John Marshall's Jurisprudence Supports Preemption of California's Net Neutrality Law

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Other Views:

• Comments of Free Press, *Restoring Internet Freedom*, WC Docket 17-108 (July 17, 2017), https://ecfsapi.fcc.gov/file/1071818465092/Free%20Press%20Title%20II%20Comments.pdf.

• Reply Comments of Public Knowledge, *Restoring Internet Freedom*, WC Docket 17-108 (Aug. 30, 2017), https://ecfsapi.fcc.gov/file/1083005674359/PK_Net_Neutrality_Reply_Comments_2017.pdf.

• Barbara van Schewick, *Gov. Brown Signs SB 822, Restoring Net Neutrality to California*, The Center for Internet and Society Blog (Sept. 30, 2018), https://cyberlaw.stanford.edu/blog/2018/09/gov-jerry-brown-signs-sb-822-restoring-net-neutrality-california.

• Comments of Public Knowledge, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311 (Nov. 14, 2018), https://ecfsapi.fcc.gov/file/1114108810842/PK_Comments_Preemption_Cable_Franchising.pdf.

• Randolph J. May and Seth L. Cooper, *FCC Preemption of State Restrictions on Government-owned Broadband Networks: An Affront to Federalism*, 16.1 Engage 39 (2015), https://fedsoc.org/commentary/publications/fcc-preemption-of-state-restrictions-on-government-owned-broadband-networks-an-affront-to-federalism.

It may be hard to see a connection between steamboats plowing the waterways of our early republic and today's high-speed broadband networks carrying the bits and bytes of internet transmissions. But there is a jurisprudential connection between Chief Justice John Marshall's 1824 decision in *Gibbons v. Ogden*[1] and the Federal Communications Commission's (FCC or Commission) 2018 assertion of authority to preempt state laws interfering with interstate internet traffic. In *Gibbons*, Marshall established federal supremacy under the Constitution's Commerce Clause to preempt a New York law that interfered with steamboat traffic between New York and New Jersey. Marshall determined that the New York law conflicted with a congressional act licensing coastal steamboat traffic, and that it therefore could not be enforced. As Marshall famously put it: "Congress may control state laws so far as it may be necessary to control them for the regulation of commerce."[2]

Gibbons often is considered one of Chief Justice Marshall's three most important opinions.[3] So it's worth considering the relevance of the Great Expounder's *Gibbons* opinion even to a matter as utterly contemporary, and as important to interstate commerce, as today's internet. First, we will examine the FCC's January 2018 *Restoring Internet Freedom Order*[4]—in which it asserted preemptive authority to invalidate state laws in conflict with the agency's declared internet policy—and California's reaction to the order. Then, we will show how the foundation laid in *Gibbons*, where Marshall was faced with incompatible federal and state laws, buttresses the current FCC's authority to keep the internet free from conflicting state regulation.

The *Restoring Internet Freedom Order* (*RIF Order*) repealed the public utility-like regulations the Obama Administration FCC imposed on broadband internet service providers (ISPs) in March 2015. The repealed 2015 regulations became known as the FCC's *Title II Order*, and they included bright-line bans on blocking, throttling, and paid prioritization, as well as a vague, open-ended "general conduct" standard barring unreasonable interference with end users' access to internet services or disadvantaging of content providers.[5] These provisions are popularly referred to as

1 22 U.S. 1 (1824).

2 *Id.* at 206.

3 The other two are, of course, *Marbury v. Madison*, 5 U.S. 137 (1803), and *McCulloch v. Maryland*, 17 U.S. 316 (1819).

4 FCC, *Restoring Internet Freedom Order*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order (hereinafter *RIF Order*), released January 4, 2018.

5 *See Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (hereinafter *Title II Order*) (The 2015 order is often referred to as the "Title II Order" because, as explained below, the FCC classified ISPs as common carriers under Title II of the Communications Act in order to impose the public utility-like regulations that are

"net neutrality" regulations. The *RIF Order* also repealed the *Title II Order*'s assertion of FCC authority to review internet network interconnection agreements.

