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John Marshall's Jurisprudence Supports Preemption of California Law Regulating Broadband Internet Services

by

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Introduction and Summary

On September 30, the U.S. Department of Justice filed a lawsuit challenging SB-822, California's new law regulating broadband Internet access services. The California "net neutrality" law conflicts with federal broadband policy, and the Justice Department's lawsuit is solidly backed by modern preemption jurisprudence. Moreover, SB-822 should be preempted consistent with core constitutional principles regarding Congress's power to regulate interstate commerce that were recognized by Chief Justice John Marshall in the early days of the Republic.

Given the likelihood that the California law will not survive judicial review, it is not surprising that California has now agreed to defer implementation of its law pending judicial review of the Federal Communications Commission's *Restoring Internet Freedom Order* (*RIF Order*). Nevertheless, in light of the likelihood of continued litigation regarding the lawfulness of state laws similar to California's, this is a propitious time to examine the jurisprudence that ultimately will determine the fate of California's law and others like it.

This *Perspectives from FSF Scholars* focuses on John Marshall's Commerce Clause jurisprudence in support of the FCC's reestablishment of a national deregulatory policy

framework for broadband Internet access services in its *Restoring Internet Freedom Order* adopted in December 2017. Federal preemption of California's attempt to stringently regulate broadband services in a way that conflicts with the federal policy is consonant with Marshall's jurisprudence in four notable respects.

First: The *Restoring Internet Freedom Order* secures a free and open interstate commercial market for broadband Internet access services. Consistent with Congress's 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 unfettered by Federal or State regulation," the Commission repealed common carrier public utility-like regulation imposed by the 2015 *Title Order* and reclassified broadband Internet access services as non-regulated, or at least lightly regulated, Title I "information services." This free market-oriented approach to broadband services coincides with the approach articulated in landmark Supreme Court opinions by Chief Justice Marshall in cases such as *Gibbons v. Ogden* (1824) and *Brown v. Maryland* (1827). These cases recognized that securing a free interstate marketplace is a primary purpose of the U.S. Constitution's Commerce Clause.

Indeed, under the Articles of Confederation, Congress was powerless to regulate commerce among the several states, and this, along with the lack of the power of taxation, was a primary reason for the convening of the Constitutional Convention that led to the adoption of the Constitution of 1787. At the Convention, James Madison, the Constitution's principal draftsman, declared himself "more and more convinced that the regulation of commerce was in its nature indivisible and ought to be wholly under one authority." According to constitutional scholar Larry Klarman, "Madison believed the Constitution's grant of commerce power to Congress automatically would preempt states from enacting laws interfering with interstate or foreign commerce." John Marshall's Commerce Clause jurisprudence bolstered this Madisonian view. As James W. Ely, Jr., a prominent law professor, observed: "Marshall sought to strengthen the bonds of the federal union, encourage the formation of a national market, and safeguard property rights from state interference."

Second: Broadband Internet access services are matters of nationwide concern and the intrastate and interstate portions of those services cannot practically be segregated. In the *Restoring Internet Freedom Order*, the Commission concluded: "[I]t is well-settled that Internet access is a jurisdictionally interstate service because 'a substantial portion of Internet traffic involves accessing interstate or foreign websites.'" The Commission also concluded: "[I]t is impossible or impractical for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance."

These conclusions by the Commission are consonant with Marshall's expounding of Congress's constitutional power "To regulate Commerce… among the several States" in *Gibbons*. John Marshall declared that Congress's power "applied to all the external concerns of the nation, and to those internal concerns which affect the states generally." The courts have recognized that the Commerce Clause prohibits regulation of activities "that inherently require a uniform system of regulation" and regulation "impair[ing] the free flow of materials and products across state borders."

Surely, such concerns include substantial portions of Internet traffic accessing interstate and foreign websites. Additionally, in *Gibbons* Marshall opined: "The word 'among' means intermingled with," and "[a] thing which is among others, is intermingled with them." And thus: "Commerce among the states cannot stop at the external boundary of each state, but may be introduced into the interior." Likewise, broadband Internet networks transmit data among and within the borders of different states. The intrastate and interstate elements of broadband services are indeed "intermingled" in a way that it is impossible or impractical to segregate and thus properly subject to federal jurisdiction only.

