

# VI. Selected Precedent-Setting Cases

## Reading Case Law<sup>260</sup>

R. Bruce Carroll

Given the power of judicial review, in the final analysis the Constitution is what the Court says it is. To be sure, the Court has "neither the sword nor the purse, only the power of judgment," but what a power it is. In exercising that power, the court has addressed the major issues of the nation and the other branches, sometimes with enthusiasm and sometimes with grumbling, have followed along. Some of the greatest cases in the history of the Nation are reported here, but first a word in order.

Article III specifies that the Court will hear cases and controversies and it is under that authority that the Court renders its decisions. Reading and understanding those decisions is easy after confronting the stiff hurdle of the language of the law. Certain elementary facts help the uninitiated.

First, a case is simply an incident in the process of judicial interpretation of the Constitution. It consists of the decision of the Court and the reasoning which is employed to support that decision. Sometimes the reasoning of a dissenting minority is appended, either because it is interesting in itself or because it expresses a point of view which may later become the opinion of the majority. A justice who joins in the result of the case, but disagrees with the reasoning of the majority, may state his views in a concurring opinion.

Each case was originally a simple controversy between private individuals or between individuals and the government (see the Constitution, III, 2). The controversy has its own setting, not only in law, but also in economics and politics. As a Federal manager, the entire background of the case, the practical as well as the constitutional issues which it raised, may be more important than the individual controversy or the language in which the decision is clothed. Read the decision with care, but also read it with imagination and understanding of these wider issues. Note the date when the case was decided and reconstruct the temper of those times and the nature of the problems which faced the nation. See how the particular case fits into the fabric

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260 With thanks to Herman Pritchett.

of the particular period and, though it may not appear to make sense today, contemplate how it may have in fact reflected the times in which it was decided.

Above all, do not fall into the error of thinking that a case is a little piece of wisdom set apart, a tiny segment of a static pattern. Constitutional decisions are living things, having their origins in the practical controversies of men, and each one marks a change, sometimes subtle, sometimes abrupt, in the framework of American government. The process of change is carried forward by judges whose attitudes are shaped by the pattern of ideas and the economic forces which make up the background of our national life. Consider the "principles" which the case establishes and reflect upon their application in everyday realities.

Cases are cited in the following manner: names of the parties (the one bringing the case is always first, the defendant second) to the controversy, followed by the volume number of the



he page number at which the case beings, and the date of the decision. For example, the opinion of the Supreme Court in a Texas abortion prosecution is cited as Roe v. Wade 410 U. S. 113 (1973). Here the "410" denotes the volume number of the United States Supreme Court Reports (the official government publication), "Roe" and "Wade" are the parties to the dispute, "113" is the page number, and "(1973)" is the date of the case [two commercial houses also publish case law, cited either as S.Ct. or L.Ed./L.Ed. 2d, so that a complete Roe citation might read 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) all reporting the same case]. All Supreme Court cases may be found on the Net, keyword "United States Supreme Court Reports."

Certain information should be derived from each case: (1) what is being sought, otherwise called the character of the action; (2) the facts of the case; (3) the issues and the answers given; (4) the decision of the Court (usually "affirmed" or "reversed"); (5) the opinion(s) or reasons for the decision; (6) any dissenting or concurring opinion(s); and (7) your comments.

## Marbury v. Madison, 1 Cranch 137 (1803)

*Although judicial review is discussed approvingly in Federalist Paper 78, it is not expressly conferred in the Constitution. On several occasions prior to Marbury, the constitutionality of legislation was upheld by the Court, but here, for the first time, it was not.*

*Involving major conflict between the Federalist Chief Justice John Marshall and a cousin, Republican President Thomas Jefferson (whom Marshall viewed a draft dodger and held in low esteem), the issue centered on whether Jefferson was obliged to finalize several Federalist appointments to judicial positions. The outgoing Adams administration had failed at the last minute to deliver the commissions of office to the deserving Federalists they sought to provide jobs. Jefferson, assuming office, was not inclined to staffing the judiciary with Federalists and consequently declined to complete the appointment process. One of the disappointed office seekers then brought suit in the Supreme Court, asking the Court to order Jefferson to deliver the commission and in the process setting the stage for the most important decision in American jurisprudence.*

*The case can only accurately be read in the context of the political times. Marshall knew he could not force Jefferson to deliver the commissions and did not want to show the weakness of the judiciary by issuing a decree the Court could not enforce. In an extraordinary tour de force, Marshall proceeded to lecture Jefferson, finding that nominated William Marbury had been wronged, there was a remedy, and then concluding the Court could not provide the remedy because it did not have the power to hear the case. This was so because Section 13 of the Judiciary Act of 1789, giving the Court jurisdiction in this kind of case, was unconstitutional.*

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On Petition for Mandamus.

{William Marbury was among those named a justice of the peace for the District of Columbia at the very close of the Federalist Administration of President John Adams, during a rash of last minute judicial appointments in March 1801. The incoming Jefferson Administration chose to disregard those appointments for which formal commissions had not been delivered before the end of Adams' term. Marbury and some disappointed colleagues then appealed to the Supreme court asking it to compel Jefferson's Secretary of State Madison to deliver their commissions.

