of the law takes from, and improves upon, the United States Supreme Court's statement in *Northwest Central Pipeline Corp. v. Kansas*.<sup>204</sup> There, the Court distinguishes *Northern Natural Gas Company v. Kansas*,<sup>205</sup> by finding that a Kansas law that threatened to cancel natural gas producers' entitlements to certain gas fields, should they reduce purchases and cut supply, was not preempted under the NGA.<sup>206</sup> According to the Court, state regulation of production rates could not be field preempted under the NGA, even if those regulations had an incidental effect on wholesale prices.<sup>207</sup> Twenty-five years later, *Solomon* represents an expansion of this doctrine, thereby including state regulations of generation and capacity expansion. This step follows logically. If

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199. *Solomon*, 766 F.3d at 248; *Nazarian*, 753 F.3d at 473.

200. *Solomon*, 766 F.3d at 254 (internal citations omitted) ("This is the first time we have a state law to address state long-term energy needs under a state procurement paid for by state rate payers . . .").

201. *Id.* at 255.

202. *Id.* (emphasis added).

203. *Id.*

204. 489 U.S. 493, 514 (1989) [hereinafter *Nw. Cent.*] ("To find field pre-emption of Kansas' regulation merely because purchasers' costs and hence rates might be affected would be largely to nullify the part of NGA § 1(b) that leaves to the states control over production . . .").

205. 372 U.S. 84 (1963).

206. See generally *Nw. Cent.*, 489 U.S. at 497-98.

207. *Id.* at 514.

under *Northwest Central*, a state may directly regulate production in a manner that has an effect on an otherwise federally regulated area, it would hold that a state wishing to indirectly affect price by simply increasing capacity for a certain energy source would likewise be permitted to do so.

Consequently, Judge Williams' theory, combined with the backing of *Solomon* and *Northwest Central*, come together to create a *modern theory of NGA preemption*. Unlike the more rigid opinions in *Northern* and *Phillips*, this theory reserves a small role for state actions consistent with Congressional intent. This theory recognizes that despite its nature as a national industry, states have always been allowed to experiment with policies designed to protect its citizens and benefit the state as a whole. After all, the NGA's central purpose as a consumer-protection mechanism<sup>208</sup> should allow states to undertake measures that will better serve its citizens, assuming they do not cross into the exclusive control of the FERC. Thus, this modern theory suggests that merely affecting—indirectly—the interstate price of natural gas by working to increase supply is not an automatic death-sentence, but an effect that must be analyzed in context, and with regard to the overall priorities embodied in federal legislation.

This modern theory of conflict preemption under the NGA and NGPA has the potential to open up a number of interesting possibilities for states that have become frustrated with the current energy prices. Maine is one such state. This Comment will now explore the contours of the ECRA, and analyze its effects under this new framework.

#### IV. A PIECE IN THE NGA PREEMPTION PUZZLE: DOES THE MAINE ECRA FIT?

##### A. *A Brief History of MPUC 2014-71*

As this Comment noted in Part II, the continued rise in natural gas prices in both Maine and New England is due in large part to the lack of sufficient pipeline capacity to transport adequate supply into the region.<sup>209</sup> It is this problem that the ECRA hopes to solve.<sup>210</sup> Stated plainly, “[i]t is in the public interest to decrease prices of electricity and natural gas for consumers in this State [and the] expansion of natural gas transmission capacity into this State . . . could result in lower natural gas prices and, by extension, lower electricity prices for consumers in this State.”<sup>211</sup>

Commissioned by the State, the report of Sussex Economic Advisors highlighted the significant capacity-related problems facing Maine and New England.<sup>212</sup> First, the report highlighted the gravity of the region's problems,

208. See *supra* note 116 and accompanying text.

209. See Tux Turkel, *Maine Businesses Can Expect Electricity Rate Shock This Winter*, PORTLAND PRESS HERALD (Oct. 6, 2014), <http://www.pressherald.com/2014/10/06/electric-rates-to-spike-for-mid-size-businesses-this-winter/>.

210. 35-A M.R.S.A. § 1903 (2013).

211. *Id.*

212. SUSSEX ECONOMIC ADVISORS, MAINE PUBLIC UTILITIES COMMISSION: REVIEW OF NATURAL GAS CAPACITY OPTIONS (2014), *available at* [http://www.iso-ne.com/committees/comm\\_wkgrps/othr/egoc/mtrls/2014/mar62014/maine\\_puc\\_gas\\_study\\_022614.pdf](http://www.iso-ne.com/committees/comm_wkgrps/othr/egoc/mtrls/2014/mar62014/maine_puc_gas_study_022614.pdf) [hereinafter SUSSEX REPORT]. The report was commissioned by the Maine PUC following the passage

particularly the elevated price of natural gas that New England (and Maine in particular) was being forced to pay.<sup>213</sup> Then, the report highlighted the significant constraints placed on New England's pipeline capacity,<sup>214</sup> as well as the number of potential options to increase that capacity being offered by various market participants.<sup>215</sup> Finally, the report analyzed the potential effects of the purchase of additional pipeline capacity. Although dotted with caveats, the report concluded that Maine ratepayers would experience certain benefits from the execution of an ECRC.<sup>216</sup>

However, following the deterioration of regional efforts to purchase a greater amount of pipeline capacity,<sup>217</sup> some parties involved in the administrative proceeding worried that acting alone, Maine would not be able to make a sizable dent in the overall price of natural gas, thus charging ratepayers for improvements that would not directly benefit them.<sup>218</sup> The Sussex Report had warned that if Maine acted

of the ECRA, and was in fact mandated by the Act as the initial step to be taken in deciding whether or not Maine should purchase pipeline capacity under this new authority. 35-A M.R.S.A. § 1904(1)(c) (alteration in original) (“In consultation with the Public Advocate and the Governor’s Energy Office, [the PUC must] hire a consultant with expertise in natural gas markets to make recommendations regarding the execution of an energy cost reduction contract.”).

213. *Id.* at 7. In particular, Sussex noted that during the 2012/2013 heating season, there were 25 instances where New England was paying at least \$10 more per MMBtu than the average price represented by the Henry Hub index.

214. *Id.* at 12-29. In particular, the report noted that four significant power generators—Salem Harbor, Vermont Yankee, Brayton Point, and Norwalk Harbor—were all scheduled to be decommissioned in the next three years. These plants represent ten percent of New England’s total electricity generation capacity. However, since none of the four use natural gas, their retirement will place further pressures on the already insufficient system, possibly causing an additional increase in market prices.

215. *Id.* at 35-40.

216. *Id.* at 60 (“[T]he introduction of new pipeline capacity into a constrained region will reduce the basis differential between that region and the Henry Hub natural gas price index.”).