Third: The *Restoring Internet Freedom Order* prescribes free market competition as the general rule by which interstate commerce in broadband Internet access services is to be conducted. In the *RIF Orde*r, the Commission adopted "a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals of the 1996 Act." Contrary to claims by some pro-regulatory advocates, 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 an exercise of regulatory power according to Marshall's understanding of the term. In *Gibbons*, Marshall explained that "the power to regulate" commerce among the states meant the power "to prescribe the rule by which commerce is to be conducted." Thus, the *Restoring Internet Freedom Order* reestablished free market competition as the basic rule by which interstate commercial activity in the broadband Internet access services market is to be conducted.

Fourth: California's law conflicts with the *Restoring Internet Freedom Order*'s free market-oriented federal policy toward broadband Internet access services. The *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." The *RIF Order* makes clear that broadband service should be governed "by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements."

In *Gibbons*, Marshall explained that the Constitution's framers included the Article VI, Section 2 Supremacy Clause to address occasions when federal and state laws conflict: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof… shall be supreme Law of the Land… any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." According to Marshall: "In every such case, the act of Congress… is supreme, and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."

California's law purports to reimpose at the state level many of the same restrictions contained in the repealed 2015 *Title II Order*. Indeed, it imposes even more stringent restrictions than the *RIF Order* repealed. SB-822 clearly conflicts with the *RIF Order* and congressional policy regarding an Internet "unfettered by Federal or State regulation." Consistent with Marshall's straightforward understanding of the Supremacy Clause, the state's law should be preempted.

Although the Justice Department's lawsuit challenging California's SB-822 will likely succeed based squarely on modern federal preemption precedents, the jurisprudence of John Marshall

supplies critical constitutional antecedents of those modern precedents. And, importantly, consideration of Marshall's Commerce Clause jurisprudence from the early days of the Republic deepens and reinforces the conclusion that the federal deregulatory policy for broadband Internet access services reestablished in the *RIF Order* should result in the preemption of California's SB-822.

Background: The FCC's Repeal of Public Utility-Like Regulation and Reestablishment of a Deregulatory Federal Policy

The Commission's 2017 *Restoring Internet Freedom Order* repealed the public utility like-regulation on broadband Internet access services adopted by the Obama Administration FCC in 2015 under then-Chairman Tom Wheeler. The repealed regulations from the 2015 *Title II Order* included bright-line bans on blocking, throttling, and paid prioritization, as well as a vague and open-ended "general conduct" standard barring unreasonable discrimination/disadvantaging of content. Also repealed was the *Title II Order*'s assertion of authority to review Internet network interconnection agreements. Consistent with Congress's 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," the Commission returned to "a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals of the 1996 Act."[1]

The *Restoring Internet Freedom Order* reclassified broadband Internet access services as Title I "information services." An abundance of federal court precedents, as well as agency precedents, treat "information services" as inherently interstate and as non-regulated, or at most lightly regulated services. In its order, the Commission emphasized: "[I]t is well-settled that Internet access is a jurisdictionally interstate service because 'a substantial portion of Internet traffic involves accessing interstate or foreign websites.'"[2] Further, the order stated: "[I]t is impossible or impractical for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance."[3]

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.[4]

In support of the *RIF Order*'s preemptive authority, the Commission cited agency precedent recognizing that "federal preemption [is] preeminent in the area of information services."[5]

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[1] 47 U.S.C. § 230(b)(1), -(2); FCC, *Restoring Internet Freedom Order*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order ("*RIF Order*") (Adopted December 14, 2017, released January 4, 2018), at ¶ 194.
[2] *RIF Order*, at ¶ 199.
[3] *RIF Order*, at ¶ 200.
[4] *RIF Order*, at ¶ P195.
[5] *RIF Order*, at ¶ 203 (quoting *Pulver Order* 199 FCC Rcd. 3307 (2004), at ¶ 16).

Likewise, the Commission considered modern federal preemption jurisprudence: "Federal 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."[6]

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

On September 30, 2018, California Governor Jerry Brown signed SB-822 into law.[7] California's SB-822, which California has now agreed to defer implementing, is an attempt to reimpose, at the state level, many of the same restrictions contained in the repealed 2015 *Title II Order*. SB-822 categorically bans blocking, throttling, and paid prioritization. SB-822 includes an unreasonable interference/disadvantage standard that closely resembles the *Title II Order*'s "general conduct" standard. It also asserts regulatory authority over "ISP traffic exchange."

