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Justice Thomas's Concurrence Says Little – and Much – About Preemption of State Net Neutrality Efforts

by

Daniel A. Lyons *

I. Introduction

A little-noticed concurrence in denial of certiorari by Justice Clarence Thomas may have caused a wrinkle in the ongoing net neutrality debate. Late last month, the Supreme Court quietly declined to review *Lipschultz v. Charter Advanced Services (MN), LLC*, an Eighth Circuit decision preempting state VoIP regulation.ⁱ While concurring in the denial, Justice Thomas raised concerns about the underlying theory of federal preemption, noting that “[i]t is doubtful that a federal policy – let alone a policy of nonregulation – is” sufficient to support conflict preemption.ⁱⁱ

Justice Thomas’s concurrence – joined by Justice Neil Gorsuch – casts an interesting shadow on the debate over preemption of state net neutrality efforts. Until recently, states have refrained from regulating most information services, in part because of the long tradition of treating information services as an exclusively federal, and mostly deregulated, domain. But when one looks further, it’s clear that Thomas’s primary objection is not a telecommunications law issue, but rather an administrative law issue. Thomas noted that because agency policies do not themselves determine rights or responsibilities, they are not “final agency action” sufficient to support a conflict preemption claim. While he is correct about the federal policy of nonregulation, this objection does not preclude the FCC from arguing that laws like California’s net neutrality law conflict with the *Restoring Internet Freedom (RIF) Order*, which is final agency action. That said, other language in the concurrence suggests that Thomas may not

support the specific arguments the FCC is likely to offer to support its theory of conflict preemption – which is not a surprise given Thomas’s prior jurisprudence, nor is it necessarily fatal to the FCC’s claims.

II. *Lipschultz* and Preemption of State VoIP Regulation

Charter Advanced Services (MN), LLC v. Lange (later recaptioned as *Lipshultz v. Charter*)ⁱⁱⁱ involved a challenge to Minnesota’s attempt to regulate fixed, interconnected VoIP service. Charter Communications offers Spectrum Voice, a service that allows subscribers to make voice calls with traditional telephone equipment, but transmits those calls over the Internet rather than the traditional public switched telephone network.^{iv} The Minnesota Public Utilities Commission compelled Charter to comply with Minnesota state laws governing telephone service. To avoid this order, Charter sought a declaratory ruling in federal district court that federal law preempted Minnesota law as applied to VoIP service.

The key question for the court was whether, under the Communications Act, fixed VoIP service is properly classified as a Title I information service or a Title II telecommunications service. In an earlier case, *Minnesota Public Utilities Commission v. FCC*, the Eighth Circuit upheld the FCC’s finding that state regulation of nomadic VoIP service was preempted under either classification. If Title II, state regulation was preempted by the inability to separate interstate from intrastate traffic (under the “impossibility exception”). And if a Title I service, state regulation was preempted by the FCC’s longstanding policy of nonregulation of information services.^v The *Charter* case offered a different wrinkle because, unlike nomadic VoIP, Charter’s fixed VoIP service apparently could be separated into intrastate and interstate traffic, so the impossibility exception did not apply.^{vi} Therefore if fixed VoIP fell under Title II, Minnesota would be free to regulate intrastate VoIP traffic.

After reviewing the evidence, the district court found that fixed VoIP was best classified as an information service.^{vii} The Eighth Circuit affirmed this finding. Because fixed VoIP was an information service, the court found under circuit precedent that the federal policy of nonregulation of information services preempted Minnesota law governing fixed VoIP.^{viii} Minnesota sought Supreme Court review of the classification decision, but the Court denied certiorari.^{ix}

III. Justice Thomas’s Concurrence and Preemption by Policy

Justice Thomas concurred with the Court’s denial, but he wrote separately to highlight an issue not central to the Eighth Circuit’s decision: whether a federal policy of nonregulation could preempt state law. Conflict preemption stems from the Supremacy Clause, which states that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made...shall be the supreme Law of the Land” and requires conflicting state law to yield.^x As a result, conflict preemption can only occur when state law conflicts with the Constitution, a treaty, or a duly enacted Law of the United States.

Thomas noted that “[i]t is doubtful whether a federal policy...is ‘Law’ for purposes of the Supremacy Clause.”^{xi} And he is, of course, correct. It is a basic principle of administrative law

that policy statements, standing alone, do not constitute final agency action because (as Thomas notes) they do not represent “the consummation of the agency’s decisionmaking process” or determine a party’s “rights or obligations.”^{xii} Policy statements do not create law, but rather “explain[] how an agency will enforce a statute or regulation.”^{xiii} They “are binding on neither the public nor the agency, and the agency retains the discretion...to change its position...in any specific case.”^{xiv} Because policies have no legal effect, they cannot constitute “laws” and therefore the Supremacy Clause does not require state law to yield in the event of a conflict.