217. In December of 2013, all six New England governors signed an accord to explore joint efforts to increase pipeline capacity into the region. The effort, coordinated in part by the New England States Committee on Electricity (NESCOE), hoped to bring state decision makers and energy stakeholders to increase the amount of natural gas coming into New England by approximately 1 Bcf/day. *New England Governors Announce Proposal to Expand Regional Energy Infrastructure*, ISO NEWSWIRE (Jan. 28, 2014, 4:26 PM), <http://isonewswire.com/updates/2014/1/28/new-england-governors-announce-proposal-to-expand-regional-e.html>. However, the group announced in August of 2014 that their collective effort would be stalled until further notice. The primary factor in this decision was the failure of the Massachusetts Legislature to pass a bill aimed at allowing Massachusetts utilities to enter into long-term contracts to purchase Canadian hydroelectricity. See Jon Chesto, *Gov. Patrick Backs Away From Regional Effort to Expand Natural Gas Capacity*, BOSTON BUSINESS JOURNAL (Aug. 18, 2014, 10:55 PM), [http://www.bizjournals.com/boston/blog/mass\\_roundup/2014/08/gov-patrick-backs-away-from-regional-effort-to.html?page=all](http://www.bizjournals.com/boston/blog/mass_roundup/2014/08/gov-patrick-backs-away-from-regional-effort-to.html?page=all). Without a regional effort, a great amount of debate within the Maine PUC surrounded whether the limit of 200 mmCf/day would be sufficient to make a dent in the overall needs of Maine. Yet, recent electoral changes in the region, particularly the election of Governor Charlie Baker in Massachusetts, may signal a thawing of the regional effort. See generally Bruce Gellerman, *As Winter Electricity Prices Jump, Mass. Debate Over Natural Gas Pipelines Heats Up*, WBUR (Mar. 10, 2015) <https://www.wbur.org/2015/03/10/natural-gas-pipelines>. Only time will tell what the final outcome will look like.

218. *Public Utilities Commission, Investigation of Parameters for Exercising Authority Pursuant to the Maine Energy Cost Reduction Act*, 35-A M.R.S. §1901, No. 2014-71, Examiners’ Report (Me. P.U.C. Oct. 1, 2014) at 13 [hereinafter Examiners’ Report].

independently, even to the upper-limit of its statutory authority, the resulting addition of capacity would likely “not . . . have a substantial effect on the basis premium . . . .”<sup>219</sup> This worry was echoed by the PUC hearing examiners, who concluded “that it is unlikely that the benefits to Maine consumers will exceed the costs of pipeline capacity if the . . . State of Maine enters into an [ECRC] . . . .”<sup>220</sup>

However, many other parties found that the possible drawbacks were far outweighed by the effect of increasing energy prices on ratepayers. Despite the deterioration of a regional effort, The Brattle Group (writing on behalf of the Office of the Public Advocate (“OPA”)) concluded that state intervention might be necessary to correct a possible market failure.<sup>221</sup> Further, the OPA noted that the pipeline constraints in the winter of 2013 had “increased Maine electricity costs by more than \$180 million.”<sup>222</sup> The bottom line, the OPA warned, was that energy prices, and their negative effects on consumers, showed no signs of reversing course.<sup>223</sup>

Noting these divergent views, the Commission staff gave preliminary approval to a request for proposals to be submitted to companies interested in constructing and selling capacity to the state.<sup>224</sup>

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219. SUSSEX REPORT, *supra* note 212, at 62.

220. Examiners’ Report, *supra* note 218, at 1. This was also a worry, among many, voiced by the Conservation Law Foundation. *Id.* at 13.

221. *Id.* at 31 (internal citation omitted) (“[B]asis differentials appear to exceed the cost of new capacity while fundamentals are arguably tightening, and yet no market participants . . . are signing up for firm transportation service to support capacity expansion.”).

222. *Id.* at 8.

223. *Id.* The exact degree of this increase in price is unknown. However, looking at the standard offer rate for electricity in Maine is helpful. The standard offer rate is the default rate for electricity supply that a Maine customer automatically pays. See Maine Office of the Public Advocate, *Electricity: Electricity Providers (Supply)*, <http://www.maine.gov/meopa/utilities/electric/supply.html> (last visited Feb. 13, 2015). Currently, the standard offer rate of Central Maine Power, the state’s largest provider, is 7.56 cents per kWh. *Id.* It was believed that when the Maine PUC solicited bids for the new standard offer price in January of 2015, the new price would rise to between 9 and 11 cents per kWh. See E-mail from Timothy Schneider, Maine Public Advocate, to author (Nov. 11, 2014, 22:46 EST) (on file with author). A general rule of thumb is that an increase of 1 cent per kWh will cost the average Maine home \$5.50 a month or \$66 a year. *Id.* However, thanks in part to the precipitous fall of oil prices in late 2014 and early 2015, standard offer prices for residential and small-business customers (in Central Maine Power’s territory, covering most of southern and central Maine) fell 13.4 percent to 6.54 cents per kWh. Tux Turkel, *Price pain turns to gain for many of CMP’s customers*, PORTLAND PRESS HERALD (last updated Jan. 14, 2015), <http://www.pressherald.com/2015/01/13/cmp-electric-rates-going-down-13-percent/>. Nonetheless, should oil prices begin to rise again, the region’s continued lack of natural gas pipeline capacity could force standard offer prices up once more.

224. Examiners’ Report, *supra* note 218, at 36; see also, Edward D. Murphy, *Maine PUC votes to review proposals for new natural gas pipelines*, PORTLAND PRESS HERALD (Oct. 30, 2014, 1:58 PM), <http://www.pressherald.com/2014/10/30/maine-puc-votes-to-review-proposals-for-new-natural-gas-pipelines/>. On November 13, 2014, by a vote of 2 to 1, the Commissioners approved moving forward with the review of three separate proposals for pipeline expansion into Maine. *Id.* Although there is continued skepticism about its effect, it has been also noted that heating prices, and the price of fuel for many of Maine’s companies, may continue to rise if no action is taken. *Id.* Nonetheless, it should be noted that the composition of the PUC changed in January 2015, with the retirement of Chair Thomas Welch, and the appointment of Carlisle McLean—as well as the promotion of Commissioner Mark Vannoy to Chair. Darren Fishell, *LePage nominates his top legal adviser to PUC, names Vannoy chairman*, BANGOR DAILY NEWS (Jan. 8, 2015, 2:54 PM), <http://bangordailynews.com/2015/01/08/politics/lepage-nominates-his-top-legal-adviser-to-puc-names->

The procedural history of the ECRA is highly important to the Act's practical impact on Maine—both as a governmental entity, and perhaps more importantly, as a community of rate-paying citizens. The Examiners' Report in this matter showcases the divergence of views on this matter: from pipeline companies, to environmental advocates, to public agencies, no person observing this matter would feel that the import of the issue was not understood.<sup>225</sup> Nonetheless, the ultimate decision of whether or not the Maine PUC will implement an ECRC is of less import to this Comment than the question of whether the State of Maine possesses the Constitutional authority to do so in the first place.

*B. Applying the “Modern NGA Preemption Theory” to the ECRA*

In *Northern* the United States Supreme Court unequivocally declared that States were preempted from regulating the wholesale price of natural gas, both directly and indirectly.<sup>226</sup> However, Part III of this Comment presented a new test for determining preemption under the NGA as it relates to the wholesale price of natural gas.<sup>227</sup> This theory rejects *Northern*'s rigid approach and posits that state regulations are not invalidated when they merely increase the supply of energy, thereby indirectly affecting the price.<sup>228</sup> Instead, this section of Part III argues that state regulations of natural gas that achieve these indirect effects while pursuing the NGA's overall purpose should be protected from preemption.