The *RIF Order* reclassified broadband internet access services as Title I "information services" rather than Title II "telecommunications services," the classification that had been adopted in the 2015 *Title II Order*.[6] An abundance of federal court and agency precedents treat information services as inherently interstate—therefore within the federal government's power to regulate under the Constitution's Commerce Clause—and as non-regulated, or at most lightly regulated, services. Thus, in its 2018 *RIF Order*, the Commission said, "it is well-settled that Internet access is a jurisdictionally interstate service because 'a substantial portion of Internet traffic involves accessing interstate or foreign websites.'"[7] Further, "it is impossible or impractical for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance."[8] The FCC emphasized in the *RIF Order* that it was acting consistently with Congress' established policy in Section 230(b) of the Telecommunications Act of 1996 "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation."[9] The Commission declared it was returning to "a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals of the 1996 Act."[10]

Because some states had already voiced their opposition to the FCC's proposed repeal of the 2015 regulations, the *RIF Order* directly addressed the legal implications of its deregulatory policy for state and local regulation: "We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order."[11] In support of the *RIF Order*'s preemptive authority, the Commission relied on agency precedent recognizing that "federal preemption [is] preeminent in the area of information services."[12] The Commission also relied on modern federal preemption jurisprudence, arguing that "[f]ederal courts have uniformly held that an affirmative federal policy of *de*regulation is entitled to the same preemptive effect as a federal policy of regulation."[13]

Despite the FCC's assertion of preemptive authority in the *RIF Order*, several states have considered regulating ISPs more stringently than the FCC, and a few have actually done so. Perhaps not surprisingly, given that Silicon Valley web giants like Google and Facebook support net neutrality regulation, California has adopted the most far-reaching state law so far, and the one most unreservedly in conflict with the FCC's deregulatory policy. Whether California's law—and other state laws that may come in its wake—survives constitutional scrutiny depends on whether the FCC is right that its deregulatory *RIF Order* has preemptive effect and is therefore the supreme law of the land in the field of ISP regulation.

This article will examine the FCC's assertion of preemption authority in light of the new California law. And it will do so in the context of examining anew Chief Justice Marshall's Commerce Clause jurisprudence, primarily *Gibbons v. Odgen*. Many articles review the myriad judicial decisions on preemption in the context of various federal-state conflicts, including federal-state conflicts arising from FCC actions. In many of these "conflict preemption" cases, the Constitution's Commerce Clause undergirds and supports the assertion of federal authority, but it goes unmentioned. Although it is often taken for granted by courts and commentators, Marshall's Commerce Clause jurisprudence is the foundation for the exercise of much preemption authority, and it is certainly pertinent to an examination of the lawfulness of the FCC's assertion of preemption authority in the *RIF Order*. In this article, we show that the way Marshall interpreted the Commerce Clause in 1824 in a case involving steamboat traffic—at that time a relatively new, but already important, means of commerce—supports the FCC's exercise of preemptive authority in a case involving internet traffic—today's newest and most important means of commerce.

I. California Senate Bill 822 and the Department of Justice's Lawsuit

On September 30, 2018, California Governor Jerry Brown signed SB-822 into law.[14] SB-822 is an attempt to reimpose, at the state level, many of the same restrictions contained in the now repealed *Title II Order*. SB-822 categorically bans ISPs from blocking access to lawful websites, "throttling" or impairing service, or implementing "paid prioritization" opportunities. SB-822 also includes a provision that closely resembles the *Title II Order*'s vague "general conduct" standard by prohibiting ISPs from unreasonably interfering with or disadvantaging the communications of customers or competitors. The California law also asserts regulatory authority over "ISP traffic exchange," a form of regulation of interconnection among ISPs. The *RIF Order*, by contrast, expressly disclaims authority to regulate interconnection.

Additionally, in at least two significant respects, SB-822's restrictions are even more stringent and far-reaching than those contained in the *Title II Order*. First, the law bars mobile broadband service providers from offering California consumers

contained in Title II.) The *Title II Order* was upheld by *United States Telecommunications Association v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *reh'g en banc denied*, 855 F.3d 381 (D.C. Cir. 2017), *cert. denied*, 586 U.S. ___, Nos. 17-498 *et al.* (Sup. Ct. Nov. 5, 2018).

6 *See, e.g., RIF Order*, at ¶¶ 20, 96.

7 *Id.* at ¶ 199.

8 *Id.* at ¶ 200.

9 47 U.S.C §230(b).

10 *RIF Order*, at ¶ 194, quoting 47 U.S.C. § 230(b)(1)(2).

11 *Id.* at ¶ 195.

12 *Id.* at ¶ 203 (quoting the *Pulver Order* 199 FCC Rcd. 3307 (2004), at ¶ 16.

