THE FREE STATE FOUNDATION
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Perspectives from FSF Scholars
October 5, 2018
Vol. 13, No. 38

John Marshall's Jurisprudence Supports the FCC's 5G Preemption Order

by

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Introduction and Summary

Supreme Court Justice Oliver Wendell Holmes once declared that "if American law were to be represented by a single figure, skeptic and worshipper alike would agree without dispute that the figure could be one alone, and that one, John Marshall,"[1] the fourth Chief Justice of the U.S. Supreme Court and its longest serving one. Joseph Story, another eminent early Supreme Court Justice, said of John Marshall: "His proudest epitaph may be written in a single line – 'Here lies the Expounder of the Constitution of the United States.'"[2] There is no gainsaying the Marshall Court's role in, as John Marshall's eminent biographer Jean Edward Smith put it, establishing "the ground rules of American government."[3]

And, so too, as shown below, there is no gainsaying the importance of John Marshall's jurisprudence regarding the scope of the Constitution's Commerce Clause to our contemporary understanding of the "ground rules" of constitutional federalism. In this *Perspectives*, we focus

[1] *See* Bernard Schwartz, DECISION: HOW THE SUPREME COURT DECIDES CASES (1996), at 162 (quoting Holmes on Marshall).
[2] Joseph Story, A DISCOURSE UPON THE LIFE, CHARACTER, AND SERVICES OF THE HONORABLE JOHN MARSHALL (1835), at 71.
[3] Jean Edward Smith, JOHN MARSHALL: DEFINER OF A NATION (1996), at 1.

on Marshall's Commerce Clause jurisprudence in support of the FCC's authority to clear away local regulatory obstacles to 5G deployment that burden interstate commerce.[4] The Commission's *Wireless Broadband Infrastructure Order*, adopted at its September 26 public meeting, preempts local government actions that effectively prohibit wireless infrastructure siting – especially small cell facilities siting.[5] The Commission estimates its preemptive actions will result in perhaps $2 billion in regulation-related cost savings and spur $2.5 billion in additional market investments.

Supporters of local regulation sometimes invoke "states' rights" and suggest that preemption is contrary to constitutional federalism. But a core tenet of federalism is the promotion of an open and free interstate commercial marketplace. Constitutional first principles drawn from the jurisprudence of Chief Justice Marshall make plain that, in many instances, preemption of local regulatory burdens on interstate communications services is fully consistent with a proper understanding of constitutional federalism. Based on principles from Marshall's jurisprudence, discussed below, there is strong support for the Commission's preemption of local regulatory barriers to 5G infrastructure siting that conflict with federal policy.

The Commission's *Wireless Broadband Infrastructure Order* clears away regulatory obstacles to wireless infrastructure siting, accelerating the deployment of nationwide 5G networks. It achieves this purpose by providing guiding interpretations of Sections 253 and 332(c)(7) of the Communications Act, which bar state and local government regulations that effectively prohibit wireless telecommunications services.[6] The order clarifies that, pursuant to Sections 253 and 332(c)(7), state and local regulations regarding wireless infrastructure siting may not render a service provider unable to provide an existing service in a new geographic area or restrict a new service provider's entry into an area.[7] Nor may state or local government actions materially inhibit the introduction of new services or the improvement of services.[8]

Additionally, the *Wireless Broadband Infrastructure Order* provides that local governments may charge fees for siting small wireless facilities only to the extent that these fees reasonably approximate the local government's objectively reasonable costs and are non-discriminatory.[9] The order also sets shot clocks for local governments to decide whether to approve or deny siting permit applications for small wireless facilities: 60 days for collocation on existing structures and 90 days for new builds.[10] Any failure to act within those shot clocks gives rise to a presumption that the local government impermissibly prohibited the provision of the services described in the

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[4] For a brief discussion of John Marshall's jurisprudence regarding intellectual property rights, see Randolph J. May and Seth L. Cooper, "The Public Contract Basis of Intellectual Property Rights," *Perspectives from FSF Scholars*, Vol. 11, No. 13 (April 19, 2016), 4-7, at: http://freestatefoundation.org/images/The_Public_Contract_Basis_of_Intellectual_Property_Rights_041816.pdf.