There is no doubt that the ECRA's purpose is to influence wholesale market rates. This purpose is not only stated in the bill's language,<sup>229</sup> but also reiterated by its proponents,<sup>230</sup> and its detractors; the latter using it in an attempt to invalidate Maine's action all together.<sup>231</sup> However, a proper approach to NGA jurisprudence demonstrates that the ECRA is not preempted. This comment solidifies this point in two distinct ways.

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vannoy-chairman/. What effect this change in composition will have on the implementation of an ECRA remains unclear.

225. The role of a stakeholder like the Tennessee Pipeline Company, whose goal is to profit from the sale of natural gas, is far different from that of the Conservation Law Foundation, which is strongly opposed to the idea of expanding the state's dependence on natural gas. See Cunningham, *supra* note 37 (“A major natural gas build out in New England will commit our region for the rest of this century to an economy and lifestyle driven substantially by natural gas akin to our reliance on coal and oil in the past century . . . Maine simply cannot afford the many consequences of this ill-advised gamble.”). However, as the author of this Comment witnessed a large portion of the proceedings before the MPUC in this matter, it should be noted that all parties seemed to have a full grasp on the precedent-setting possibilities of the ECRA, and the ways in which the choice to implement an ECRC or not could impact both Maine ratepayers, and the natural gas industry as a whole.

226. *N. Natural Gas Co. v. Kan. Corp. Comm'n*, 372 U.S. 84, 91 (1963).

227. See *supra* pp. 21-23 (a state action that produces an effect on interstate prices is not automatically preempted under the NGA, but instead is analyzed in the context of the NGA's overall purpose for providing uniform regulation of interstate sales of natural gas and ensuring affective consumer protection).

228. *Id.*

229. 35-A M.R.S.A. § 1903 (2013).

230. See Fredette Testimony, *supra* note 30.

231. CLF Brief, *supra* note 41, at 23-24 (arguing that because the ECRA expressly states its intention to influence wholesale rates of natural gas, the Act impinges upon FERC's authority as outlined by the NGA).

First of all, ECRA critics fail to differentiate the type of action the Act proposes from the types of action that have been preempted in the past. In this area, it is critical to recognize that the ECRA does not seek to regulate<sup>232</sup> the expansion of natural gas pipeline capacity.<sup>233</sup> Instead, Maine is acting in the shoes of a private party. The ECRA itself does not delegate the authority to set rates, to override the decision of the federal government, or to otherwise act in a fashion that would be consistent with the type of action invalidated in *Northern*. Instead, it potentially funds an action typically undertaken by a private party, an action outside of the scope of the NGA, and thus immune from preemption. Maine is participating in the natural gas market in an attempt to secure a beneficial result for its “customer,” the people of Maine. Although of a different scale, Maine’s action warrants the same constitutional scrutiny as if a large industrial company chose to relocate to Maine, and Maine helped to fund the construction of a smaller pipeline branch to feed the operation and help create jobs for a rural community. Framed in this way, Maine does not need to justify the scope of its action vis-à-vis the NGA as only state regulatory actions must account for their effect on wholesale prices.<sup>234</sup>

Alternatively, should Maine’s action be determined to be regulatory in nature, the State can distinguish the warning of *Northern* by using the modern NGA preemption theory, which does not seek to discredit *Northern*, but merely narrows the scope of the decision to a position consistent with the intent of the NGA. The NGA was not drafted in a vacuum. Instead, it was conceived with the purpose of creating a uniform set of regulations to govern the interstate transportation and sale of natural gas in order to protect the common citizen from unregulated pipeline companies.<sup>235</sup> The ECRA is not inconsistent with this purpose and thus should not be preempted. Instead, Maine continues to operate within its constitutionally protected area of influence—primarily that of ensuring the local prices for consumer electricity, gas, heat and water are “just and reasonable.”<sup>236</sup> The ECRA’s stated intent is to reduce interstate natural gas prices. However, its means for carrying out this goal are not achieved by contradicting federal regulation, but by increasing the supply of this fuel into the region, while still respecting the NGA’s stated goal of protecting consumer interests. In theory, the resulting effect would be a lower price for natural gas. Consequently, this goal and the means for its

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232. BLACK’S LAW DICTIONARY 1475 (10th ed. 2014) (regulation: “Control over something by rule or restriction.”). This Comment draws the distinction between an act that forces certain activities to occur, and the ECRA, which involves the process of allowing the State to act in the capacity of an otherwise regulated actor to purchase pipeline capacity.

233. The construction of interstate natural gas pipelines is under the sole jurisdiction of FERC. 15 U.S.C. § 717(b) (2005).

234. See generally *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”). Finding that the ECRA presented a type of action outside the scope of NGA analysis, would allow a reviewing court to dispense with the case *without* undergoing the constitutional analyses discussed within the Comment. This constitutional avoidance, or *Ashwander* Principle, has been preferred by the courts over the years and could steer a court away from invalidating the law or opening up a constitutional Pandora’s box by validating a new test of NGA preemption.

235. See *Pierce*, *supra* note 53, at 62.

236. 35-A M.R.S.A. § 301(2) (2014).

achievement are both consistent with the emphasis placed on consumer protection by the NGA,<sup>237</sup> and supported by the Third Circuit's distinction of "supply and demand" in *Solomon*. The decision in *Solomon* conceived of a situation where the simple increase of fuel capacity would have an indirect effect on the resulting interstate wholesale price of that fuel. Some have doubted the ability of Maine's actions to change the price of natural gas.<sup>238</sup> Nonetheless, the theory behind the ECRA is precisely the type of situation envisioned in *Solomon*. As the Third Circuit noted, FERC may have exclusive authority over interstate rates – both under the FPA and the under the NGA—but this authority “does not carry with it exclusive control over any and every force that influences [these rates.]”<sup>239</sup> Unlike the regulations invalidated in *Northern*, *Nazarian*, and *Solomon*, Maine is not crossing the Rubicon that divides federal and state regulatory authority. It is not mandating<sup>240</sup> a change in producer behavior, nor is it not overriding FERC-approved cost structures. More importantly, Maine's action under the ECRA is not dictating a new price for wholesales of natural gas carried in interstate commerce. This power, at the heart of the NGA, remains at the sole discretion of FERC. In theory, this action has the potential to change the overall wholesale price of natural gas in the region. However, it seems highly unlikely that the state's action in this context would give rise to cries of preemption, because though its actions may affect the wholesale price of natural gas, in no way is such action inconsistent with FERC's regulatory regime.

This distinction shows the wisdom of *Solomon*. The Third Circuit correctly recognized that failing to limit the otherwise-absolute scope of *Northern* could produce dire consequences for individual states. By distinguishing the “law of preemption” from the “law of supply and demand” the court correctly recognized the concern that without a limiting principle, a “firestorm of litigation”<sup>241</sup> could ensue, challenging each and every state practice that sought to increase the supply of affordable fuel in order to protect citizens from the volatility of the market. Such an outcome cannot be considered consistent with the past intent of Congress, especially following the NGPA's rollback of federal price controls.<sup>242</sup>

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237. See DeVane, *infra* note 284, at 39-40.