13 *Id.* at ¶ 194; *id.* at n.726 (citing Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 383 (1983); Bethlehem Steel Co. v. N.Y. State Labor Relations Bd., 330 U.S. 767, 774 (1947); Minn. Pub. Util. Comm'n v. FCC, 483 F.3d 570,580-81 (8th Cir. 2007)).

14 *See* Cal. Legis. SB-822 Reg. Sess. 2017-2018 (2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB822.

"free data" plans that allow consumers to access content from selected websites without such access counting against their monthly data allotments. Second, SB-822 appears to restrict broadband service providers from offering so-called "non-broadband Internet access data services" or "specialized services" over the same last-mile facilities over which they offer broadband internet access services. These services were permitted by the *RIF Order*.

As soon as Governor Brown signed SB-822, the U.S. Department of Justice (DOJ) filed a lawsuit against California in the U.S. District Court for the Eastern District of California.[15] Subsequently, several ISPs filed another lawsuit challenging SB-822 in the same district.[16] DOJ's lawsuit against California seeks a federal court order declaring SB-822's restrictions on broadband internet access services preempted and therefore invalid. In its complaint, DOJ alleges that "SB-822 conflicts with the 2018 Order's affirmative federal 'deregulatory policy' and 'deregulatory approach' to Internet regulation" that was adopted in furtherance of Congress' policy to preserve a competitive free market for the internet "unfettered by Federal or State regulation."[17] DOJ's complaint also alleges that SB-822 contributes to "a patchwork of separate and potentially conflicting requirements from different state and local jurisdictions," thereby impairing "the effective provision of broadband services" because broadband ISPs are unable to comply with conflicting requirements for intrastate and interstate communications.[18]

California agreed not to enforce its net neutrality law pending the resolution of a challenge to the *RIF Order* that had previously been filed in the U.S. Court of Appeals for the D.C. Circuit[19] and any follow-on proceedings in the Supreme Court.[20] Given the likelihood that the California law would not survive judicial review, it is not surprising that California agreed to defer its implementation pending judicial review of the *RIF Order*. Nevertheless, if California ever decides to try to implement its law, DOJ's lawsuit should succeed on the merits because it is solidly based on modern federal preemption jurisprudence. For instance, the *RIF Order* cited *Arkansas Electric Cooperative Corporation v. Arkansas Public Services Commission*, in which the Supreme Court declared that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate."[21] It also cited *Minnesota Public Utilities Commission v. FCC*, where the U.S. Court of Appeals for the Eighth Circuit stated that "deregulation" is a "valid federal interest[] the FCC may protect through preemption of state regulation."[22] Similarly, the Eighth Circuit ruled in September 2018 that Minnesota's attempt to regulate an ISP's interconnected Voice over Internet Protocol service was preempted because it "attempted regulation of an information service [that] conflicts with the federal policy of nonregulation."[23]

While these modern federal preemption precedents would likely suffice to assure DOJ of victory in its challenge to SB-822, Chief Justice Marshall's decision in *Gibbons v. Ogden* provides further support and shows that this result is deeply rooted in American jurisprudence.[24] Preemption of state laws that affect interstate commerce—like California's— is by no means novel. Marshall's early interpretation of the Commerce Clause's reach supports the preemptive effect of the *RIF Order* in the following respects:

- In *Gibbons*, Marshall declared that Congress' power under the Commerce Clause "applied to all the external concerns of the nation, and to those internal concerns which affect the states generally."[25] And Marshall recognized that interstate and intrastate services may be "intermingled" in a way which "cannot stop at the external boundary line of each state."[26] Marshall held that, where such intermingling obtains, Congress has power to regulate despite the presence of some intrastate features of the commerce in question. The *RIF Order* argued that it is "well settled that Internet access is a jurisdictionally interstate service" because a substantial portion of internet traffic accesses interstate or foreign

15 Complaint for Declaratory and Injunctive Relief of Plaintiff U.S. Department of Justice, U.S. v. California, Case No. 18-01539 (E.D. Cal.) (filed Sept. 30, 2018) (hereinafter DOJ Complaint).

16 *See* Complaint, American Cable Assoc., et al., v. Becerra, Case No. 18-01552 (E.D. Cal.) (filed Oct. 3, 2018).

17 DOJ Complaint, at ¶ 41.

18 *Id.* at ¶ 42.

19 *See* Mozilla v. FCC, Case Nos. 18-1051, *et al.* (D.C. Cir, filed Feb. 22, 2018). Petitioners seeking review of the FCC's *RIF Order* in the D.C. Circuit case include edge providers like Mozilla and Etsy and public interest groups like Public Knowledge.