Justice Thomas’s concurrence could cast some doubt on the FCC’s traditional dominance over regulation of information services. With the exception of certain states’ recent forays into the net neutrality battle, most states have generally avoided regulating information services. This reluctance has been motivated, at least in part, by the FCC’s consistent refrain, stretching back nearly two decades across both Democratic and Republican administrations, that information services should “remain insulated from unnecessary and harmful economic regulation at both the federal and state levels.”^{xv} Thomas suggests that this policy, which was sufficient to defeat Minnesota’s efforts to regulate both nomadic and fixed VoIP, is not enough alone to fend off the efforts of states which disagree – a conclusion which is also reflected in the *Mozilla* court’s determination that the federal policy of nonregulation is insufficient to support the *RIF Order*’s express preemption provision.^{xvi} Going forward, according to the *Mozilla* majority, the FCC must say more by way of explanation to support a finding that a particular federal regulation of information services preempts inconsistent state efforts.

But despite this doubt, Thomas’s primary concern does not pose an obstacle to the government’s efforts to fight state net neutrality initiatives in cases such as *United States v. California*. In that case, the government argues that California’s net neutrality law conflicts with the *RIF Order*’s light-touch regulation of broadband service.^{xvii} Unlike the policy of nonregulation of information services, the *RIF Order* was enacted pursuant to notice and comment procedures. It is a final order representing the consummation of the agency’s decisionmaking process regarding the proper regulation of broadband network management practices and carries the force and effect of law. As a result, it constitutes a “Law[] of the United States” sufficient to preempt contradictory state laws under the Supremacy Clause.

IV. Justice Thomas’s Concurrence and Implied Preemption

Thus, while Justice Thomas’s concurrence has raised concerns about the FCC’s approach to information services, it does not preclude the agency from arguing that the *RIF Order* is sufficient to support a conflict preemption claim. But elsewhere in the concurrence, one sees indications that Thomas may be skeptical of the government’s most likely theory of conflict preemption.

As I have discussed in greater detail in earlier Free State Foundation *Perspectives* articles,^{xviii} the FCC’s strongest preemption argument rests on *Geier v. American Honda Motor Co.*^{xix} In that case, the Court found a state tort law requiring airbags in all automobiles was preempted by a Transportation Department regulation that “deliberately provided the manufacturer with a range of choices among passive restraint devices” designed to “bring about a mix of different devices introduced gradually over time.”^{xx} The agency explained why it adopted a this-far-and-no-further

rule, and the court found that a more stringent state regulation “would have presented an obstacle” to the Transportation Department’s efforts and thus would “frustrate the accomplishment of a federal objective.”^{xxi}

Similarly, the *RIF Order* reflects the FCC’s judgment regarding the appropriate level of regulatory scrutiny to impose on broadband networks. The Supreme Court’s *Brand X* decision recognized that the Communications Act is ambiguous about whether broadband is a Title I or Title II service.^{xxii} Moreover, the agency has ancillary authority to apply specific rules to Title I networks, and to forbear from applying specific Title II requirements.^{xxiii} Thus Congress has granted the FCC a broad spectrum of potential rules for governing broadband network management practices. The *RIF Order* chose one spot along that spectrum – enhanced transparency requirements coupled with general consumer protection and antitrust law – as the optimal regulatory bundle, and explained why it felt greater restrictions (such as net neutrality) were likely to harm consumers and innovation.^{xxiv} State laws prohibiting blocking, throttling, paid prioritization, and the like – restrictions explicitly repealed by the *RIF Order* – upset this carefully calibrated federal scheme and thus are likely preempted because they frustrate the accomplishment of a federal objective.

Thomas’s concurrence hints that he might disapprove of this argument. Even if a federal policy does constitute final agency action, he writes, the Supremacy Clause “requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameralism and presentment procedures.”^{xxv} He goes on to assert that “[g]iving pre-emptive effect to a federal agency policy of nonregulation thus expands the power of both the Executive and the Judiciary” by “authorizing the Executive to make ‘Law’ by declining to act” and “authorizing the courts to conduct a freewheeling judicial inquiry into the facts of federal nonregulation.”^{xxvi}

Taken at face value, the idea that a state cannot preempt by “declining to act” could call the FCC’s likely conflict preemption argument into question. The FCC will likely argue that the *RIF Order* acts as both a floor and a ceiling for regulation of broadband network management practices. The agency gave good reasons why it adopted the rule that it did and why it declined to go further, reasons that were upheld in *Mozilla*. But Thomas hints that the agency cannot rely on its refusal to go further as a way to preempt states that disagree. For Thomas, it may be that the *RIF Order* establishes merely a federal regulatory floor that states are permitted to exceed.

Justice Thomas’s disapproval of *Geier*-like preemption claims based on frustration of a carefully balanced federal objective is perhaps unsurprising. After all, Thomas dissented in *Geier*.^{xxvii} He also concurred in the judgment in a later case, *Wyeth v. Levine*, that arguably narrowed *Geier*. *Wyeth* found that FDA drug labeling laws did not preempt states from requiring additional warnings.^{xxviii} Although he agreed with the resolution of the case, Thomas declined to join the majority, instead concurring in the judgment. He said he was “increasingly skeptical of this Court’s ‘purposes and objectives’ pre-emption jurisprudence” in which “the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within

the text of federal law.”^{xxix} In other words, Thomas interprets conflict preemption strictly and would not apply it in cases where state law merely frustrates a federal objective.