[5] Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, Declaratory Ruling and Third Report and Order ("*Wireless Broadband Infrastructure Order*" or "Order") (released September 27, 2018).

[6] 47 U.S.C. § 253(a); 47 U.S.C. § 332(c)(7)(B)(i).

[7] Order, at ¶ 37.

[8] Order, at ¶¶ 31, 35-38.

[9] Order, at ¶ 11.

[10] Order, at ¶ 13.

application—and can be litigated in federal court.[11] The order also prohibits certain unreasonable and discriminatory aesthetic requirements for siting facilities.[12]

In the *Wireless Broadband Infrastructure Order*, the Commission states that it aims to combat state and local regulatory "conduct that threatens to limit the deployment of 5G services."[13] By the Commission's estimate, the order's implementation will "eliminate around $2 billion in unnecessary costs" and "stimulate around $2.4 billion of additional buildouts."[14] Furthermore, the Commission estimates that "97 percent of new deployments would be in rural and suburban communities that otherwise would be on the wrong side of the digital divide."[15]

On occasion, supporters of local regulation argue that those who support constitutional federalism ought to oppose preemption. But a pro-federalism case can readily be made for preempting local regulatory burdens on interstate communications services, including wireless infrastructure siting processes that effectively deter the deployment of 5G wireless networks. Principles drawn from the constitutional jurisprudence of John Marshall, fourth Chief Justice of the U.S. Supreme Court, provide the basis for such a case.

The Commission's exercise of preemptive authority – expressly delegated to it by Congress – in its *Wireless Broadband Infrastructure Order* furthers a free and open interstate 5G mobile broadband market. This is consistent with John Marshall's view in *Brown v. Maryland* (1827) and *Gibbons v. Ogden* (1824) that a primary purpose of the Constitution is to preserve and promote a vibrant interstate commercial marketplace. Moreover, although wireless physical infrastructure, including small wireless antennae, may be located within individual states, the designs and operations of interconnected mobile broadband networks, including nascent 5G networks, transcend state and even national borders. The order's declaration clarifying standards regarding impermissible local government restrictions on mobile services is in keeping with Chief Justice Marshall's recognition in the landmark *Gibbons* decision that Congress's Commerce power can reach within a state's borders to address nationwide commercial concerns.

Local wireless siting permit processes that effectively prohibit mobile broadband providers from offering service conflict with congressional policy set forth in Sections 253(a) and 332(c)(7). Such prohibitions also conflict with the Commission's decision to prioritize the rollout of 5G technology as a matter of policy. As Marshall observed in *Gibbons*, the Commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."[16] And so, Marshall added: "[W]hen a State proceeds to regulate commerce … 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."[17]

The Supremacy Clause in Article VI, which declares "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be supreme Law of the Land …

[11] Order, at ¶¶ 13, 17 (citing 47 U.S.C. § 332(c)(7)(B)(v)).
[12] Order, at ¶¶ 84-88.
[13] Order, at ¶ 6.
[14] Order, at ¶ 7.
[15] Order, at ¶ 7.
[16] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).
[17] *Id*. at 199-200.

any Thing in the … Laws of any State to the Contrary notwithstanding," provides the basis for Commission's exercise of preemptive authority in the *Wireless Broadband Infrastructure Order*. As Marshall put it in *Gibbons*, under the Constitution's Commerce Clause, it is "unequivocally manifested that Congress may control the State laws so far as it may be necessary to control them for the regulation of commerce."[18] In his book, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States*, James F. Simon stated: "Marshall's opinion in *Gibbons v. Ogden* put to rest for all time any notion that the nation could return to Balkanized commercial relations among the states that had existed under the unsuccessful Articles of Confederation."[19]

At the conclusion of his *Gibbons* opinion, the Chief Justice warned against those who would attempt to subject the Commerce power to "the narrowest possible compass" through "refined and metaphysical reasoning" that would "explain away the Constitution of our country and leave it a magnificent structure indeed to look at, but totally unfit for use."[20]

