

The Burger Court Opinion Writing Database

*Transcontinental Gas Pipe Line Corp. v.
State Oil and Gas Board of Mississippi*
474 U.S. 409 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

December 18, 1985

RE: No. 84-1076 - Transcontinental Gas Pipe Line Co. v.
State Oil & Gas Board

Dear Harry,

Please join me in Parts I, II, and III of your opinion.

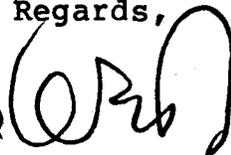
I regret that I cannot join Part IV and intend to circulate the following statement:

CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I join in Parts I, II, and III of the Court's opinion.

However I cannot join Part IV. Having established that the State's ratable take rule is preempted by the Natural Gas Act and the Natural Gas Policy Act, it is unnecessary and in my view inappropriate, to reach the question whether the State rule also violates the Commerce Clause. A holding that Congress intended to preempt this field of natural gas regulation leaves Congress elbow room for later consideration in light of current views of the policy questions involved. Holding that the states are constitutionally prohibited from imposing ratable take rules upon interstate pipelines, however, forecloses legislative response in this enormously complicated area of regulation. Because we should not unnecessarily adjudicate constitutional questions of such magnitude, see Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-348 (1936) (Justice Brandeis, concurring), I dissent from Part IV of the Court's opinion.

Regards,



DEC 18 10 20

Justice Blackmun
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CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

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

November 25, 1985

No. 84-1076

Transcontinental Gas Pipe Line
Corporation v. State Oil and Gas
Board of Mississippi and Coastal
Exploration, Inc., et al.

Dear Harry,

I agree.

Sincerely,

Bill

Justice Blackmun

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 20, 1985

No. 84-1076

Transcontinental Gas Pipe Line
Corporation v. State Oil and Gas
Board of Mississippi and Coastal
Exploration, Inc., et al.

Dear Harry,

I'm still with you.

Sincerely,



Justice Blackmun

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88 DEC 23 10:30

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 25, 1985

84-1076 - Transcontinental Gas Pipe Line
Corporation v. State Oil and Gas Board of
Mississippi and Coastal Exploration, Inc.

Dear Harry,

I shall await the dissent in this case.

Sincerely yours,



Justice Blackmun

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W

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 17, 1985

84-1076 - Transcontinental Gas Pipe Line Corporation v. State Oil and Gas Board of Mississippi and Coastal Exploration, Inc.

Dear Harry,

I join Parts I, II, and III of your proposed opinion. Having reservations about Part IV, however, I would not reach the Commerce Clause issue.

Sincerely yours,



Justice Blackmun

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 26, 1985

Re: No. 84-1076 - Transcontinental Gas Pipe Line
v. State Oil and Gas Board of
Mississippi & Coastal Exploration

Dear Harry:

Please join me.

Sincerely,

T.M.
T.M.

Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 21, 1985

MEMORANDUM TO THE CHIEF JUSTICE
AND JUSTICES BRENNAN, WHITE, AND MARSHALL:

Re: No. 84-1076, Transcontinental Gas Pipe Line Co.
v. State Oil & Gas Board of Mississippi

You will recall that the vote at conference for this case was 5 to 4 to reverse. The five of us constituted the majority. My notes indicate, however, that we were not in agreement on the approach. Some wanted to do it on pre-emption; others preferred that the decision go off on the Commerce Clause.

I have thought about this at some length. You will receive shortly a proposed draft of an opinion which covers both pre-emption and the Commerce Clause. I realize that it is perhaps unnecessary or redundant to treat both propositions, when one will do.

On the other hand, I hope that each of you at least will give consideration to both approaches. I suggest this for more than one reason. First, the case is important enough that it would be helpful to have a Court opinion. If one of us chooses to limit his views to one proposition, we shall have, even if the votes to reverse remain firm, only a plurality opinion. Second, it seems to me that it would be well to nail both propositions down now so as to avoid further litigation in this area in the future. Third, the dissent will have to cover both propositions anyway. Fourth, the Supreme Court of Mississippi covered both prongs.