238. See CLF Brief, *supra* note 41, at 15-17. Ironically, if CLF's theory was vindicated and an ECRC had *no effect on natural gas prices*, this entire Constitutional exercise would be for not. When conducting an analysis relying on *Northern* and its progeny, it is necessary for state action to produce either a direct or indirect effect on wholesale prices. Without a resulting effect, state action is not at risk of treading on federal priorities.

239. PPL Energyplus, LLC v. Solomon, 766 F.3d 241, 255 (3d Cir. 2014).

240. However, an argument could be made that the Act *induces* a change in behavior. The current PUC order, *Public Utilities Commission*, Investigation of Parameters for Exercising Authority Pursuant to the Maine Energy Cost Reduction Act, 35-A M.R.S. §1901, No. 2014-71, Order – Phase 1 (Me. P.U.C. Nov. 13, 2014) at 1 [hereinafter Phase 1 Order], authorizes a request for proposals to parties interested in building new pipeline capacity, which Maine *could* subsequently buy. Considering the fact that Commission staff had acknowledged the existence of market failure, *infra* note 243, the State offering to buy new capacity should spur action from market participants that would not have otherwise occurred.

241. Brief of Connecticut Utilities Regulatory Authority et al. as Amici Curiae Supporting Appellants, PPL Energyplus, LLC v. Solomon, No. 13-4330 (3d. Cir., Jan. 24, 2014).

242. See Williams, *supra* note 135, at 524.

C. *A Protected Species: the ECRA is Not Preempted Under the NGA*

Simply put, the history of express preemption under the NGA is not consistent with the invalidation of the ECRA. From *Interstate* to *Phillips* to *Northern* to a possible challenge of *Nazarian*, federal courts have strongly protected FERC's regulatory monopoly over natural gas travelling in interstate commerce. However, while the ECRA's impact has the potential to extend beyond Maine's borders, the action of purchasing additional capacity to pass into the state falls far short of FERC's presumptive jurisdiction. The ECRA does not seek to supersede the just and reasonable analysis conducted on a federal level, as the regulations in *Solomon* and *Nazarian* did. It does not force natural gas companies to change the amount of gas that they pass into the wholesale market, as the State of Kansas attempted to do in *Northern*. Instead, Maine is attempting to correct a perceived failure in the wholesale natural gas market.<sup>243</sup> Thus, the simple purchase of additional natural gas, although indirectly affecting the wholesale price, does not intrude on the *expressly stated intent* of Congress in the NGA, therefore surviving the express preemption hurdle.

Next, implied preemption is not appropriate, as the ECRA remains consistent with the legislative purpose of the NGA. Finding conflict preemption is only appropriate if a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>244</sup> As is summarized above,<sup>245</sup> the NGA was not passed because the federal government was interested in regulating industry, but because the express lack of interstate regulation was harming customers through the charging of excessive rates. Thus, if consumer protection remains paramount in a court's conflict preemption analysis, the ECRA must survive. The legislative history,<sup>246</sup> the testimony of many parties involved,<sup>247</sup> numerous media pieces,<sup>248</sup> and the express language of the Act,<sup>249</sup> all signal the need to increase pipeline capacity in order to help save customers from retail natural gas and electricity prices that are anything but just and reasonable.

This purpose is not hostile to that of the NGA. In fact, it supports the overall purpose of the NGA in a way that FERC cannot—by entering the competitive market. FERC is able to regulate the industry from a high-altitude perspective,

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243. Examiners' Report, *supra* note 218, at 31 ("The purpose of the Act is not to interfere with an otherwise functioning market simply to collapse the basis differential, but rather to address any market failure to protect Maine consumers from the present economic phenomenon whereby they are subject to a much higher basis differential than the rest of the country.").

244. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

245. *See supra* p. 12

246. *See* Fredette Testimony, *supra* note 30.

247. *See Public Utilities Commission*, Investigation of Parameters for Exercising Authority Pursuant to the Maine Energy Cost Reduction Act, 35-A M.R.S. §1901, No. 2014-71, Brief of the Office of the Public Advocate (Me. P.U.C. Aug. 22, 2014) at 12 ("Energy costs in Maine were 56.8% higher in 2012/13 than in 2011/2012, primarily as a result of significantly higher costs during the winter months attributable to pipeline capacity constraints.").

248. *See, e.g.,* Whit Richardson, *Standard Offer Electricity Prices Jump More Than 10 Percent for CMP, Emera Maine Customers*, BANGOR DAILY NEWS (Jan. 22, 2014, 3:09 PM) <http://bangordailynews.com/2014/01/22/business/standard-offer-electricity-price-for-most-cmp-customers-jumps-by-more-than-10-percent/>.

249. 35-A M.R.S.A. § 1903 (2013).



ensuring that interstate prices remain competitive, that no monopolies form, and that the market as a whole remains healthy. However, the NGA does not provide the ability to help correct local market failures—the workings of intrastate markets and regulations were meant to be preserved.<sup>250</sup> This is precisely the point.

In sum, if state actions meant to protect consumers still fall within the grasp of FERC, and are thereby preempted, then perhaps the clear intent of the NGA is not so clear after all, and the dual regulatory regime of the NGA, with the express purpose of protecting the public interest,<sup>251</sup> should be reexamined.

*D. The ECRA Represents A New Wave of Federalism in Energy Planning That Should be Encouraged*

In the area of constitutional law, the conception of the states as laboratories of democracy is at risk of becoming a cliché.<sup>252</sup> However, with increased worries about global warming, and the cost of every-day electricity for consumers, the role of the state in crafting adequate policy solutions has never been more important. To be sure, the need for an overarching regime to regulate the energy sector in its interstate workings is also important. After all, it was the lack of such a system that prompted the genesis of the NGA. However, the power of the federal government can and should only go so far—and to ignore the role of each individual state in aiding in this overall endeavor is critical. Thus, a proper preemption analysis must consider this complimentary role of the state, and how invalidation would quash its inherent value.

This interplay should also be considered if and when a challenge of the ECRA, or a similar state law comes to the fore. Part of the beauty of allowing for state experimentation is that a state is (theoretically) more knowledgeable with regard to local issues, and is more responsive to the needs of individual citizens. Thus, an effective preemption analysis must seek to balance the relative benefits of state involvement with the preservation of a comprehensive federal regime, or even favor the involvement of local regulatory authorities in resolving a novel issue.<sup>253</sup>

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250. *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 690 (1947) (“The [NGA] takes no authority from State commissions, and is so drawn as to complement and in no matter usurp State regulatory authority.”).

251. 15 U.S.C. § 717(a) (2009).

252. *See New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

253. *See Note, Preemption and Regulatory Efficiency in Federal Energy Statutes*, 103 HARV. L. REV. 1306, 1307-08 (1990) (“An economic approach to [preemption analysis] views federalism as a functional balance of competing sources of law; courts can compare the benefits of local flexibility with those of federal uniformity. Advantages of state regulation include not only quicker responses to local needs and greater political accountability, but also experimentation with a broader variety of regulatory approaches.”); *see also* Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607, 670 (1985) (“It is in the national interest to permit each state to adopt its own regulatory policy to the extent that such state decisions affect only, or predominantly, the interests of state residents.”); C. Boyden Gray, *Regulation and Federalism*, 1 YALE J. ON REG. 93, 93 (1983) (“[T]here should be a presumption in favor of state or local operation of regulatory programs.”).