Admittedly, this analysis reads a lot of meaning into a small amount of words. But even if the FCC is unable to convince Justice Thomas (and perhaps Justice Gorsuch), all is not lost for the agency. Unlike with respect to the preemption-by-policy discussion, the sources Justice Thomas cites for his narrow view of preemption are a pair of his own opinions concurring in the judgment, neither of which commanded a majority of the Justices – or indeed, a single Justice other than himself.^{xxx} Thomas’s potential concerns here likely reflect a unique belief about the narrowness of conflict preemption that does not appear to be shared by a majority of his colleagues.

V. Conclusion

Justice Thomas’s concurrence certainly could be read as a shot across the bow of the FCC’s intention to keep information services free of state regulation. Going forward, the agency cannot simply rely on a federal policy of nonregulation to keep states at bay – if, indeed, it ever could. Policies of strategic ambiguity, such as the FCC’s position on VoIP service, are likely to create a vacuum that states can step in to fill. Only final agency action, preferably action that expressly discusses how state action conflicts with the FCC’s objectives, are sufficient to support a conflict preemption claim.

But this objection to preemption by policy has little bearing on the government’s pending action against California’s net neutrality law. Unlike the policy of nonregulation, the *RIF Order* is an order adopted via notice and comment that carries the force of law. Thus, courts are free to find that state net neutrality efforts are preempted to the extent that they conflict with the *RIF Order*. Thomas’s rhetoric, here and elsewhere, suggest he is unlikely to support the specific theory of conflict preemption the FCC is likely to pursue. But in this, for now, Thomas speaks only for himself (and perhaps Gorsuch). So, the FCC is not precluded from continuing to defend the *RIF Order* from attempts by states to undermine or overturn this federal rule’s light-touch regulatory treatment of broadband.

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ⁱ 589 U.S. ___, 2019 WL 5300908 (Oct. 21, 2019), available at https://www.supremecourt.gov/opinions/19pdf/18-1386_2034.pdf.

ⁱⁱ *Id.* (Thomas, J., concurring). Justice Thomas nonetheless agreed the case was not cert-worthy because Minnesota did not make this argument below.

ⁱⁱⁱ 903 F.3d 715 (2018).

^{iv} *Id.* at 717.

^v *Minnesota Pub. Utilities Comm’n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007).

^{vi} *Lange*, 903 F.3d at 718.

^{vii} *Id.* at 719.

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- ^{viii} *Id.* at 720.
- ^{ix} See *Lipschultz*, supra note 1.
- ^x US Const. Art. VI, cl. 2.
- ^{xi} *Lipschultz*, supra note 1 (Thomas, J., concurring).
- ^{xii} *Id.* (citing cases).
- ^{xiii} *Assoc. of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015) (citation omitted).
- ^{xiv} *Id.* (internal quotation marks and citation omitted).
- ^{xv} In the Matter of Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications Nor Telecommunications Service, 19 FCC Rcd. 3307, 3307 (2004).
- ^{xvi} *Mozilla v. FCC*, ___ F.3d ___ (2019), slip op. p. 130.
- ^{xvii} See *United States v. California*, No. 2:18-at-01539 (E.D. Cal, filed Sept. 30, 2018).
- ^{xviii} See Daniel A. Lyons, *Express and Conflict Preemption of State Net Neutrality Efforts*, 14 PERSPECTIVES FROM FSF SCHOLARS No. 4 (2019); Daniel A. Lyons, *Conflict Preemption of State Net Neutrality Efforts After Mozilla*, 14 PERSPECTIVES FROM FSF SCHOLARS No. 29 (2019); see also Daniel A. Lyons, *State Net Neutrality*, 80 U. PITT. L. REV. 905 (2019).
- ^{xix} 529 U.S. 861 (1999).
- ^{xx} *Id.* at 875-875.
- ^{xxi} *Id.* at 863, 873.
- ^{xxii} *National Cable & Telecomm. Ass’n, Brand X Telecomm. Servs.*, 545 U.S. 967 (2005).
- ^{xxiii} See *United States v. Southwestern Cable*, 392 U.S. 157 (1968); 47 U.S.C. § 160.
- ^{xxiv} *Restoring Internet Freedom*, 33 FCC Rcd. 311 (2018).
- ^{xxv} *Lipschultz*, supra note 1 (Thomas, J., concurring) (quoting *Wyeth v. Levine*, 555 U. S. 555, 586 (2009) (Thomas, J., concurring in judgment)).
- ^{xxvi} *Id.*
- ^{xxvii} See Geier, supra note 19.
- ^{xxviii} 555 U.S. 555 (2009).
- ^{xxix} *Id.* at 583 (Thomas, J., concurring in the judgment).
- ^{xxx} See *Lipschultz*, supra note 1 (citing *Wyeth v. Levine*, 555 U. S. 555, 586 (2009) (Thomas, J., concurring in judgment) and *Department of Transportation v. Association of American Railroads*, 575 U. S. 43, 86 (2015) (Thomas, J., concurring in judgment)).