Additionally, in at least two primary respects, SB-822 is even more stringent than the *Title II Order*. First, it bars mobile broadband service providers from offering California consumers "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 prohibit or at least restrict broadband service providers from offering so-called "non-broadband Internet access data services" or "specialized services" over the same last-mile facilities they offer broadband Internet access services.

Once SB-822 was signed, the U.S. Department of Justice (DOJ) promptly filed a lawsuit against California. Subsequently, several service providers also filed a lawsuit challenging SB-822. DOJ's lawsuit against California seeks a federal court order declaring SB-822's restrictions on broadband Internet access services preempted and thereby rendered invalid, null, and void. In its complaint, DOJ alleges "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's policy to preserve a competitive free market for the Internet "unfettered by Federal or State regulation."[8] DOJ's complaint also alleges that SB-822 contributes to "separate and potentially conflicting requirements from different state and local jurisdictions" and that broadband ISPs are unable to comply with such requirements for intrastate communications without applying the same requirements to interstate communications.[9]

Given the likelihood that the California law will not survive judicial review, it is not surprising that California agreed to defer implementation of its law pending judicial review of the *RIF Order* by the U.S. Court of Appeals for the D.C. Circuit.[10] 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 Coop. Corp. v. Arkansas Public Services Commission* (1983), which declared: "[A] federal decision to forgo regulation in a given area may imply an authoritative federal

[6] *RIF Order*, at ¶ 194.
[7] *See* Cal. Legis. SB-822 Reg. Sess. 2017-2018 (2018), at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB822.
[8] Complaint for Declaratory and Injunctive Relief of Plaintiff U.S. Department of Justice, *U.S. v. California*, Case No. 18-01539 (U.S. Dist Ct. E. Dist. Cal.) (filed Sept. 30, 2018), at 11, ¶ 41.
[9] Complaint for DOJ, at 10, ¶ 42.
[10] *See Mozilla v. FCC*, Case Nos. 18-1051, *et al.* (D.C. Cir).

determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate."[11] In *Minnesota Public Utilities Commission v. FCC* (2007), the U.S. Court of Appeals for the Eighth Circuit stated: "[D]eregulation" is a "valid federal interest[] the FCC may protect through preemption of state regulation."[12] Similarly, a decision handed down in September 2018 by the Eighth Circuit in *Charter Advanced Services (MN), LLC v. Lange* (2018), ruled that Minnesota's attempt to regulate Charter's interconnected VoIP service was preempted because it was "attempted regulation of an information service [that] conflicts with the federal policy of nonregulation."[13]

Although we conclude that DOJ's lawsuit challenging SB-822 will likely succeed based squarely on modern federal preemption precedents, the purpose of this *Perspectives from FSF Scholars* paper is to add depth to that conclusion. In this paper, we focus on the jurisprudence of Chief Justice Marshall in leading Commerce Clause cases that supports the preemptive effect of the federal deregulatory policy framework for broadband Internet access services. As described further below, federal preemption of California's attempt to stringently regulate broadband services is consonant with Marshall's jurisprudence in four notable respects.

A Free and Open Interstate Commercial Market for Broadband Internet Access Services

In our *Perspectives from FSF Scholars* paper published on October 5, we focused on John Marshall's jurisprudence in support of the FCC's authority to clear away local regulatory obstacles to 5G deployment that have the effect of imposing burdens on interstate commerce.[14] As that paper explained, the promotion of a free and open interstate commercial market was a key tenant of Marshall's jurisprudence under the Constitution's Commerce Clause. Marshall's opinions for the Supreme Court in cases such as *Brown v. Maryland* (1827) and *Gibbons v. Ogden* (1824) described the precarious state of the new nation's economy following the American Revolution, "the feebleness of the federal government" under the Articles of Confederation,[15] and the felt necessity of the American people to lodge the power to regulate commerce with foreign nations and among the states in Congress under the Constitution of 1787.