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The...opinion of the Court was delivered by the Chief Justice {MARSHALL}:

Opinion of the Court.

... [T]he present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

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In the order in which the court has viewed this subject, the following questions have been considered and decided:

- 1<sup>st</sup>. Has the applicant a right to the commission he demands?
- 2<sup>nd</sup>. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
- 3<sup>rd</sup>. If they do afford him a remedy, is it a mandamus issuing from this court?

First,... has the applicant a right to the commission he demands?

It is...decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state....

Mr. Marbury...since his commission was signed by the President and sealed by the Secretary of State, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second enquiry;.... If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

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The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

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Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is place by our Constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy.

That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted....

It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act....

By the Constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy....

It is, then, the opinion of the court [that Marbury has a] right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

This depends on - 1<sup>st</sup>. The nature of the writ applied for, and, 2dly. The power of this court. 3dly. He is entitled to the remedy for which he applies.

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1<sup>st</sup>. The nature of the writ....

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, 'to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined or at least supposes to be consonant to right and justice.' Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1<sup>st</sup>. With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination; and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court.

But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject, over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?

If one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right to be done to an injured individual, than if the same services were to be performed by a person not the head of a department....

This, then, is a plain case of a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court 'to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.'

The secretary of state, being a person, holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The Constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that 'the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.'

It has been insisted at the bar, that as the original grant of jurisdiction to the supreme and inferior courts is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the Constitution has declared their jurisdiction shall be original; and original jurisdiction where the Constitution has declared it shall be appellate; the distribution of jurisdiction made in the Constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the Constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it.

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The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to

be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.

This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution: if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do

what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions--a written constitution, would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the Constitution which serve to illustrate this subject. It is declared that 'no tax or duty shall be laid on articles exported from any state.' Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law.

The Constitution declares that 'no bill of attainder or ex post facto law shall be passed.'

If, however, such a bill should be passed and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve?

"No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these and many other selections which might be made, it is apparent, that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: 'I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as--according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States.'

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? If it is closed upon him and cannot be inspected by him.

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

## McCulloch v. Maryland, 4 Wheat. 316 (1819)

*One of the great Marshall decisions, McCulloch raised the question of whether the Constitution includes implied powers or whether Federal power is restricted to the express grants stipulated in it. At issue was the Congressional creation of the Bank of the United States, a power not explicit in the Constitution. Marshall's answer is among the classic statements about the living Constitution, one that is intended to endure for the ages and to be adapted to the needs of the day, not one to be placed in a straightjacket by narrow interpretation of its terms.*

*Federalism is also under judicial scrutiny, for the specific issue was whether Maryland could tax the national bank, which led Marshall to discussion of Federal-State relations. He concluded that the power to tax includes the power to destroy: therefore, Maryland could not levy the tax. Marshall's opinion stands to this day as the classic statement on American federalism.*

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[Congress chartered the Second Bank of the United States in 1816. The Bank soon established branches in many states. Its branch in Baltimore quickly became the most active of all. In April 1818, the Maryland legislature adopted "An Act to impose a Tax on all Banks or Branches thereof in the State of Maryland, not chartered by the Legislature." The law provided that any banks operating in Maryland "without authority from the State" could issue bank notes only on stamped paper furnished by the State upon payment of a fee varying with the denomination of each note; but any bank subject to that requirement could "relieve itself" from it "by paying annually, in advance, . . . the sum of fifteen thousand dollars." The statute also provided for penalties for violators: for example, the president, cashier and all other officers of the bank were to "forfeit" five hundred dollars "for each and every offense." The penalties were enforceable by indictment or by "action of debt, in the County Court," "one half to the informer, and the other half to the use of the State."

[This action for the statutory penalty was brought in the County Court of Baltimore County by one John James, suing for himself and the State, against James McCulloch, the Cashier of the Baltimore branch of the Bank of the United States. It was admitted that the Bank was doing business without authority from the State and that McCulloch had issued bank notes without complying with the Maryland law. The case was decided against McCulloch on the

basis of the agreed statement of facts, and the decision was affirmed by the Maryland Court of Appeals. From there, the case was taken by writ of error to the Supreme Court.]

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State.... The conflicting powers of the government of the Union and of its members...are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.

The first question ... is, has Congress power to incorporate a bank?

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The power now contested was exercised by the first Congress elected under the present Constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.

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The government of the Union... is emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, {is} now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist.

The government of the United States, [though] limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.

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Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the Constitution to be

preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction, (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means?

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But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

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Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense...which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary,

absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the first article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "Imposts, or duties on imports or exports except what may be *absolutely* necessary for executing its inspection laws, with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying Into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it.

\* \* \*

In ascertaining the sense in which the word "necessary" is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and *proper* to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the Convention, as manifested in the whole clause. To waste time and argument in proving that, without it, Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun.