So too, the *Wireless Broadband Infrastructure Order* unequivocally states the FCC's intention to strengthen investment and innovation in the interstate mobile broadband services market by clearing away local regulatory barriers to 5G infrastructure siting, and not to control that market through a comprehensive federal regulatory scheme. As the order says: "[W]e reach a decision today that does not preempt nearly any of the provisions passed in recent state-level small cell bills."[21] Under the order, state and local governments retain the authority to grant or deny permits and to ascertain and charge permit application fees. And the order does not directly require state or local government officials to implement a federal regulatory scheme. In short, the Commission's approach coincides with Marshall's understanding – as acknowledged by biographers such as Charles F. Hobson and R. Kent Newmyer – that the Commerce Clause and its enforcement is not a means for displacing state or local regulation with federal regulation but rather is intended to ensure an interstate market based on the free exchange of goods and services, as well as strong private property rights.[22]

The Commission's 2009 *Wireless Infrastructure Order* adopted rules and interpretive guidance regarding Sections 253(a) and 332(c)(7), and its authority to do so was upheld by the Court of Appeals for the Fifth Circuit in *City of Arlington v. FCC* (2012).[23] And its 2014 *Wireless Infrastructure Order*, which also had preemptive effect, was upheld by the Fourth Circuit in *Montgomery County v. FCC* (2015).[24] Certainly, those decisions and other modern administrative law and agency preemption precedents bolster the present *Wireless Broadband Infrastructure Order*. But from a constitutional standpoint, as a matter of first principles, and

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[18] *Id*. at 206.
[19] James F. Simon, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES (2002), at 290-91.
[20] *Gibbons*, 22 U.S. at 222.
[21] Order, at ¶ 6.
[22] *See* R. Kent Newmyer, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT (2002), at 318-19; Charles F. Hobson, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW (1996), at 20.
[23] 668 F.3d 229 (5th Cir. 2012), *aff'd* 133 S. Ct. 1863 (2013) (addressing whether a federal agency receives *Chevron* deference for its interpretation of a statutory ambiguity regarding its "jurisdiction" and deciding this question in the affirmative).
[24] 811 F.3d 121 (4th Cir. 2015).

particularly as reflected in the jurisprudence of Chief Justice John Marshall, the Commission's order to accelerate 5G deployment by removing local regulatory obstacles to wireless infrastructure siting rests on solid legal ground.

Furthering a Vibrant 5G Interstate Commercial Marketplace

According to John Marshall, a core tenet of constitutional federalism is the preservation and promotion of an open and free interstate commercial marketplace. As Marshall declared in *Brown v. Maryland* (1827): "It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress."[25] To cement America's commercial union, the Commerce Clause in Article I, Section 8 grants Congress the power "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."

The Commission's exercise of preemptive authority in its *Wireless Broadband Infrastructure Order* is essential, at least in important respects, to furthering a vibrant interstate 5G mobile broadband marketplace. The order will foster national economic prosperity by avoiding up to $2.5 billion in unnecessary costs and facilitating as much as $2.5 billion in infrastructure investment, thereby boosting and enhancing the U.S. position in the global race to 5G. The order also provides increased legal uniformity and certainty in commercial matters of nationwide importance. It accomplishes this, for instance, by its Declaratory Ruling clarifying the "materially inhibit" standard for ascertaining effective prohibitions on mobile services and establishing shot clocks for local government decision-making on small cell siting permit applications.

As Marshall recognized, Congress's authority over commerce encompasses commerce among the states and can also reach within a state's borders to further nationwide commercial concerns. In the landmark case of *Gibbons v. Ogden* (1824), Marshall defined it as Congress's power "to prescribe the rule by which commerce is to be governed."[26] The scope and extent of this power "comprehend every species of commercial intercourse between the United States ..."[27] Moreover, "Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior."[28]

Wireless towers, antennae, and other physical infrastructure are no doubt located within individual states' geographic boundaries. But the designs and operations of interconnected mobile broadband networks, including nascent 5G networks, are interstate in scope, storing, processing, sending, and retrieving information across state lines. The commercial activities that mobile broadband networks engage in and facilitate are not merely internal to one state. Therefore, to ensure a competitive and innovative market for interstate commercial activities involving mobile broadband, the Commission is justified in declaring standards for infrastructure siting that takes place at the local level.