20 *See* FCC, *Chairman Pai Statement on Agreement by California not to Enforce Its Internet Regulations*, October 26, 2018, https://docs.fcc.gov/public/attachments/DOC-354813A1.pdf.

21 461 U.S. at 383 (cited by *RIF Order*, at ¶ 194 n.726).

22 483 F.3d at 580-581 (cited by *RIF Order*, at ¶ 194 n.726).

23 Charter Advanced Services (MN), LLC v. Lange, 2018 WL 4260322, at *2, *4, *reh'g en banc denied,* Case No. 17-2290, December 4, 2018. For the contrary view of the FCC's authority to preempt regulation of information services, see the comments submitted by Free Press on July 17, 2017, in the *RIF Order* proceeding, at https://ecfsapi.fcc.gov/file/1071818465092/Free%20Press%20Title%20II%20Comments.pdf, and the reply comments submitted by Public Knowledge on August 30, 2017, in the *RIF Order* proceeding, at https://ecfsapi.fcc.gov/file/1083005674359/PK_Net_Neutrality_Reply_Comments_2017.pdf.

24 Several states are attempting to resurrect net neutrality prohibitions by purporting to use their procurement authority to require that ISPs offering proprietary services to the state adhere to prohibitions like those repealed by the FCC's *RIF Order*. These actions relating to proprietary procurement service offerings raise somewhat different issues and are not the subject of this article. For our views on this subject, see Seth L. Cooper, *State Executive Orders Reimposing Net Neutrality Regulations Are Preempted by the Restoring Internet Freedom Order*, Perspectives from FSF Scholars, February 2, 2018, http://www.freestatefoundation.org/images/State_Executive_Orders_Reimposing_Net_Neutrality_Regulations_Are_Preempted_by_RIF_Order_020218.pdf.

25 *Gibbons*, 22 U.S. at 195.

26 *Id.* at 194.

websites.[27] And, consistent with *Gibbons*, the *RIF Order* further determined that the intrastate and interstate portions of broadband internet services are intermingled in a way that cannot be segregated and stopped at state boundary lines.

- In *Gibbon*s, Marshall stated that "the acts of New York must yield to the law of Congress" when they "come into collision."[28] Similarly, in the *RIF Order*, the FCC determined that laws like California's which impose net neutrality mandates that the FCC has repealed are inconsistent with the federal deregulatory policy for internet services.[29] In other words, they are, as Marshall put it, in "collision" with the federal policy and must yield.
- In *Gibbons*, Marshall defined "the power to regulate" as the power "to prescribe the rule by which commerce is to be governed."[30] The *RIF Order* prescribes what the FCC variously describes as a "light touch" or "deregulatory" approach for broadband internet services as the general rule. In other words, what the FCC announced as "the federal deregulatory policy restored in this [RIF] order,"[31] consistent with *Gibbons*, is the rule by which internet commerce is to be conducted.

II. The *RIF Order* Affirmed That Internet Access Services Are Jurisdictionally Interstate Services That Cannot Be Segregated From Any Intrastate Elements

Chief Justice Marshall's opinion in *Gibbons* is foundational to understanding the FCC's assertion of preemption authority in its *RIF Order. Gibbons* concerned the lawfulness of New York's grant of an exclusive operating license to a steamboat company. The exclusive licensing regime impeded steamboat commerce between points in New York and New Jersey because it limited the number of steamboat companies allowed to operate there. DOJ's challenge to SB-822 concerns state restrictions that the FCC claims impede commerce—not by steamboats, but by digital communications streaming between and among the states and foreign countries.

In *Gibbons*, Marshall explained that Congress' power to regulate commerce "applied to all the external concerns of the nation, and to those internal concerns which affect the states generally."[32] And he stated that "[t]he word 'among' means intermingled with," and that thus "[c]ommerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior."[33] The FCC's conclusions regarding the interstate nature of internet access services in the *RIF Order* are consonant with Marshall's exposition of Congress' power to regulate commerce in *Gibbons*. In the *RIF Order*, the Commission, citing several precedents, concluded that it is well settled that internet access is a jurisdictionally interstate service because "a substantial portion of Internet traffic involves accessing interstate or foreign websites."[34] The agency also stated that "the record continues to show that broadband Internet access service is predominantly interstate because a substantial amount of Internet traffic begins and ends across state lines."[35] And the Commission determined that state laws like California's that impose stringent net neutrality mandates that the Commission has repealed "could pose an obstacle to or place an undue burden on the provision of broadband Internet access service and conflict with the deregulatory approach we adopt today."[36]