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We think so for the following reasons:

- 1<sup>st</sup>. The clause is placed among the powers of congress, not among the limitations on those powers.
  
- 2<sup>nd</sup>. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted..... Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

\* \* \*

But, were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

\* \* \*

After the most deliberate consideration, it is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional... The great duties of the bank are prescribed; those duties require branches; and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the Court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire whether the State of Maryland may, without violating the Constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded, if it may restrain a State from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

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...The Constitution and the laws made in pursuance thereof are supreme; ... they control the Constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. that a power to create implies a power to preserve. 2nd. that a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. that where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme....

That the power of taxing [the bank] by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by, the Constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution.

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We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States is unconstitutional and void.

This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional. {Reversed}.

## Gibbons v. Ogden, 9 Wheat. 1 (1824)

*In this case Chief Justice Marshall established a very expansive view of the commerce the Congress might regulate under Article 1, sec. 8, cl.3, on the basis of which much of the post-1930's expansion of the Federal government occurred. At issue was whether the State of New York could require a steamboat licensed in New Jersey to pay a tax for the privilege of operating in New York. Did this constitute a state regulation of commerce among the states? In the first detailed construction of the commerce clause, Marshall thought that it did and in the process established the "effect on commerce" doctrine used to this day to regulate commerce.*

\* \* \* \* \*

[The New York legislature granted to Robert Livingston and Robert Fulton the exclusive right to operate steamboats in New York waters. In turn, they gave, Aaron Ogden monopoly rights to operate steamboats between New York and New Jersey. Thomas Gibbons, a former partner of Ogden, began operating two steamboats between New York and Elizabethtown, New Jersey, in violation of Ogden's monopoly. Gibbons' boats were enrolled and licensed as "vessels employed in the coasting trade" under a federal law of 1793. Ogden obtained an injunction ordering Gibbons to stop operating his ferries in New York waters. The highest New York court affirmed. On appeal, the Supreme Court reversed. Only a part of Chief Justice Marshall's opinion sustaining Gibbons' appeal and discussing the national commerce power is reproduced below.]

Mr. Chief Justice MARSHALL delivered the opinion of the Court....

The {Constitution} contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they be so construed? Is there one sentence in the Constitution which gives countenance to this role? ... What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistence with the general views and objectives of the instrument; for that narrow construction, which would cripple the government, and render it

unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded... If, from the imperfection of human language, there should be serious doubt respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction...

The words are, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce and to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and, has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense; because all have understood it in that sense, and the attempt to restrict it comes too late.

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to things not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere,

for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State....

We are now arrived at the inquiry -What is the power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that for example of declaring war the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

This principle is, if possible, still more clear, when applied to commerce “among the several States.” They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce “among” them; and how is it to be conducted? Can a trading expedition between two adjoining States, commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a State. The power of Congress,

then, whatever it may be, must be exercised within the territorial jurisdiction of the several States....

The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with “commerce with foreign nations, or among the several States, or with the Indian tribes.” It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies....

[The Court then held that the Federal law took precedence over Ogden’s monopoly claim under New York law and that Gibbons properly was licensed to engage in coastal trade.]

## Champion v. Ames, 188 U.S. 321 (1903)

*Illustrative of how the commerce clause may be used to regulate an activity which may appear to be intrastate in character, the case raises the issue of whether the Federal government in enacting the Lottery Act of 1895 was infringing on the state police power under the Tenth Amendment. The Court, moving toward the virtual elimination of the distinction between intrastate and interstate commerce, was clear that the Act was an appropriate exercise of Congressional authority.*

\* \* \* \* \*

[Appellant was arrested in Chicago to assure his appearance in a federal court in Texas, where he had been indicted for conspiracy to violate the Federal Lottery Act of 1895. The law prohibited importing, mailing, or transporting "from one State to another in the United States " any "ticket, chance, share or interest in or dependent upon the event of a lottery . . . offering prizes dependent upon lot or chance." The indictment charged shipment by Wells Fargo Express, from "Texas to California, of a box containing Paraguayan lottery tickets. Appellant challenged the constitutionality of the Act by seeking release on habeas corpus in Chicago. The Circuit Court dismissed the writ.]

Mr. Justice HARLAN delivered the opinion of the Court.

We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States.

But it is said that the statute in question does not regulate the carrying of lottery tickets from State to State, but by punishing those who cause them to be so carried Congress in effect prohibits such carrying; that in respect of the carrying from one State to another of articles or things that are, in fact, or according to usage in business, the subjects of commerce, the authority given Congress was not to *prohibit*, but only to *regulate*.

\* \* \*

Are we prepared to say that a provision which is, in effect, a *prohibition* of the carriage of such articles from State to State is not a fit or appropriate mode for the *regulation* of that particular kind of commerce? If lottery traffic, *carried on through interstate commerce*, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the States, and under the power to regulate interstate commerce, devise such means within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the States?

In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2, 1895, to suppress cannot be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court. In Phalen v. Virginia, 8 How. 163, 168, after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of Government, this court said: "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."