I shall be interested in your reactions.

Harry

Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: NOV 22 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1076

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, APPELLANT *v.* STATE OIL AND GAS BOARD OF MISSISSIPPI AND COASTAL EXPLORATION, INC., ET AL.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

[November —, 1985]

JUSTICE BLACKMUN delivered the opinion of the Court.

We are confronted again with the issue of a state regulation requiring an interstate pipeline to purchase gas from all the parties owning interests in a common gas pool. The purchases would be in proportion to the owners' respective interests in the pool, and would be compelled even though the pipeline has pre-existing contracts with less than all of the pool's owners.

This Court, in *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U. S. 84 (1963), struck down, on pre-emption grounds, a virtually identical regulation. In the present case, however, the Supreme Court of Mississippi ruled that the subsequently enacted Natural Gas Policy Act of 1978 (NGPA), 92 Stat. 3351, 15 U. S. C. §3301 *et seq.*, effectively nullified *Northern Natural* by vesting regulatory power in the States over the wellhead sale of gas. The Mississippi Supreme Court went on to hold that the Mississippi regulation did not impermissibly burden interstate commerce. Because of the importance of the issues in the functioning of the interstate market in natural gas, we noted probable jurisdiction. — U. S. — (1985).

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 20, 1985

Memorandum to the Conference

Re: No. 84-1076, Transcontinental Pipe Line
v. State Oil & Gas Board

In view of the way the votes in the majority have come in, I am changing the opinion to cover only pre-emption and not the Commerce Clause. A new draft will be around shortly. I do not know whether this will occasion any change in Bill Rehnquist's dissent.

H. A. B.

DEC 30 10 23

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 20, 1985

Re: No. 84-1076, Transcontinental Pipe Line
v. State Oil & Gas Board

Dear Chief, Bill, Byron, and Thurgood:

We now have a Court in this case for Parts I, II, and III of the proposed opinion.

As I indicated in my letter of November 21 to the four of you, the five of us who voted to reverse were not in agreement on the approach. My notes indicate that Byron would not reach the Commerce Clause; that Thurgood would rest the decision on the Commerce Clause; that Bill Brennan was willing to follow both pre-emption and the Commerce Clause; and that the Chief Justice did not express his preference. Because of this, as I said in my letter of November 21, I prepared the opinion on both prongs, so that each of you would be forced to make a decision or go along with both. While I would have preferred to do both, Byron and the Chief do not wish to do so. There is not much point, therefore, in covering the Commerce Clause, although I think it would have been good law to have on the books.

Accordingly, I have had the opinion rerun to cover only the pre-emption issue. This has a Court, and I might as well make use of it. The new draft should be around shortly. I shall regard all of you as joining, unless you direct me otherwise. This, I assume, will make the Chief's proposed separate writing unnecessary.

Sincerely



The Chief Justice
Justice Brennan
Justice White
Justice Marshall

DEC 30 10 23

20543

Justice Brennan
 Justice White
 Justice Marshall
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Blackmun**

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STYLISTIC CHANGES

pp. 14, 15

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1076

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
 APPELLANT *v.* STATE OIL AND GAS
 BOARD OF MISSISSIPPI AND COASTAL
 EXPLORATION, INC., ET AL.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

[December —, 1985]

JUSTICE BLACKMUN delivered the opinion of the Court.

We are confronted again with the issue of a state regulation requiring an interstate pipeline to purchase gas from all the parties owning interests in a common gas pool. The purchases would be in proportion to the owners' respective interests in the pool, and would be compelled even though the pipeline has pre-existing contracts with less than all of the pool's owners.