The ECRA is a prime example of this phenomenon. In a stated attempt to aid families and businesses, Maine is acting as a prudent investor would, purchasing a commodity for which there is a significant demand, in hopes of reducing its wholesale price. Just as in *Solomon*,<sup>254</sup> states in a federal system should be able to choose which types of electricity generation to build, and likewise, they should be able to choose which types of fuel should power that generation.<sup>255</sup> This balance between the authority *between* state borders and state authority *within* those borders is precisely the type of regime envisioned by the NGA. Thus, preserving a space for state experimentation in this most volatile and important of areas is within in the best interests of all those involved, particularly consumers. As such preemption cannot, and should not be, a tool used by FERC to quash novel experiments in energy policy, whose effects would not expand into the region of interstate commerce. Instead, they should be encouraged, and facilitated in a manner consistent with the keeping prices of energy just and reasonable for each and every citizen. The ECRA's furtherance of this objective bolsters its constitutional legitimacy.

*E. One More Bump in the Road: Dealing with the Dormant Commerce Clause*

Even assuming, *arguendo*, that the ECRA is not preempted by the NGA, it has been argued that the Act is invalid under the dormant Commerce Clause.<sup>256</sup> Initially conceived by Chief Justice John Marshall,<sup>257</sup> the dormant Commerce Clause is not an express constitutional provision, but a logical offshoot of the exclusive power of Congress to regulate the use, channels, instrumentalities, and activities, which have a substantial effect on interstate commerce.<sup>258</sup> Because Congress has exclusive authority over these broad categories, a State is not permitted to enact laws or regulations that benefit local interests at the expense of out-of-state interests.<sup>259</sup> State laws that expressly discriminate against out-of-state interests are *per se* unconstitutional.<sup>260</sup> This presumption can only be overcome if a

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254. PPL Energyplus, LLC v. Solomon, 766 F.3d 241, 254 (3d Cir. 2014).

255. To be clear, this Comment does not advocate reversal of the Third Circuit's decision in *Solomon*. However, the facts in *Solomon* spotlight how states can shape their own energy policies by investing in certain types of generation. Of course, this "investment" cannot interfere with, or otherwise displace federal priorities.

256. See CLF Brief, *supra* note 41, at 23.

257. See *Gibbons v. Ogden*, 22 U.S. 1, 199-200 (1824) ("[W]hen a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do.").

258. See *U.S. v. Lopez*, 514 U.S. 549, 558-59 (1995).

259. See, e.g., *Camps Newfound/Owatona, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 575-76 (1997) (holding that a state tax exemption for charitable organizations violated the dormant Commerce Clause because it specifically benefited organizations that served in-state clientele instead of out-of-state clientele); *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 527-28 (1935) (holding a law that required dealers of milk to pay out-of-state producers the same minimum price as dealers were required to pay in-state producers an unconstitutional violation of the Dormant Commerce Clause).

260. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (holding that a state law which forbade the importation of waste from other states was unconstitutional under the Commerce Clause); see also *Whelton v. Missouri*, 91 U.S. 275, 281 (1875) (finding a state law which forbade the importation of *any* goods from out-of-state to be in violation of the Commerce Clause); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (holding that the denial of a license to operate a daily and

state demonstrates both a compelling local interest and the lack of any viable alternative to protect this interest.<sup>261</sup> If, however, a law is not facially discriminatory, it may still be invalidated if it was passed with a discriminatory purpose, or produces a discriminatory effect.<sup>262</sup> In these cases, the Court will employ the *Pike*<sup>263</sup> balancing test, which attempts to ascertain whether the benefits of a law for local interests outweigh the burdens it places on interstate commerce.<sup>264</sup>

However, the dormant Commerce Clause only applies to a state's regulatory actions, and as such, the Court has consistently found that a state's direct actions as a *market participant* are not subject to the traditional Commerce Clause analysis.<sup>265</sup> In fact, the frequency of states acting as market participants has become so common that modern courts often treat the market participant exception as a threshold question before employing the traditional dormant Commerce Clause tests.<sup>266</sup> Thus, "[the] [i]mpact on out-of-state residents figures in the equation *only* after it is decided that the [State] is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause."<sup>267</sup>

Recent regulations in the context of energy and the environment have been challenged under the dormant Commerce Clause. For example, the United States Supreme Court in 1992 invalidated a state law that required electricity generators to

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creamery to an out-of-state company, despite the company's successful completion of every applicable step, violated the Commerce Clause).

261. *Maine v. Taylor*, 477 U.S. 131 (1986). The Court allowed Maine to ban the importation of non-native baitfish. The State successfully proved that there was no other way to prevent various invasive species of baitfish from being introduced into non-native habitats other than their outright ban. To date, *Taylor* remains the only instance of a State successfully overcoming strict scrutiny in this context.

262. *See, e.g., Hunt v. Wa. State Apple Adver. Comm'n*, 432 U.S. 333 (1977) (invalidating a state law that required all imported apples to only bare USDA classifications, as this indirectly discriminated against out-of-state producers).

263. *Pike v. Bruce Church, Inc.*, 397 U.S. 132, 142 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce, are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

264. *Id.*; *see also Exxon Corp. v. Maryland*, 437 U.S. 117 (1978); *Parker v. Brown*, 317 U.S. 341 (1943). In both instances, the Court held that the burdens placed on petroleum producers and raisin producers respectively were not significant enough to outweigh local interests that they sought to protect.

265. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) ("Nothing in the purposes animating the Commerce Clause forbids a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."); *see also Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (upholding South Dakota's ability to charge less to in-state purchasers of cement than out-of-state purchasers, because the state-owned company was directly participating in the cement market). The only limit to the exception is that a State may not attach discriminatory conditions to any sale it conducts while participating in the market. *South-Central Timber Dev. Corp. v. Wunnicke*, 467 U.S. 82, 97 (1984).

266. *See White v. Mass. Council of Const. Employ., Inc.* 460 U.S. 204, 210 (1983) ("[C]ourts treat the question of whether the state is acting as a market participant as a threshold question for dormant Commerce Clause analysis.").

267. *Id.*

purchase a percentage of their fuel supply from in-state sources.<sup>268</sup> More recently, concerns have been raised of the potentially discriminatory impact of state “renewable portfolio standards” (“RPSs”), which seek to incentivize the construction of renewable electricity generation by providing tax credits and other state-provided incentives.<sup>269</sup> The argument is raised that incentivizing in-state development of renewable energy implicitly discriminates against out-of-state alternatives.<sup>270</sup> In this vein, a recent decision of the United States Court of Appeals for the Ninth Circuit upheld a state law that regulated a number of carbon-based pollutants.<sup>271</sup> Overturning the district court,<sup>272</sup> the Ninth Circuit held that the law did not violate the dormant Commerce Clause, as it regulated pollutants based on their carbon content and impact on the environment, not on their point of origin.<sup>273</sup> In addition, the United States District Court for the District of Colorado upheld a state law that required each Colorado-based utility to produce at least 10 percent of its annual electricity sales from renewable sources.<sup>274</sup> Despite the fact that the Colorado law might affect the bottom-line of some out-of-state companies, the court held that the standards did not impose enough of a burden on interstate commerce to be struck down.<sup>275</sup> Beyond these two examples, however, the area of the dormant Commerce Clause has rarely been explored in the context of state

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268. *Wyoming v. Oklahoma*, 502 U.S. 437, 444 (1992). Oklahoma had traditionally imported all of the coal needed to fuel its power plants. However, its legislature instituted a law that required all gas-fired generators to purchase at least 10 percent of its supply from Oklahoma-based companies. The Court applied strict scrutiny due to the facially discriminatory nature of the bill, and found that the interest could be achieved in other ways, thus invalidating the law. *Id.* at 456.