\* \* \*

If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. {S}urely it will not be said to be a part of any one's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals.

\* \* \*

Congress [does] not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any State, but has in view only commerce of that kind among the several States. It has not assumed to interfere with the completely internal affairs of any State, and has only legislated in respect of a matter which concerns the people of the United States. As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States-perhaps all of them-which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end.

It is said, however, that if, in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the States any article, commodity or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one State to another. It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the States. [T]he possible abuse of a power is not an argument against its existence.

## Wickard v. Filburn, 317 U.S. 111 (1942)

*In one of its most expansive interpretations of the reach of the commerce clause, the Court held that Congress under the Agricultural Adjustment Act of 1938 could limit the production of wheat that was entirely destined for domestic consumption. None was to be shipped in commerce among the states and none was imported as seed for planting, but the Federal government nevertheless had the authority to regulate the wheat product.*

\* \* \* \* \*

{Filburn, a farmer in Ohio, sued Wickard, the Secretary of Agriculture, to enjoin enforcement of a marketing penalty imposed under the Agricultural Adjustment Act of 1938 “upon that part of his 1941 wheat crop which was available for market in excess of the market quota established for his farm.” He attacked the marketing quota provisions of the Act as beyond the commerce power. The lower court enjoined enforcement on other grounds, and Secretary Wickard appealed.}

Mr. Justice JACKSON delivered the opinion of the Court.....

The appellee for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding.

\* \* \*

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, there were established for the appellee's 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He was given notice of such allotment in July of 1940 before the Fall planting of his 1941 crop of wheat, and again in July of 1941, before it was harvested. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which under the terms of the Act as amended on May 26, 1941, constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or \$117.11 in all. The appellee has

not paid the penalty and he has not postponed or avoided it by storing the excess under regulations of the Secretary of Agriculture, or by delivering it up to the Secretary.

\* \* \*

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce.

It is urged that under the Commerce Clause of the Constitution, Article I, 8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in United States v. Darby, except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm.

\* \* \*

The sum of this is that the Federal Government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty or except it is stored as required by the Act ....

Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are at most 'indirect.' In answer the Government argues that the statute regulates neither production nor consumption, but only marketing; and, in the alternative, that if the Act does go beyond the regulation of marketing it is sustainable as a 'necessary and proper' implementation of the power of Congress over interstate commerce.

The Government's concern lest the Act be held to be a regulation of production or consumption rather than of marketing is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as 'production,' 'manufacturing,' and 'mining' are strictly 'local' and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as matter of law, only 'indirect.' Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof. We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect'

and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

\* \* \*

The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause ... has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be 'production' nor can consideration of its economic effects be foreclosed by calling them 'indirect.'

\* \* \*

Whether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is, therefore, not material for purposes of deciding the question of federal power before us.

\* \* \*

But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'

\* \* \*

The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 per cent of total production, while during the 1920's they averaged more than 25 per cent. The decline in the export trade has left a large surplus in production which in connection with an abnormally large supply of wheat and other grains in recent years caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion.

\* \* \*

In the absence of regulation the price of wheat in the United States would be much affected by world conditions. During 1941 producers who cooperated with the Agricultural

Adjustment program received an average price on the farm of about \$1.16 a bushel as compared with the world market price of 40 cents a bushel.

\* \* \* The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such [home-grown] wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices ....

Reversed.



## Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964)

*The Civil Rights Act of 1964 is one of the most important legislative accomplishments of the Twentieth Century, yet it came only after great controversy. Congress, finally ready to address problems of race relations in the nation, found Constitutional authority to prohibit racial discrimination in places of public accommodation in both the Fourteenth Amendment (Section V and the Equal Protection clause) and Article I's commerce clause.*

*The Heart of Atlanta Motel, arguing that at root it was an intrastate business and therefore beyond the reach of the Civil Rights Act, attacked its constitutionality. Though a majority of its clients came from out-of-state and though it advertised nationally, it argued that the Federal government lacked authority to require it to be non-discriminatory in its admissions policies.*

*Relying only on the commerce clause and taking it a step further, the Court disagreed. Defining commerce as that which concerns more than one State and has a substantial relation to the national interest, the Court legitimized the Federal government's move into the arena of race relations in places of public accommodation.*

\* \* \* \* \*

Justice Clark delivered the opinion of the Court.

This is a declaratory judgment action...attacking the constitutionality of Title II of the Civil Rights Act of 1964.... Appellant owns and operates the Heart of Atlanta Motel which has 216 rooms available to transient guests. The motel is located on Courtland Street, two blocks from downtown Peachtree Street. It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41. Appellant solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation; it maintains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of State. Prior to passage of the Act the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.

It is admitted that the operation of the motel brings it within the provisions of §§ 201 (a) of the Act and that appellant refused to provide lodging for transient Negroes because of their race or color and that it intends to continue that policy unless restrained.

The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The legislative history of the Act indicates that Congress based the Act on §§ 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, §§ 8, cl. 3, of the Constitution.

