AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Federalism/Preemption

**Lipschultz v. Charter Advanced Services (MN), LLC, \_\_\_ U.S. \_\_\_** (2019).

*Charter Advanced Services provides a service that enables persons to make phone calls using their internet connection. The Minnesota Public Utilities Commission objected to the ways in which Charter restructured how they corporation was organized in ways that might insulate that service from state regulation. Charter responding by filing a lawsuit in federal court claiming that the regulation was preempted the Telecommunicates Act of 1996, which gave the Federal Communications Commission {FCC] the power to regulate information services. The lower federal court agreed that the FCC’s failure to regulate such services established a policy that preempted state efforts to regulate and that decision was affirmed by the Court of Appeals for the Eighth Circuit. Dan Lipschultz, in his capacity of Commission of the Minnesota Public Utilities Commission, appealed to the Supreme Court.*

*The Supreme Court unanimously denied the petition for the writ of certiorari. Justice Clarence Thomas nevertheless issued a short statement asserting that the justices ought to reconsider whether federal agencies can preempt state laws. Thomas insisted that a failure to regulate was not a law that could preempt state policy under the Supremacy Clause and that federal agency rules were not law under that constitutional provision. Why is the basis for these arguments? Are they correct? Would their adoption by the entire court disrupt the entire administrative state?*

The petition for a writ of certiorari is denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I2d65ec94548811e9adfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I2d65ec94548811e9adfea82903531a62), with whom Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I2d65ec94548811e9adfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I2d65ec94548811e9adfea82903531a62) joins, concurring in the denial of certiorari.

. . . .

I agree with the Court's determination that this case does not satisfy our criteria for certiorari. I write to explain why, in an appropriate case, we should consider whether a federal agency's policy can pre-empt state law.

The Supremacy Clause of the Constitution provides:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

The Clause contains a *non obstante*provision, a common device used by 18th-century legislatures to signal the implied repeal of conflicting statutes. At the time of the founding, this Clause would have been understood to pre-empt state law only if the law logically contradicted the “Constitution,” the “Laws of the United States,” or “Treaties.”

It is doubtful whether a federal policy—let alone a policy of nonregulation—is “Law” for purposes of the Supremacy Clause. Under our precedent, such a policy likely is not final agency action because it does not mark “the consummation of the agency's decisionmaking process” or determine Charter's “rights or obligations.”  Even if it were final agency action, 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 bicameral and presentment procedures.”

Giving pre-emptive effect to a federal agency policy of nonregulation thus expands the power of both the Executive and the Judiciary. It authorizes the Executive to make “Law” by declining to act, and it authorizes the courts to conduct “a freewheeling judicial inquiry” into the facts of federal nonregulation, rather than the constitutionally proper “inquiry into whether the ordinary meanings of state and federal law conflict,”  Because this petition does not clearly challenge the underlying basis of the pre-emption theory, however, I concur in the denial of certiorari.