269. See William Griffin, *Renewable Portfolio Standards and the Dormant Commerce Clause: The Case for In-region Location Requirements*, 41 B.C. ENVTL. AFF. L. REV. 133, 133 (2014).

270. *Id.* at 134.

271. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), *cert denied*, 134 S.Ct. 2875 (2014) (holding, among other things, that California’s low-carbon fuel standards were not facially discriminatory (as would violate the dormant Commerce Clause) because they did not differentiate between pollutants on the basis of their origin, but instead on the basis of their carbon content).

272. *Corey*, 730 F.3d at 1078.

273. *Id.* at 1093 (“The dormant Commerce Clause does not require California to ignore real differences in carbon intensity among out-of-state ethanol pathways, given preferential treatment to those with a higher carbon intensity. These factors are not discriminatory because they reflect the reality of assess and attempting to limit GHG emissions from ethanol production.”).

274. *Energy and Env’tl. Legal Inst. v. Epel*, No. 11-cv-00859-WJM-BNB, 2014 WL 1874977, at \*2 (D. Colo. May 9, 2014). The USDC for the District of Minnesota also explored the constitutional implications of a law that forbade the construction of new coal-fired generation without the necessary carbon offsets. *North Dakota v. Heydinger*, 15 F.Supp.3d 891 (D. Minn. 2014). However, because the court found the law to be preempted by the FPA, the additional dormant Commerce Clause challenge was not explored. Commentary and synopsis of both these cases can be found in Alexandra B. Klass, *State Energy Policy and the Commerce Clause: Spotlight on Colorado and Minnesota*, ENERGY LAW PROFESSOR BLOG (May 21, 2014), <http://energylawprof.wordpress.com/2014/05/21/state-energy-policy-and-the-commerce-clause-spotlight-on-colorado-and-minnesota/>. Additionally, a full-scale analysis of both cases, the statutes that begot them, and the issue of RPSs and the dormant Commerce Clause generally has been conducted. Its conclusions are split, and hinge more on states’ ability to draft legislation in a way that prevents attack, rather than on the Constitutional validity of RPSs as a whole. Daniel K. Lee & Timothy P. Duane, *Putting the Dormant Commerce Clause Back to Sleep: Adapting the Doctrine to Support State Renewable Portfolio Standards*, 43 ENVTL. L. 295 (2013).

275. *Epel*, 2014 WL 1874977 at \*6 (“The dormant Commerce Clause neither protects the profits of any particular business, nor the right to do business in any particular manner.”).

energy regulations, and has not been explored to date in the area of natural gas.

Nonetheless, the dormant Commerce Clause does not present an obstacle to the ECRA. In fact, it does not even provide a bump in the road. First and foremost, the ECRA does not discriminate against out-of-state interests. The argument has been raised that the ECRA violates the dormant Commerce Clause simply because it “places a direct burden on interstate commerce.”<sup>276</sup> Yet, this argument not only misinterprets the Supreme Court’s previous rulings on the issue, but also fails to advance any reasons why the purchasing of natural gas pipeline capacity would discriminate against out-of-state interests wishing to do the same.

Additionally, the ECRA does not facially or effectually discriminate against out-of-state interests, in fact it encourages the use of regional and local strategies if such efforts might lead to “lower natural gas prices and, by extension, lower electricity prices for consumers in Maine.”<sup>277</sup> Secondly, it is hard to envision a situation where the introduction of additional pipeline capacity, either into New England as a region, or into Maine as a state, would produce the necessary discriminatory effect in order to invalidate the ECRA in line with *Wyoming*, *Hunt*, or *Dean’s Milk*. The ECRA does not privilege a Maine natural gas company, or pipeline provider over an out-of-state competitor, nor does it establish any method by which Maine interests would be elevated over those of New Hampshire, Vermont, Massachusetts, Connecticut, or Rhode Island. Rather, the ECRA establishes a process and a framework by which Maine will hopefully reduce its energy bills. No scenario, at least that can be envisioned at this point in time, produces the type of effect necessary for an aggrieved party to bring suit under the dormant Commerce Clause; producing a “direct burden on interstate commerce”<sup>278</sup> is not enough.

Finally, although not necessary at this juncture, the ECRA has an emergency hatch through which it could escape invalidation under the dormant Commerce Clause: the market participant exception. As the Maine PUC staff has already admitted, the current alignment of the private market is not producing the necessary result.<sup>279</sup> Despite the obvious lack of capacity resources to transport natural gas into both Maine, and New England, the private market has not solved the problem.

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276. CLF Brief, *supra* note 41, at 23-24.

277. See generally 35-A M.R.S.A. § 1930(2); SUSSEX REPORT, *supra* note 212, and accompanying text. The modus operandi for the past year has been that as the lack of natural gas pipeline capacity was a regional problem, that a collective regional strategy was the best way to solve it. The letter released by all six New England governors on December 5, 2013, spoke to this exact issue: “New England ratepayers can benefit if the states collaborate together to advance our common goals. The Governors therefore commit to continue to work together, in coordination with ISO-New England and through the New England States Committee on Electricity (NESCOE), to advance a regional energy infrastructure initiative that diversities our energy supply portfolio while ensuring that the benefits and costs of transmission and pipeline investments are *shared appropriately among the New England States*. Press Release, New England Governors’ Commitment to Regional Cooperation on Energy Infrastructure Issues (Dec. 5, 2013) (emphasis added), *available at* [http://www.nescoe.com/uploads/New\\_England\\_Governors\\_Statement-Energy\\_12-5-13\\_final.pdf](http://www.nescoe.com/uploads/New_England_Governors_Statement-Energy_12-5-13_final.pdf). Additionally, all of NESCOE’s letters, memoranda, and other materials relating to a regional infrastructure effort are cataloged at [http://www.nescoe.com/Regional\\_Infrastructure.html](http://www.nescoe.com/Regional_Infrastructure.html) (last visited Oct. 31, 2014, 3:41 pm).

278. See CLF Brief, *supra* note 41, at 23-24.

279. See Examiners’ Report, *supra* note 218, at 31.

Thus, the solution proposed by the Maine Legislature by way of the ECRA is for Maine to pick up the slack and partially finance the type of pipeline expansion that would theoretically reverse the currently unfavorable basis differential. In this way, Maine is not regulating the transport of natural gas.<sup>280</sup> Instead, Maine is attempting to plug the hole vacated by the usual market participants; it is attempting to purchase enough capacity to unilaterally reverse the ever-escalating price of natural gas in the Northeast. As the Court stated so clearly in *White*, this activity amounts to *participating* in the market, rather than *regulating* it, and thus the Commerce Clause does not apply.<sup>281</sup>

In sum, no part of the ECRA, or a potential contract that Maine might enter into, poses a threat to out-of-state interests. Instead, it represents a measure that could, if successful, constitutionally and lawfully benefit not just Maine, but most of its similarly starved neighbors.