The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." At the same time, however, it noted that such an objective has been and could be readily achieved "by congressional action based on the commerce power of the Constitution." S. Rep. No. 872, supra, at 16-17. Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone. Nor is §§ 201 (d) or §§ 202, having to do with state action, involved here and we do not pass upon either of those sections....

While the Act as adopted carried no congressional findings, the record ... is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce .... This testimony included the fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight...; and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself "dramatic testimony to the difficulties" Negroes encounter in travel.... These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is "no question that this discrimination in the North still exists to a large degree" and in the West and Midwest as well.... This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community. We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.

The power of Congress to deal with these obstructions depends on the meaning of the Commerce Clause. [T]he determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is "commerce which concerns more States than one" and has a real and substantial relation to the national interest....

The same interest in protecting interstate commerce which led Congress to deal with segregation in interstate carriers and the white-slave traffic has prompted it to extend the exercise of its power to gambling; to criminal enterprises; to deceptive practices in the sale of products;

to fraudulent security transactions; to misbranding of drugs; to wages and hours; to members of labor unions; to crop control; to discrimination against shippers; to the protection of small business from injurious price cutting; to resale price maintenance; to professional football; and to racial discrimination by owners and managers of terminal restaurants.

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, "if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Mfrs. Assn.*, 336 U.S. 460, 464 (1949).

\* \* \*

Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may -- as it has -- prohibit racial discrimination by motels serving travelers, however "local" their operations may appear.

We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years.

Affirmed.

## Missouri v. Holland, 252 U.S. 416 (1920)

*Missouri sought to regulate migratory birds when they were within its borders in the face of a treaty between the United States and Great Britain which sought to protect the birds in their flight from Canada to the south. Federal enforcement of the treaty conflicted with the State claim under the Tenth Amendment, leaving the resolution to the Supreme Court. See, too, Martin v. Hunter, 1 Wheat 314 (1816).*

\* \* \* \* \*

Mr. Justice HOLMES delivered the opinion of the court.

This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918.... The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment. A motion to dismiss was sustained by the District Court on the ground that the Act of Congress is constitutional.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their annual migrations traversed many parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified closed seasons and protection in other forms, and agreed that the two powers would take or propose to their lawmaking bodies the necessary measures for carrying the treaty out. The act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture. [T]he question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do.

\* \* \*

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-- making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found.

\* \* \*

We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.

\* \* \*

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld.

Decree affirmed.

## Dred Scott v. Sanford, 15 How. 393 (1857)

*This is the first case after Marbury v. Madison in which the Court struck down legislation on grounds of unconstitutionality. The Court held that Congress had exceeded its Constitutional authority in enacting the Northwest Ordinance which banned slavery within the territory ceded to the United States by France under the name of Louisiana. Chief Justice Taney for the Court wrote one of the most controversial opinions in its history, in the process writing blacks from the rights and privileges of the Constitution and providing one of the precipitants to the Civil War. Under this ruling, a Negro could not be a citizen within the meaning of the Constitution and therefore had no Constitutional rights. Taney, an otherwise distinguished jurist, found his reputation ruined by this opinion.*

\* \* \* \* \*

Mr. Chief Justice TANEY delivered the opinion of the court.

\* \* \*

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

\* \* \*

It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves.

\* \* \*

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court thinks the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

\* \* \*

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognised as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

\* \* \*

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

\* \* \*

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

\* \* \*

.....upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.

\* \* \*

*[Had Dred Scott become free by living in a free state or territory? Was Congress empowered to pass legislation to exclude slavery from certain lands?]*

In considering this part of the controversy, two questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? And 2. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

We proceed to examine the first question.

The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the have of any one of the States.

The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;' but, in the judgment of the court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more.

\* \* \*

The language used in the clause, the arrangement and combination of the powers, and the somewhat unusual phraseology it uses, when it speaks of the political power to be exercised in the government of the territory, all indicate the design and meaning of the clause to be such as we have mentioned. It does not speak of any territory, nor of *Territories*, but uses language which, according to its legitimate meaning, points to a particular thing. The power is given in relation only to the territory of the United States - that is, to a territory then in existence, and then known or claimed as the territory of the United States.

Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to

traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words-too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.

## Schenck v. United States, 249 U.S. 47 (1919)

*Mr. Schenck was alleged to have distributed over 15,000 leaflets objecting to the draft during World War I. A Socialist, Mr. Schenck was arrested and indicted for violating the Espionage Act of 1917 by obstructing recruitment, by wrongly using the mails to distribute the product, and by advocating insubordination by military personnel. Convicted on all three counts, he appealed to the Court, arguing that the Act violated his First Amendment rights to freedom of speech and press.*

*The First Amendment appears to prohibit any Congressional regulation of speech and press (“Congress shall make no law...), but the Court, Justice Holmes, formulated a new test of when the Congress could in fact impose restrictions. This is the case in which the “clear and present danger” test was created. See, too, Gitlow v. New York, 268 U.S. 652 (1825), Holmes dissenting.*

\* \* \* \* \*

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917, c. 30, §§ 3, 40 Stat. 217, 219, by causing and attempting to cause insubordination in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire ... by printing and circulating to men who had been called and accepted for military service under the Act of May 18, 1917, a document set forth and alleged to be calculated to cause such insubordination and obstruction.