This Court, in *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U. S. 84 (1963), struck down, on pre-emption grounds, a virtually identical regulation. In the present case, however, the Supreme Court of Mississippi ruled that the subsequently enacted Natural Gas Policy Act of 1978 (NGPA), 92 Stat. 3351, 15 U. S. C. § 3301 *et seq.*, effectively nullified *Northern Natural* by vesting regulatory power in the States over the wellhead sale of gas. The Mississippi Supreme Court went on to hold that the Mississippi regulation did not impermissibly burden interstate commerce. Because of the importance of the issues in the functioning of the interstate market in natural gas, we noted probable jurisdiction. — U. S. — (1985).

November 26, 1985

84-1076 TRANSCO v. State Oil & Gas

Dear Bill:

I overlooked confirming our talk that you would write the dissent in this case.

I appreciate your cheerful willingness to do this. I have taken a quick look at Harry's opinion and still think we have the better side of the case.

Sincerely,

Justice Rehnquist

lfp/ss

cc: Justice Stevens
Justice O'Connor

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 26, 1985

84-1076 TRANSCO v. State Oil & Gas

Dear Harry:

As you will recall from the views I expressed at Conference, I will wait for Bill's dissent.

Sincerely,



Justice Blackmun

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 18, 1985

84-1076 Transcontinental v. State Oil and Gas

Dear Bill:

Please join me in your dissent.

Sincerely,

Lewis

Justice Rehnquist

lfp/ss

cc: The Conference

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20543

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 25, 1985

Re: 84-1076 - Transcontinental Gas Pipe Line Corp.
v. State Oil and Gas Bd. of Mississippi

Dear Harry:

I will try my hand at a dissent in this case.

Sincerely,



Justice Blackmun

cc: The Conference

Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

From: **Justice Rehnquist**

Circulated: DEC 17 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1076

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
 APPELLANT *v.* STATE OIL AND GAS
 BOARD OF MISSISSIPPI AND COASTAL
 EXPLORATION, INC., ET AL.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

[November —, 1985]

JUSTICE REHNQUIST, dissenting.

Section 601(a)(1) of the Natural Gas Policy Act of 1978 (NGPA), 15 U. S. C. § 3431(a)(1), removes the wellhead sales of "high-cost natural gas" from the coverage of the Natural Gas Act (NGA), 15 U. S. C. §§ 717-717w, and § 121(b) of the NGPA, 15 U. S. C. § 3331(b), exempts such gas from any lingering price controls under the NGPA. The Court nonetheless holds that Mississippi's application of its ratable take rule to high-cost gas in order to "do equity between and among owners in a common pool of de-regulated gas," J. S. App. 28a, is both preempted by the NGPA and runs afoul of the Commerce Clause. The Court's opinion carries both the preemption and the Commerce Clause doctrines further than they have ever been carried before in order to extricate appellant Transcontinental Gas Pipe Line Corp. (Transco) from a bed it made for itself. I therefore dissent.

The imposition of a ratable take rule is a familiar solution of oil and gas law to the problem of "drainage" in a commonly owned gas pool.¹ When several individuals own gas in a

¹The withdrawal of gas from a common pool causes changes in pressure, resulting in the migration and spreading out of the remaining gas over the entire pool. This migration is called "drainage" because, from the viewpoint of each owner, the withdrawal of gas by another causes gas to migrate or "drain" away from his end of the pool.

STYLISTIC CHANGES THROUGHOUT

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

From: **Justice Rehnquist**

Circulated: _____

Recirculated: DEC 20 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1076

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
 APPELLANT *v.* STATE OIL AND GAS
 BOARD OF MISSISSIPPI AND COASTAL
 EXPLORATION, INC., ET AL.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

[December —, 1985]

JUSTICE REHNQUIST, with whom JUSTICE POWELL, JUSTICE STEVENS, and JUSTICE O'CONNOR join, dissenting.