## V. CONCLUSION

### A. In Summary

Federalism is a delicate balance, especially when energy policy is involved. Although each state has its own needs and ideas on how to meet them, they all must fit into an intricate puzzle to enable the country to function as a whole. Originally, the interest and jurisdiction of the states were given preference, while the power of Congress to regulate “interstate commerce” was pruned to the extreme.<sup>282</sup> Yet the emergence of large industry, the need for far-reaching oversight, and perhaps the influence of President Franklin D. Roosevelt, all began to swing the balance in the other direction, and the broad power of federal government to regulate large-scale commerce began to come into fruition.<sup>283</sup>

It was in this era of a more expansive commerce power that both the Natural Gas Act and the Federal Power Act were passed. However, the passage of both Acts was not intended to be a federal power grab—instead, both Acts were meant to bridge the divide left between states, and to provide a general safety net for consumers.<sup>284</sup> In the wake of *Kansas Gas*,<sup>285</sup> the need for comprehensive federal

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280. Such regulation, of course, would necessarily be preempted by the NGA. See 15 U.S.C. § 717(a).

281. See *supra* note 266.

282. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (invalidating a federal regulation on the working conditions of sugar workers, which the federal government attempted to pass under its Commerce Clause power); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding that the regulation of working conditions and the imposition of a minimum wage on the coal industry had no relation to interstate commerce and thus could not be passed pursuant to Congress’s power under the Commerce Clause).

283. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937) (citations omitted) (internal quotation marks omitted) (“The fundamental principle is that the power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement; to adopt measures to promote its growth and insure its safety; to foster, protect, control, and restrain.”).

284. See Dozier A. DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 GEO. WASH. L. REV. 30, 34 (1945) (“It was the expressed desire of [President Roosevelt] and of the majority leaders in Congress, that any legislation enacted by Congress

legislation was clear; however, like the government's assertion of control over interstate electricity sales three years prior, the Natural Gas Act was merely meant to aid, rather than intrude upon state regulatory authority.<sup>286</sup> Further, the passage of the NGA was considered to be a hedge for states' interests in regulating natural gas companies, rather than a broad-scale usurpation of states' rights.<sup>287</sup> This context is extremely important when analyzing current state efforts to improve the public good by way of state energy procurement and planning programs. The need for affordable, dependable energy has been a concern of elected officials and common voters alike for many, many years. The glut of natural gas in the mid-Atlantic and increased concerns over global warming have only intensified the public's attention on energy policy as a whole.<sup>288</sup> Yet, while federal priorities are clear as mud, the opportunity exists for states to take the initiative.

Maine's passage of the Energy Cost Reduction Act is a prime example. Saddled with increasing electricity bills and confronted with the closure of large-scale industry, due in part to the inexorable rise in natural gas prices, the Maine Legislature saw the need for action. The debate over the potential effect of new natural gas capacity has been spirited and highly informative, and although a conclusion has not been reached, the process exemplifies the potential for state actions within the context of national energy markets to provide beneficial results for state-specific consumers.

Whether Maine will ever enter into a capacity contract for natural gas is uncertain, and whether such an investment would be prudent, or disastrous, is not within the scope of this Comment.<sup>289</sup> What should not be in doubt, however, is the State of Maine's ability to pass this bill, free of conflict with federal statutes, or the Constitution itself.<sup>290</sup> This Comment has explored the development of federal

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should be of a character that would aid in securing reasonable consumer rates, but that such legislation should not divest state commissions of their power . . .").

285. See *supra* notes 81-87 and accompanying text.

286. See DeVane, *supra* note 284, at 39-40.

287. *Id.* at 41 ("Under these two Acts the Federal Government is pioneering in the field of federal cooperation with state commissions in an effort to establish more effective regulation under our dual form of government.").

288. See Stephen Ansolabehere & David Konisky, *Energy: What Americans really want*, BOSTON GLOBE (Sept. 14, 2014), <http://www.bostonglobe.com/ideas/2014/09/13/energy-what-americans-really-want/SdM914A5hoIK4rKP2rKn3O/story.html> ("Americans have a clear understanding of what types of energy they want to see the United States use, and what types they want to see reduced.").

289. See Phase I Order, *supra* note 240, at 40-41; see also *supra* note 27; Fishell, *supra* note 224. As of the drafting of this Comment, the Maine PUC has agreed to move into Phase II of procuring an ECRC. Phase I Order, *supra* note 240, at 36. It will now solicit bids from interested pipeline companies and will review them as soon as possible. *Id.* When reviewing bids, the Commission will review the price, the timeline of a particular project, and most importantly, the potential for a purchase of natural gas capacity to produce a "net benefit" for the people of Maine in the resulting reduction in price for natural gas and electricity. *Id.* at 38-39. However, this progress is, to a certain extent, contingent on the actions of the new PUC who will begin work in the Spring of 2015.

290. This conclusion would hold true for other state-sponsored purchases of generation assets or capacity. Although not tested in these areas to this point, the key commonality between the ECRA and an analogous state action is whether the state sought to increase the supply of a certain resource rather than usurping a federally regulated price. However, each case will have its own intricacies and nuances that will have to be analyzed under both the modern preemption theory, and perhaps the market participant exception to the dormant Commerce Clause, in due course.

regulation of natural gas, as well as the general history and criteria of both preemption and dormant Commerce Clause challenges to similar state actions. Through this analysis, the Comment has concluded that a state action like the ECRA is, in fact, the type of initiative that the NGA regime sought to enable and preserve.

First, this Comment argued that the act of purchasing pipeline capacity is wholly market-based in nature, rather than regulatory, thereby eliminating the need to conduct any preemption analysis.<sup>291</sup> However, in the alternative, this Comment asserted that a state's attempt to increase the supply of a federally regulated fuel is not preempted either.<sup>292</sup> The plain language of the NGA protects the ability of state commissions to regulate intrastate matters, even if they concern natural gas initially transported through interstate commerce.<sup>293</sup> This reservation of state authority is indicative of the times, but also the overall intention of the act. The federal government intended to foster a competitive market while protecting the interests of consumers, and in doing so, protecting the sovereign authority of states and their commissions, which had been in place prior to enactment of the NGA and FPA.<sup>294</sup>

Second, this Comment has highlighted the fact that state actions may produce an effect on interstate energy rates without coming into conflict with federal priorities. The modern theory of conflict preemption under the NGA furthers the historical view that state and federal interests were meant to work in unison to solve a common goal, rather than be consistently at odds. Judge Williams has suggested, and this Comment's analysis confirms, that state laws, which affect, rather than regulate, intrastate natural gas supplies and pricing do so in a way that is congruent with, not adverse to, federal regulation under the NGA.<sup>295</sup> In particular, the Third Circuit's decision in *Solomon* distinguishes the law of supply and demand from the law of preemption, highlighting the clear difference between a policy that directly regulates a wholesale price and a policy that attempts to influence the price by increasing the supply of a certain energy resource.<sup>296</sup>

This modern theory does not revolutionize this area of law; it merely shines a light on what was already there. History shows that the federal government's interest in controlling the wholesale price of natural gas was never intended to undermine state authority; thus, there is no reason why the NGA should effectively prevent states from acting in their own best interest, when this interest does not adversely affect the industry at large.<sup>297</sup> More to the point, an indirect effect on wholesale price should never be the principal ground on which a state initiative is invalidated.<sup>298</sup> Instead, a comprehensive analysis of the effect, and its ability to

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291. See *supra* Part IV(b), at 28-30.