\* \* \*

The second count alleges a conspiracy to commit an offence against the United States, to-wit, to use the mails for the transmission of matter declared to be nonmailable by Title XII, §§ 2 of the Act of June 15, 1917, to-wit, the above mentioned document .... The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. The defendants were found guilty on all the counts. They set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press, and bringing the case here on that ground have argued some other points also of which we must dispose.

\* \* \*

Schenck ... was general secretary of the Socialist party, and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive Committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing. On August 20, the general secretary's report said "obtained new leaflets from printer and started work addressing envelopes" &c., and there was a resolve that Comrade Schenck be allowed \$125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office which he said were printed on the other side of the one sided circular, and were there for distribution. Other copies were proved to have been sent through the mails to drafted men. Without going into confirmatory details that were proved, no reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about....

The document in question, upon its first printed side, recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act, and that a conscript is little better than a convict. In impassioned language, it intimated that conscription was despotism in its worst form, and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said "Do not submit to intimidation," but in form, at least, confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that anyone violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up, "You must do your share to maintain, support and uphold the rights of the people of this country." Of course, the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose .... We admit that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done ... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre

and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force ... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.

## Griswold v. Connecticut, 381 U.S. 479 (1965)

*Connecticut law prohibited the provision of advice on the use and the actual use of contraceptives. The Executive Officer and a staff physician of a planned parenthood league office in New Haven gave information, instruction, and medical advice to a married couple on contraception and were charged with and found guilty of violating the law.*

*The case provided the Court an opportunity to examine the question of whether privacy exists as a Constitutional right and whether a state might regulate doctor-client and husband-wife relationships. It is the basis for one of the most contentious issues of contemporary times, legalized abortion.*

\* \* \* \* \*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School, who served as Medical Director for the League at its Center in New Haven - a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instructions, and medical advice to *married persons* as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved ... are Sections 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.). The former provides: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

Section 54-196 provides: "Any person who assists, abets, counsels, causes, hires, or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

The appellants were found guilty as accessories and fined \$100 each.

\* \* \*

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York*, 198 U.S. 45, should be our guide. But we decline that invitation .... We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice - whether public or private - or parochial is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce v. Society of Sisters*, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska*, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge ....

In *NAACP v. Alabama*, 357 U.S. 449, 462, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *Ibid.* In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members.

Those cases involved more than the "right of assembly" - a right that extends to all irrespective of their race or ideology. The right of "association," like the right of belief is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra

of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

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The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights, older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

*Reversed.*

## United States v. Nixon, 418 U.S. 683 (1974)

*The so-called Watergate tapes case raised the issue of the Court's authority to oblige the President to disclose the contents of conversations with subordinates which he secretly taped in the privacy of his office. The President resisted on grounds of executive privilege. It illustrates judicial review and the system of separation of powers in practice.*

\* \* \* \* \*

Mr. Chief Justice BURGER delivered the opinion of the Court.

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging seven named individuals<sup>261</sup> with various offenses, including conspiracy to defraud the United States and obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted coconspirator. On April 18, 1974, upon motion of the Special Prosecutor, a subpoena *duces tecum* was issued... to the President by the United States District Court and made returnable on May 2, 1974. This subpoena required the production, in advance of the September 9 trial date, of certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others. The Special Prosecutor was able to fix the time, place, and persons present at these discussions because the White House daily logs and appointment records had been delivered to him. On April 30, the President publicly released edited transcripts of 43 conversations; portions of 20 conversations subject to subpoena in the present case were included. On May 1, 1974, the President's counsel filed a "special appearance" and a motion to quash the subpoena under Rule 17 (c). This motion was accompanied by a formal claim of privilege....

On May 20, 1974, the District Court denied the motion to quash. [It] further ordered "the President or any subordinate officer, official, or employee with custody or control of the documents or objects subpoenaed" to deliver to the District Court, on or before May 31, 1974, the originals of all subpoenaed items, as well as an index and analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30. The District Court rejected [the] contention that the judiciary was without authority to review an assertion of executive privilege by the President.

The District Court held that the judiciary, not the President, was the final arbiter of a claim of executive privilege. The court concluded that, under the circumstances of this case, the

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<sup>261</sup> The seven defendants were John N. Mitchell, H.R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson, and Gordon Strachan. Each had occupied either a positional of responsibility on the White House staff or a position with the Committee for the Re-election of the President. Colson entered a guilty plea on another charge and is no longer a defendant. [Footnote by the Court.]

presumptive privilege was overcome by the Special Prosecutor's prima facie "demonstration of need sufficiently compelling to warrant judicial examination in chambers."