The Commission went on to argue that the intrastate and interstate elements of internet access services are so intermingled that Congress has power over the internet access services as a whole; this conclusion is consonant with Marshall's exposition of Congress' power to regulate commerce in *Gibbons*. In the *RIF Order*, the Commission concluded that, because of the way that modern digital networks route internet traffic, "it is impossible or impracticable for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance."[37] This is consistent with the recognition by courts that the Commerce Clause allows Congress to preempt state regulation of "activities that inherently require a uniform system of regulation" and those that "impair the free flow of materials and products across state borders."[38]

Both interstate and intrastate communications include substantial portions of internet traffic that access interstate and foreign websites. Likewise, today's broadband internet networks transmit data among and within the borders of different states and across the globe. Even an internet communication that begins and ends in the same state may be comprised of bits that traverse many states and even countries overseas before being reconnected to complete the transmission. In other words, the intrastate and interstate elements of broadband internet services are indeed "intermingled" in a way that it makes it impossible or impractical to segregate them in a way that they "stop at the external boundary line of each state."[39] As the Commission concluded, "any effort

27 *RIF Order*, at ¶ 199.

28 *Gibbons*, 22 U.S. at 210.

29 *RIF Order*, at ¶ 194-195.

30 *Gibbons*, 22 U.S. at 196.

31 *RIF Order*, at ¶ 196.

32 *Gibbons*, 22 U.S. at 195. *See* U.S. Const. art. I, sec. 8. Constitutional historian Maurice Baxter observed, "The part of the opinion that was the most impressive at the time and would be most durable in the future was a comprehensive exegesis of the commerce clause." Maurice G. Baxter, The Steamboat Monopoly: Gibbons v. Ogden, 1824 48 (1972).

33 *Id.* at 194.

34 *RIF Order*, at ¶ 199 (citing Bell Atl. Tel. Cos. v. FCC, 206 F.3d 1, 5 (D.C. Cir. 2000); NARUC Broadband Data Order, 25 FCC Rcd 5051, 5024 n.24 (2010); High-Cost Universal Service Support Order, 24 FCC Rcd 6475, 6496 n.69 (2008)).

35 *Id.*

36 *Id.* at ¶ 195.

37 *Id.* at ¶ 200.

38 Nat'l Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1154-55 (9th Cir. 2012).

39 *Gibbons*, 22 U.S. at 194.

by states to regulate intrastate traffic would interfere with the Commission's treatment of interstate traffic."[40]

III. The California Law Conflicts with Federal Broadband Internet Policy and Is Therefore Preempted

Chief Justice Marshall observed in *Gibbons* that the Constitution's framers foresaw occasions when a state law would come into conflict with a law passed by Congress, and that they provided for such occasions by including the Supremacy Clause in the Constitution. The Supremacy Clause is found in Article VI, Section 2, and it states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[41]

Marshall explained in *Gibbons* that the Supremacy Clause applies to "such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to, the laws of Congress made in pursuance of the Constitution or some treaty made under the authority of the United States."[42] "In every such case," concluded Marshall, "the act of Congress or the treaty is supreme, and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."[43]

Three years after his *Gibbons* opinion, Justice Marshall had occasion in *Brown v. Maryland* to once again discuss the Commerce Clause, this time with reference to a Maryland law that required importers of foreign goods to pay a fee to obtain a license to sell their products in Maryland. Marshall found that Maryland's licensing regime that allowed the state to decide what goods could be imported into the state, subject to imposition of importation fees, conflicted with a federal law generally authorizing the importation and sale of goods.[44] Marshall declared the Maryland law invalid because federal law is supreme in the event of a conflict with a state law on a matter impacting interstate or foreign commerce:

> It has been observed that the powers remaining with the states may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation.[45]

The FCC's *RIF Order* expressly "preempt[s] any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing . . . or that would impose more stringent requirements for any aspect of broadband service."[46] The *RIF Order* makes clear that broadband internet service should be governed "by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements."[47] But California's law reimposes at the state level many of the same restrictions on ISPs contained in the 2015 *Title II Order* that the FCC repealed in the *RIF Order*. Indeed, it adopts net neutrality requirements that are even more stringent than those in the 2015 order. Thus, SB-822 clearly conflicts with the *RIF Order* and the articulated congressional policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by federal and state regulation."[48] Consistent with Marshall's understanding of the Supremacy and Commerce Clauses, California's law should be preempted.