Indeed, under the Articles of Confederation, Congress was powerless to regulate commerce among the several states, and this, along with the lack of the power of taxation, was a primary reason for the convening of the Constitutional Convention that led to the adoption of the Constitution of 1787. At the Convention, James Madison, the Constitution's principal draftsman, declared himself "more and more convinced that the regulation of commerce was in its nature indivisible and ought to be wholly under one authority."[16] According to constitutional scholar Larry Klarman, "Madison believed the Constitution's grant of commerce power to Congress

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[11] 461 U.S. 375, 383 (1983) (cited by *RIF Order*, at ¶ 194, fn. 726).
[12] 483 F.3d 570, 580-581 (8th Cir. 2007) (cited by *RIF Order*, at ¶ 194, fn. 726).
[13] 2018 WL 4260322, at *2, 4.
[14] Randolph J. May and Seth L. Cooper, "John Marshall's Jurisprudence Supports the FCC's 5G Preemption Order," *Perspectives from FSF Scholars*, Vol. 13, No. 18 (October 5, 2018), at: http://www.freestatefoundation.org/images/John_Marshall_s_Jurisprudence_-_100418.pdf.
[15] Brown v. Maryland, 25 U.S. 419, 446 (1827).
[16] Max Farrand, *Records of the Federal Convention*, Vol. 2 (Reprint 1996), at 625.

automatically would preempt states from enacting laws interfering with interstate or foreign commerce."[17] John Marshall's Commerce Clause jurisprudence bolstered this Madisonian view.

Scholars have also recognized the interstate commercial imperatives in Marshall's Commerce Clause jurisprudence. According to Law Professor Herbert A. Johnson:

> Marshall looked forward to a changed world in which the American states, bound together in a strong common market, would become independent of European-manufactured goods and self-sufficient for all other necessities. This was part of the national vision held by many delegates to the Philadelphia Convention and the state ratifying conventions, and it seems to have impressed upon the Chief Justice the need to establish legal and constitutional foundations for such a new American nations. Indeed, behind most of his constitutional opinions touching upon economic matters there was the tacit assumption that for America to grow, the economy must be diversified to include commercial activity and industrial development. To achieve these goals, Marshall and many of his contemporaries saw the need to encourage foreign investment and to protect interstate commercial activity from the baneful effects of incipient state mercantilism.[18]

Added Johnson:

> The unhampered flow of trade among the American states was essential to their political and business connectedness; it also built national strength and prestige in world markets. That activity, as well as foreign trade, depended upon safety and predictability in commercial and contractual arrangements. It required a system of impartial federal courts to adjudicate disputes and to define and secure property rights. Transfer of funds demanded solidity and reliability in banking institutions, and the risks of commercial activity needed to be lessened by an effective system of insolvency and bankruptcy laws. Obviously the ideal common market has never been created, but Marshall and his colleagues went a long way toward creating such an economic system within the Union.[19]

Similar observations have been made by Law Professor James W. Ely, Jr.

> A Federalist, Marshall was sympathetic to property interests and business enterprises. He distrusted state interference with economic relationships. To Marshall, property ownership both preserved individual liberty and encouraged the productive use of resources. Security of private property promoted the public interest by quickening commercial activity and thereby increasing national wealth. Consequently, Marshall sought to strengthen the bonds of the federal

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[17] Michael Klarman, *The Framers' Coup: The Making of the U.S. Constitution* (2016), at 152.
[18] Herbert A. Johnson, *The Chief Justiceship of John Marshall, 1801-1835* (1997), at 162.
[19] Johnson, *Chief Justiceship of John Marshall*, at 163.

> union, encourage the formation of a national market, and safeguarded property rights from state interference.[20]

As described earlier, Section 230(b) of the Telecommunications Act of 1996 declares Congress's policy "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation."[21] Consistent with the statute, the *RIF Order* reestablished a federal deregulatory policy by repealing common carrier public utility-style regulation imposed by the 2015 *Title II Order* and by reclassifying broadband Internet access services as non-regulated or at least lightly regulated Title I "information services." 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."[22] The Commission's free market-oriented approach to broadband services coincides with Justice Marshall's jurisprudential recognition that a primary purpose of the Constitution's Commerce Clause is to secure a free and open interstate marketplace.