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[25] 25 U.S. (12 Wheat.) 419, 446 (1827).
[26] *Gibbons*, 22 U.S. at 196.
[27] *Id*. at 193.
[28] *Id*. at 194.

Preempting Local Regulatory Burdens that Conflict with Congressional and FCC Policy Regarding Provision of 5G Services

As John Marshall observed in *Gibbons*, the Commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."[29] And he added pointedly: "[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."[30] Thus, when state or local restrictions on commercial activity conflict with federal policy regarding interstate commerce, preemption of such restriction follows from the Supremacy Clause in Article VI, Clause 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be 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."

Local wireless siting permit processes that effectively prohibit mobile broadband providers from offering service conflict with congressional policy set forth in Sections 253(a) and 332(c)(7). They also conflict with the Commission's policy of prioritizing "the rollout of 5G technology."[31] Such conflicts justify the Commission's exercise of preemptive authority in the present *Wireless Broadband Infrastructure Order*. Commission orders from 2009 and 2014 exercising preemptive authority in the wireless infrastructure siting context have been upheld by federal circuit courts of appeals. Those precedents similarly support the *Wireless Broadband Infrastructure Order*'s preemptive effect. As Marshall concluded in *Gibbons*, pursuant to the Commerce Clause, it is "unequivocally manifested that Congress may control the State laws so far as it may be necessary to control them for the regulation of commerce."[32]

Importantly, Marshall did not view Congress's Commerce Clause power as a means for displacing state or local regulation with federal regulation. Rather, he regarded that power as intended to ensure an interstate market based on the free exchange of goods and services.

Measured Preemptive Action Respects the Core Sovereign Powers of States

In *McCulloch v. Maryland* (1819), Chief Justice Marshall inferred from the Supremacy Clause that Congress's exercise of its enumerated powers is immunized from state taxation and

[29] *Id.* at 196.
[30] *Id.* at 199-200.
[31] Applications of XO Holdings and Verizon Communications Inc. for Consent to Transfer Control of Licenses and Authorizations, WC Docket No. 16-70, Memorandum Opinion and Order ("*Verizon/XO Order*") (released November 16, 2016), at ¶ 57. *See also* Application of Verizon Communications Inc. and Straight Path Communications, Inc. for Consent to Transfer Control of Local Multipoint Distribution Service, 39 GHz, Common Carrier Point-to-Point Microwave, and 3650-3700 MHz Service Licensees, ULS File No. 0007783428, Memorandum Opinion and Order ("*Verizon/Straight Path Order*") (released January 18, 2018), at ¶ 2 (affirming the Wireless Bureau's crediting of "the expeditious use of this spectrum for the potential introduction of innovative 5G services to the benefit of American consumers").
[32] *Gibbons*, 21 U.S. at 206.

regulation.[33] His opinion in *McCulloch* did not indicate whether states received a similar type of immunity from direct federal regulation of their exercise of core state sovereign powers.[34] However, Marshall recognized that Congress's power over interstate commerce did not authorize the evisceration of the core sovereign functions of state governments. As he stated in *Gibbons* in 1824: "Although many of the powers formerly exercised by the States are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system."[35] Moreover, subsequent to Marshall's passing, the Supreme Court issued rulings effectively mirroring Marshall's federal immunity doctrine announced in *McCulloch*, thereby providing immunity to state governments in certain circumstances.[36] For instance, under modern Supreme Court jurisprudence, "States retain broad autonomy in structuring their governments and pursuing legislative objectives."[37] And the anti-commandeering doctrine prohibits the federal government from ordering state government officials to carry out federal regulatory programs.[38]

The Commission's measured exercise of preemptive authority in the *Wireless Broadband Order* avoids constitutional and statutory pitfalls. The order's new rules and clarified standards align with the terms of Sections 253(a) and 332(c)(7). Also, the order bars state and local government actions that effectively prohibit mobile broadband services – but it does not impose affirmative regulatory mandates on state and local governments. For instance, the order bars local regulations that materially inhibit the introduction of new services or the improvement of services, yet it does not affirmatively require local governments to take any regulatory action. Similarly, for purposes of federal law, the order creates the presumption of an effective prohibition on service when a local government fails to act on small cell wireless facilities petitions within the 60- and 90-day shot clocks. But local governments are not compelled to act within those shot clocks.