IV. The *RIF Order*'s Deregulatory Rule for Internet Services Is Consistent with Marshall's Commerce Power Rule

In *Gibbons*, Chief Justice Marshall defined "the power to regulate" commerce among the states as the power "to prescribe the rule by which commerce is to be conducted."[49] Consistent with Marshall's view in *Gibbons*, the FCC's affirmative decision to adopt a deregulatory approach is a rule by which commerce is to be conducted, in this case a rule by which internet access services will be regulated by the federal government under the Commerce Clause power.

In the *RIF Order*, the Commission declared that it was adopting "a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals of the 1996 Act."[50] In the Commission's view, an affirmative decision to adopt a deregulatory rule is still an exercise of its power to regulate under the Commerce Clause. Contrary to claims by some advocates of regulation,[51]

40 *RIF Order*, at ¶ 200.

41 The proposal to add the Supremacy Clause to the Constitution was adopted after the delegates rejected Madison's idea of allowing a federal veto of any state law. Much later, in 1833, Madison wrote in a letter to future president John Tyler: "The necessity of some constitutional and effective provision guarding the Constitution and the laws of the union against violations of them by the laws of the states was felt and taken for granted by all, from commencement to the conclusion of the work performed by the convention." *See* James Madison to John Tyler (1833) (unsent), 3 Max Farrand, Records of the Federal Convention 527 (Reprint 1996).

42 *Gibbons*, 22 U.S. at 211.

43 *Id.*

44 25 U.S. 419 (1827).

45 *Id.* at 448.

46 *RIF Order*, at ¶ 195.

47 *Id.* at ¶ 194.

48 47 U.S.C. § 230(b)(2).

49 *Gibbons,* 22 U.S. at 196.

50 *RIF Order*, at ¶ 194.

51 *See, e.g.*, Barbara van Schewick, *Gov. Brown Signs SB 822, Restoring Net Neutrality to California*, The Center for Internet and Society Blog (September 30, 2018) (arguing "the FCC cannot prevent the states from adopting net neutrality protections because the FCC's repeal order removed its authority to adopt such protections"), https://cyberlaw.stanford.edu/blog/2018/09/gov-jerry-brown-signs-sb-822-restoring-net-neutrality-california; Comments of Public Knowledge, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and

the Commission did not simply abandon authority in this area and leave matters up to the states. Rather, the Commission's reestablishment of what it referred to as "an affirmative federal policy of *de*regulation" was a deliberate exercise of regulatory power consistent with Marshall's understanding of the term.[52] The D.C. Circuit has recognized that "providing interstate [communications] users with the benefit of a free market and free choice" is a "valid goal" and that "[t]he FCC may preempt state regulation . . . to the extent that such regulation negates the federal policy of ensuring a competitive market."[53] The Commission's establishment of a carefully calibrated federal regulatory regime, albeit a light-touch rather than a heavy-handed one, is a rule establishing a federal policy under the Commerce Clause—and one that supports preemption of conflicting state laws.

V. Conclusion

If ultimately litigated to its conclusion, DOJ's lawsuit challenging California's SB-822 likely will succeed based on modern federal preemption precedents. But it is important to understand that Chief Justice Marshall's jurisprudence, especially his opinion in the landmark *Gibbons v. Ogden* case, supplies a critical constitutional backdrop for those modern precedents. Consideration of Marshall's Commerce Clause jurisprudence deepens and reinforces the conclusion that the federal deregulatory policy applicable to broadband internet access services reestablished in the FCC's *RIF Order* should, and most likely will, result in the preemption of California's net neutrality law and any similar laws that might be passed in other states.

Competition Act of 1992, MB Docket No. 05-311 (November 14, 2018) (opposing a proposed FCC rulemaking to limit and/or preempt cable local franchising authorities and arguing the *RIF Order*'s Title I reclassification of broadband internet access services, combined with the absence of any declared exercise of ancillary authority, removed the Commission's authority over those services), https://ecfsapi.fcc.gov/file/1114108810842/PK_Comments_Preemption_Cable_Franchising.pdf.

52 *RIF Order*, at ¶ 194.

53 Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 880 F.2d 422, 430, 431 (D.C. Cir. 1989).