292. See *supra* Part IV(c), at 31-32.

293. 15 U.S.C. § 717(c) (2014).

294. See *DeVane*, *supra* note 284, at 39-40; see also *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 683-84 (1954).

295. See *supra* notes 171-175.

296. *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 255 (3d Cir. 2014).

297. See *Pierce*, *supra* note 253, at 670 (1985) ("It is in the national interest to permit each state to adopt its own regulatory policy to the extent that such state decisions affect only, or predominantly, the interests of state residents.").

298. Of course, this excludes effects like those explored in *Nazarian*, or other state initiatives where states frustrate the wholesale rates regulated and set by FERC. This Comment is not advocating for the



coexist with federal priorities, must be the norm.<sup>299</sup> This view is not only indicative of this country's federalist underpinnings,<sup>300</sup> but the desires of Congress identified in the NGA.<sup>301</sup> States have a valuable role to play in today's energy policy, and given the traditional preference for complementary state action in this area, it does not square with history for the NGA to be used as a tool for silencing state initiatives.

Finally, this Comment concludes that the ECRA does not violate the dormant Commerce Clause. In this area, Maine does not act as a regulator, but instead acts as a market participant. As such, the *market participant* exception exempts the ECRA from Commerce Clause oversight.<sup>302</sup> Furthermore, the ECRA does not discriminate against out-of-state interests in favor of Maine interests. While it does act in order to benefit the people of Maine, it will not burden commerce in another state, but may in fact benefit other states by decreasing the basis differential on natural gas flowing into New England.

In sum, the ECRA is constitutional.

### B. What next?

Energy policy is central to the everyday life and future of this country. Sound policy decisions to confront this reality require consistency and a clear interpretation of which types of actions are constitutionally permissible. This Comment has identified a type of state action—the purchase of natural gas pipeline capacity—that on its face survives constitutional scrutiny. However, Circuit Courts have only spoken in dicta on this issue, and the Supreme Court has yet to rule. Thus, the question remains: what, if anything, can be done to clarify this apparent ambiguity.

Barring an immediate clarification of this issue by the Supreme Court, the most sensible way to enforce this modern theory of NGA preemption is by way of amending the Natural Gas Act. This would not represent a major overhaul of federal regulatory priorities, but would clearly establish the complimentary role that states must play in this area. It would not attempt to curtail federal initiatives, but would simply clarify that state actions regarding the purchase of additional

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hijacking of federal priorities in any way—this, of course, is immediate ground for preemption. Instead, this Comment proposes that the line between state and federal involvement in energy regulation is too rigid and formulaic. This view is not consistent with history, nor does it help facilitate the type of innovation and consideration of the type of unique programs that some states are in fact moving forward with. The ECRC is a prime example.

299. See Williams, *supra* note 135, at 536.

300. See, e.g., Alexander Hamilton, Speech to the New York Convention (June 24, 1788) (“While the Constitution continues to be read and its principles known the States must by every rational man be considered as essential, component parts of the Union; and therefore the idea of sacrificing the former to the latter is wholly inadmissible.”).

301. *Panhandle E. Pipeline Co. v. Ind. Pub. Serv. Comm’n.*, 332 U.S. 507, 517-18 (1947) (“The [NGA], though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by prior decisions. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or delete it in any way.”).

302. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976).

natural gas, or other resource, that create an indirect effect on wholesale energy prices, are not preempted under the NGA. Should a state attempt to decrease its carbon footprint by building its own wind turbines or bio-mass generators, or by adopting its own carbon fuel standard, the role of the federal government should be to encourage such investment, rather than relying on an “indirect effect” on wholesale electricity or natural gas prices to shoot such measures down.<sup>303</sup> Likewise, if a state wishes to divest itself of more fossil fuels, and help build different types of generation assets, the resulting effect on natural gas or oil prices would certainly not frustrate any federal regulatory scheme. This fundamental ability of states to act within their own borders is essential to the proper functioning of our system of governance. Thus, this clarification is not only aligned with the traditional purpose of the NGA and FPA, but is necessary to enable states like Maine to act in the best interest of their citizenry. Planning for large-scale legislation and investments like an ECRC can take years, but this process should not be dampened or impinged by an overly formalistic reading of the NGA. For this reason, formally codifying the modern theory of conflict preemption is imperative.<sup>304</sup>

This is the beginning of a new era in American energy policy. States like Maine are leading the way by taking novel approaches that have the real potential to benefit the public interest. The ECRA represents “an unprecedented and remarkable approach”<sup>305</sup> to reducing household energy burdens—particularly for those living with financial insecurity—and helping to entice new industries to relocate to the State to help create jobs and revive a once vibrant economy. Regardless of the outcome, Maine (and New England) has presented an example of what states can achieve—bold investments seeking to benefit each and every citizen. In an age of a divided and often-paralyzed Congress, decisive state action might just be the remedy for which this nation’s energy and climate crisis has been looking.<sup>306</sup>

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303. See *N. Natural Gas Co. v. Kan. Corp. Comm’n*, 372 U.S. 84, 91 (1963).

304. This is not to suggest that states should receive carte blanche. FERC would certainly maintain oversight in regards to the building of new natural gas pipelines, or the safety of a different type of generation resource. The underlying theory, however, is that states should be expressly enabled to contrive and debate the merits of a particular initiative that will benefit those living within that state’s borders without fear of unwarranted constitutional challenges that not only waste judicial resources, but which directly contradict the intention of Congress in passing the FPA and the NGA in the first place.

305. Tux Turkel, *New England governors start push to cut cost of power*, PORTLAND PRESS HERALD (Jan. 23, 2014), [http://www.pressherald.com/2014/01/23/governors\\_craft\\_plan\\_to\\_develop\\_gas\\_and\\_electric\\_resources/](http://www.pressherald.com/2014/01/23/governors_craft_plan_to_develop_gas_and_electric_resources/) (quoting Tom Welch, the past chairman of the Maine Public Utilities Commission, who was very influential in both the regional and state efforts to increase pipeline capacity to Maine).

306. Nonetheless, the authority of states to act differs dramatically depending on the type of action. Although the mode of analysis proposed by this Comment could be mirrored for other state attempts to increase the supply of certain fuels, the ability of states to act under other federal regimes, e.g. Clean Air Act, Clean Water Act, etc. is not explored here, and this Comment does not purport to offer a mode of analysis for *any* state action in the realm of environmental or energy law. For example, the federal priorities embodied in these pieces of legislation are different from those enacted via the NGA and FPA. As such, further analysis must apply on separate case law and statutes; this could, of course, lead to an opposite outcome.