Broadband Internet Services Are of Nationwide Concern and the Intrastate and Interstate Portions of Those Services Are Intermingled

In his landmark opinion for the Supreme Court in *Gibbons v. Ogden* (1824), Chief Justice John Marshall expounded on the meaning and scope of Congress's constitutional power under the Article I, Section 8 Commerce Clause "To regulate Commerce… among the several States." Indeed, constitutional historian Maurice Baxter observed: "The part of the opinion what was the most impressive at the time and would be most durable in the future was a comprehensive exegesis of the commerce clause."[23]

In *Gibbons*, Marshall wrote that Congress's power to regulate Commerce "applied to all the external concerns of the nation, and to those internal concerns which affect the states generally."[24] Additionally, in *Gibbons* Marshall opined: "The word 'among' means intermingled with," and "[a] thing which is among others, is intermingled with them." And thus: "Commerce among the states cannot stop at the external boundary of each state, but may be introduced into the interior."[25]

As discussed above, in the *Restoring Internet Freedom Order*, the Commission concluded that Internet access is a jurisdictionally interstate service because "'a substantial portion of Internet traffic involves accessing interstate or foreign websites.'"[26] The Commission further concluded it is "impossible or impractical" for broadband service providers to "distinguish between intrastate and interstate communications over the Internet or to apply different rules in each

[20] James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3rd ed. 2008), at 63.
[21] 47 U.S.C. § 230(b)(2).
[22] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 430, 431 (D.C. Cir. 1989).
[23] Maurice G. Baxter, *The Steamboat Monopoly: Gibbons v. Ogden, 1824* (1972), at 48.
[24] *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824).
[25] *Gibbons,* 22 U.S. at 194.
[26] *RIF Order*, at ¶ 199 (internal quotes omitted).

circumstance."[27] Such conclusions by the Commission are consistent with the recognition by courts that the Commerce Clause prohibits regulation of activities "that inherently require a uniform system of regulation" and regulation "impair[ing] the free flow of materials and products across state borders."[28]

Moreover, the Commission's conclusions regarding the jurisdictionally interstate nature of Internet access are consonant with Marshall's exposition of Congress's power to regulate commerce in *Gibbons*. In particular, the external concerns of the U.S. as well as the internal concerns of states include substantial portions of Internet traffic accessing interstate and foreign websites. Likewise, broadband Internet networks transmit data among and within the borders of different states. The intrastate and interstate elements of broadband services are indeed "intermingled" in a way that it is impossible or impractical to segregate and thus properly subject to federal jurisdiction only.

Free Market Competition Is the Rule by Which Interstate Commerce in Broadband Internet Access Services Is to Be Conducted

In *Gibbons*, Marshall defined "the power to regulate" commerce among the states to mean the power "to prescribe the rule by which commerce is to be conducted."[29] The *RIF Order* reestablished free market competition as the basic rule by which interstate commercial activity in the broadband Internet access services market is to be conducted.

In the *RIF Order*, the Commission adopted "a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals of the 1996 Act."[30] Contrary to claims by some pro-regulatory advocates, 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 according to Marshall's understanding of the term.[31]

The California Law Conflicts with Federal Broadband Policy and Must Be Preempted

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 pursuant to its constitutional powers, and provided for it with the Supremacy Clause. Contained in Article VI, Section 2, the Supremacy Clause states: "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."

Marshall explained 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

[27] *RIF Order*, at ¶ at 200.
[28] *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154-55 (9th Cir. 2012).
[29] *Gibbons*, 22 U.S. at 196.
[30] *RIF Order*, at ¶ 194.
[31] *RIF Order*, at ¶ 194.

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."[32] "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."[33]

The *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."[34] The *RIF Order* makes clear that broadband service should be governed "by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements."[35] But California's law attempts to reimpose at the state level many of the same restrictions contained in the repealed 2015 *Title II Order*. SB-822 clearly conflicts with the *RIF Order* and congressional policy regarding an Internet unfettered by federal and state regulation. Consistent with Marshall's straightforward understanding of the Supremacy Clause, the state's law should be preempted.

Conclusion

Although the Justice Department's lawsuit challenging California's SB-822 will likely succeed based squarely on modern federal preemption precedents, the jurisprudence of John Marshall supplies a critical constitutional backdrop for those precedents. A consideration of Marshall's jurisprudence therefore deepens and reinforces the conclusion that the federal deregulatory policy for broadband Internet access services reestablished in the *Restoring Internet Freedom Order* should result in the preemption of California's SB-822.

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Further Readings

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[32] *Gibbons*, 22 U.S. at 211.
[33] *Gibbons*, 22 U.S. at 211.
[34] *RIF Order*, at ¶ 195.
[35] *RIF Order*, at ¶ 194.

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