Section 601(a)(1) of the Natural Gas Policy Act of 1978 (NGPA), 92 Stat. 3409, 15 U. S. C. § 3431(a)(1), removes the wellhead sales of "high-cost natural gas" from the coverage of the Natural Gas Act (NGA), 15 U. S. C. §§ 717-717w, and section 121(b) of the NGPA, 15 U. S. C. § 3331(b), exempts such gas from any lingering price controls under the NGPA. The Court nonetheless holds that Mississippi's application of its ratable-take rule to high-cost gas in order to "do equity between and among owners in a common pool of de-regulated gas," App. to Juris. Statement 28a, is both pre-empted by the NGPA and runs afoul of the Commerce Clause. The Court's opinion carries both the pre-emption and the Commerce Clause doctrines further than they have ever been carried before in order to extricate appellant Transcontinental Gas Pipe Line Corp. (Transco) from a bed it made for itself. I therefore dissent.

The imposition of a ratable-take rule is a familiar solution of oil and gas law to the problem of "drainage" in a commonly owned gas pool.¹ When several individuals own gas in a

¹The withdrawal of gas from a common pool causes changes in pressure, resulting in the migration and spreading out of the remaining gas over the

Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

STYLISTIC CHANGES THROUGHOUT

Pg 1, 9, 11-12

From: **Justice Rehnquist**

Circulated: _____

Recirculated: _____ **DEC 23 1985**

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1076

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, APPELLANT *v.* STATE OIL AND GAS BOARD OF MISSISSIPPI AND COASTAL EXPLORATION, INC., ET AL.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

[December —, 1985]

JUSTICE REHNQUIST, with whom JUSTICE POWELL, JUSTICE STEVENS, and JUSTICE O'CONNOR join, dissenting.

Section 601(a)(1) of the Natural Gas Policy Act of 1978 (NGPA), 92 Stat. 3409, 15 U. S. C. § 3431(a)(1), removes the wellhead sales of "high-cost natural gas" from the coverage of the Natural Gas Act (NGA), 15 U. S. C. §§ 717-717w, and section 121(b) of the NGPA, 15 U. S. C. § 3331(b), exempts such gas from any lingering price controls under the NGPA. The Court nonetheless holds that Mississippi's application of its ratable-take rule to high-cost gas in order to "do equity between and among owners in a common pool of de-regulated gas," App. to Juris. Statement 28a, is pre-empted by the NGA and NGPA. The Court's opinion misuses the pre-emption doctrine to extricate appellant Transcontinental Gas Pipe Line Corp. (Transco) from a bed it made for itself. I dissent because I do not believe that Mississippi's ratable take rule invades the exclusive sphere of the NGA, conflicts with the NGPA's purpose of decontrolling the wellhead price of high-cost gas, or runs afoul of the implicit free market policy of the dormant Commerce Clause.

The imposition of a ratable-take rule is a familiar solution of oil and gas law to the problem of "drainage" in a commonly

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 25, 1985

Re: 84-1076 - Transcontinental Gas Pipe Line
v. State Oil & Gas Board of Mississippi
& Coastal Exploration

Dear Harry:

I shall wait for Bill's dissent.

Respectfully,

A handwritten signature in dark ink, appearing to read "J.P.S.", with a large, sweeping flourish extending from the end of the signature.

Justice Blackmun

Copies to the Conference

⑤

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

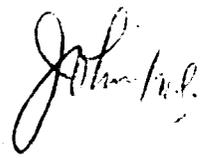
December 18, 1985

Re: 84-1076 - Transcontinental Gas Pipe
Line v. State Oil and Gas
Board of Mississippi

Dear Bill:

Please join me.

Respectfully,



Justice Rehnquist

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Justice Rehnquist
20543

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 25, 1985

No. 84-1076 Transcontinental Gas Pipe Line
v. State Oil & Gas Board of
Mississippi & Coastal Exploration

Dear Harry,

I will wait and take a look at the dissent
before deciding whether to join you in this complex
case.

Sincerely,



Justice Blackmun

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 17, 1985

No. 84-1076 Transcontinental Gas Pipe Line v.
State Oil and Gas Bd. of Miss.

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Rehnquist

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