\* \* \*

The case was set for argument on July 8, 1974.<sup>262</sup>

### A

{We} turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce." The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena duces tecum .

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of {Marbury v. Madison} that "is emphatically the province and duty of the judicial department to say what the law is."

No holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential Presidential communications for use in a criminal prosecution, but other exercises of power by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution. In a series of cases, the Court interpreted the explicit immunity conferred by express provisions of the Constitution on Members of the House and Senate by the Speech or Debate Clause. Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers.

Our system of government "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch."

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<sup>262</sup> This case was decided on July 24, 1974. Before the decision in the case, the President and his representatives had left it unclear whether he would obey an adverse Court decision. In the oral argument before the Supreme Court, for example, Presidential Counsel St. Clair had emphasized that the President "has his obligations under the Constitution." But eight hours after the Court decision was announced, President Nixon's office issued a statement reporting that he would comply. Among the 64 tape recordings to be turned over to Judge Sirica as a result of the decision was a particularly damaging one of the conversations on June 23, 1972, six days after the Watergate burglary. On August 5, President Nixon released transcripts of those conversations. On August 8, President Nixon announced that he would resign on the next day.

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"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."

Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, §§ 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. [The Federalist, No. 47.] We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case....

## B

In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process.<sup>263</sup> Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of

constitutional duties. Certain powers and privileges flow from the nature of enumerated powers;<sup>264</sup> the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

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<sup>263</sup> There is nothing novel about government confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. Moreover, all records of those meetings were sealed for more than 30 years after the Convention. Most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written.

<sup>264</sup> The Special Prosecutor argues that there is no provision in the Constitution for a presidential privilege as to his communications corresponding to the privilege of Members of

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence....To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

### C

Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the Judiciary from according high respect to the representations made on behalf of the President.

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a

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Congress under the Speech or Debate Clause. But the silence of the Constitution on this score is not dispositive. "The rule of constitutional interpretation announced in *McCulloch v. Maryland* that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it.

way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution. In *Nixon v. Sirica*, 487 F.2d 700 (1973), the Court of Appeals held that such Presidential communications are “presumptively privileged,” and this position is accepted by both parties in the present litigation....

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that “the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.” We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

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In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality....

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice.<sup>265</sup> The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of

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<sup>265</sup> We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, not with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality against the constitutional need for relevant evidence in criminal trials.

law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice....

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Affirmed.

## Barron v. Baltimore, 7 Pet. 243 (1833)

*In order to build roads, the City of Baltimore diverted certain streams which had the effect of leaving Barron's wharf high and dry. He sued for recovery under the Fifth Amendment, claiming this was a taking without just compensation. At issue was whether the Fifth Amendment applied to the city (and the state), for if it did not, Barron would have no claim. Marshall for the Court held that it did not, in effect holding that the Bill of Rights restrained only the Federal Government, not the States. See Gitlow v. New York, 268 U.S. 652 (1925) and Mapp v. Ohio, 367 U.S. 643 (1961).*

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Mr. Chief Justice MARSHALL delivered the opinion of the Court.

\* \* \*

The question [is] ... of great importance, but not of much difficulty. The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated: The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes....

If these propositions be correct, the fifth amendment must be understood as restraining the power of the General Government, not as applicable to the States. In their several Constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested, such as they deemed most proper for themselves....

The ninth section [of Art. 1] having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the General Government, the tenth proceeds

to enumerate those which were to operate on the State legislatures. These restrictions are brought together in the same section, and are by express words applied to the States. "No State shall enter into any treaty," &c. Perceiving, that in a constitution framed by the people of the United States, for the government of all, no limitation of the action of government on the people would apply to the State government, unless expressed in terms, the restrictions contained in the tenth section are in direct words so applied to the States....

If the original Constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the General Government and on those of the State; if, in every inhibition intended to act on State power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments before that departure can be assumed.

We search in vain for that reason.

\* \* \*

But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the General Government -- not against those of the local governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.

We are of opinion that the provision in the Fifth Amendment to the Constitution declaring that private property shall not be taken for public use without just compensation is intended solely as a limitation on the exercise of power by the Government of the United States, and is not applicable to the legislation of the States. We are therefore of opinion that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by

the defendants at the trial of this cause, in the court of that State, and the Constitution of the United States.

\* \* \*

## Mapp v. Ohio, 367 U.S. 643 (1961)

*Freed from the constraint of the Fourth Amendment by Barron v. Baltimore, Cleveland police, believing Mrs. Mapp was harboring a fugitive, entered her home and searched it without a warrant. They did not find a fugitive, but did find some lewd and lascivious books, pictures, and photographs, the possession of which violated Ohio law. She was arrested and successfully prosecuted in State courts.*

*At issue is whether the seized materials on the basis of which she convicted should be admissible in a state prosecution. Interpreting the due process clause of the Fourteenth Amendment as including protection from an illegal search and seizure, the Court incorporated the Fourth Amendment search and seizure protection into it. See, too, Gideon v. Wainwright, 372 U.S. 335 (1963), Malloy v. Hogan, 378 U.S. 1 (1964), Benton v. Maryland, 395 U.S. 784 (1969), Pointer v. Texas, 380 U.S. 400 (1965), et. al, Duncan v. Louisiana, 391 U.S.145 (1968).*

\* \* \* \* \*

Mr. Justice CLARK delivered the opinion of the Court.