Removing State Regulation to Encourage Free Markets, Not Impose Federal Regulation

Importantly, Marshall did not view Congress's Commerce power as a means for displacing state or local regulation with federal regulation. Rather, he regarded that power as intended to ensure an interstate market based on the free exchange of goods and services. According to Charles F. Hobson, a Marshall biographer and editor of his writings:

> He was never an advocate of national power for its own sake, however, but only as a means to preserve and consolidate the newly won independence of the United States and to promote the commercial prosperity of the American people ... In championing national power, Marshall was not a precursor of modern liberation nationalism or of the positive, interventionist regulatory state of the twentieth century. Although he and the Court were not infrequently denounced as "consolidationist," the chief justice looked upon the federal government as

[33] 17 U.S. (4 Wheat.) 316 (1819).
[34] *Id*. at 436. *See also* David E. Engdahl, CONSTITUTIONAL FEDERALISM IN A NUTSHELL (2d ed. 1987), at 369.
[35] *Gibbons*, 21 U.S. at 198-99.
[36] *See* Engdahl, CONSTITUTIONAL FEDERALISM IN A NUTSHELL, at 383-90.
[37] Shelby Cty. v. Holder, 133 S. Ct. 2612, 2623 (2013).
[38] *See, e.g.*, Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

> chronically vulnerable to the aggressive encroachments of the state governments.[39]

A similar assessment was offered by Kent R. Newmyer, a judicial biographer of Marshall:

> What these national decisions of the Marshall court did *not* do, however, was create a modern nation-state, with its extensive regulatory apparatus. No one, least of all Marshall, expected Congress to *regulate* the national economy; indeed, the first modern regulatory statute did not come until three years after his death in 1838, when Congress passed modest safety laws regulating steam boilers on steamboats plying interstate waters … What he wanted the national government to do, in short—what his Court empowered Congress to do—was facilitate individual economic activity.[40]

So too, the *Wireless Broadband Infrastructure Order* is intended to strengthen the interstate mobile broadband services market, not to control that market by establishing a comprehensive federal regulatory scheme. Under the order, state and local governments retain decision-making authority on wireless siting processes. This includes the authority to ascertain and assess fees charged to service providers filing permit applications. As explained above, the order does not directly require state or local government officials to act or implement a federal regulatory scheme. Rather, the order's purpose in establishing certain preemptive parameters is to spur market investment on a national basis in 5G and other wireless network infrastructure by removing costly and time-consuming local regulatory burdens.

Conclusion

The Commission's 2009 and 2014 *Wireless Infrastructure Orders*, both of which exercised preemptive authority regarding wireless infrastructure siting, were upheld by federal circuit courts of appeals. Those decisions and other modern legal precedents support the preemptive provisions of the present *Wireless Broadband Infrastructure Order*. Moreover, even a cursory review of the Commerce Clause jurisprudence of John Marshall shows the Commission's order to accelerate 5G by clearing away local regulatory obstacles to wireless infrastructure siting is solidly grounded in constitutional first principles enunciated in the early days of the American republic. And these first principles remain fully applicable today.

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Further Readings

Seth L. Cooper, "FCC's Proposals Promoting Infrastructure Deployment Don't Violate Anti-

[39] Hobson, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW, at 20.
[40] Newmyer, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT, at 318-19.

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Comments of the Free State Foundation, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79 (June 15, 2017).

Randolph J. May and Seth L. Cooper, "FCC Preemption of State Restrictions on Government-owned Broadband Networks: An Affront to Federalism," *Engage*, Vol. 16, Issue 1 (May 20, 2015).