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs [in violation of Ohio law]. [T]he Supreme Court of Ohio found that her conviction was valid though based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home.

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The State says that even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial, citing Wolf v. Colorado. [I]t is urged once again that we review that holding.

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The Court in Wolf first stated that “{t}he contrariety of views of the States” on the adoption of the exclusionary rule of Weeks was “particularly impressive.” While in 1949, prior to the Wolf case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the Wolf case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the Weeks rule.

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[T]he second basis elaborated in Wolf {was} that “other means of protection” have been afforded “the right to privacy.”

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The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States.

Likewise, time has set its face against what Wolf called the “weighty testimony” of People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926). There Justice (then Judge) Cardozo, rejecting adoption of the Weeks exclusionary rule in New York, had said that “{t}he Federal rule as it stands is either too strict or too lax.” However, the force of that reasoning has been largely vitiated by later decisions of this Court.

\* \* \*

Today we once again examine Wolf’s constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very

same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, [the] freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."

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In extending the substantive protections of due process to all constitutionally unreasonable searches - state or federal - it was logically and constitutionally necessary that the exclusion doctrine - an essential part of the right to privacy - be also insisted upon as an essential ingredient of the right newly recognized by the Wolf case. In short, the admission of the new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.

\* \* \*

[Our holding is] not only the logical dictate of prior cases, but it also makes very good sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. [Under] the double standard recognized until today, [in] non-exclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated.

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." People v. Defore, 242 N. Y., at 21, 150 N. E., at 587. In some cases this will

undoubtedly be the result. But, as [has been said], “there is another consideration—the imperative of judicial integrity.”

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States,... we can no longer permit that right to remain an empty promise....

Reversed and remanded.

## Brown v. Board of Education, 347 U.S. 483 (1954)

*Confronting segregated schools based on its separate but equal ruling in Plessy v. Ferguson (1896), the Court unanimously found that separate schools are inherently unequal under the Fourteenth Amendment's Equal Protection clause and ordered the integration of the Nation's schools. Among the most important decisions of the Twentieth Century, the decision signaled the commitment of the Federal government to addressing race relations in the Nation.*

\* \* \* \* \*

Mr. Chief Justice WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware....

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases, {the court below relied on} the so-called "separate but equal" doctrine announced by this Court in Plessy v. Ferguson.

\* \* \*

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then-existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-

War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history with respect to segregated schools is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences, as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states, and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.<sup>266</sup> The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson, involving not education but transportation.<sup>267</sup> American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. In Cumming v. County Board of Education, 175 U.S. 528, and Gong Lum v. Rice, 275 U.S. 78,

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<sup>266</sup> Slaughter-House Cases, 16 Wall. 36, 67-72 (1873); Strauder v. West Virginia, 100 U.S. 303, 307-308 (1880)

<sup>267</sup> The doctrine apparently originated in Roberts v. City of Boston, 59 Mass. 198, 206 (1850), upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. But elsewhere in the North segregation in public education has persisted until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

the validity of the doctrine itself was not challenged.<sup>268</sup> In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. Missouri ex rel. Gaines v. Canada, 305 U.S. 337; Sipuel v. Oklahoma, 332 U.S. 631; Sweatt v. Painter, 339 U.S. 629; McLaurin v. Oklahoma State Regents, 339 U.S. 637. In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff. And in Sweatt v. Painter, supra, the Court expressly reserved decision on the question whether Plessy v. Ferguson should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike Sweatt v. Painter, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be

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<sup>268</sup> In the Cumming case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the Gong Lum case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In McLaurin v. Oklahoma State Regents, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: "... his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."<sup>269</sup> Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority.<sup>270</sup> Any language in Plessy v. Ferguson contrary to this finding is rejected.

We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of

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<sup>269</sup> A similar finding was made in the Delaware case: "I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated."

<sup>270</sup> K.B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, *Personality in the Making* (1952), c. VI; Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 *J. Psychol.* 259 (1948); Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 *Int. J. Opinion and Attitude Res.* 229 (1949); Brameld, *Educational Costs, in Discrimination and National Welfare* (McIver, ed., 1949), 44-j48; Frazier, *The Negro in the United States* (1949), 674-681. And see generally Myrdal, *An American Dilemma* (1944). [Footnote by the Court.]

the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

\* \* \*

It is so ordered.



*Barron v. Baltimore* held that the Fifth Amendment, and by extension the Bill of Rights, applied only to the Federal government and was not a restriction on the States, leaving the States constrained only by their respective laws and Constitutions. The Fourteenth Amendment imposed new constitutional limitations upon the States, but in ambiguous ways. What, for example, does the due process clause of that Amendment mean? How does it restrict the states?

The *Gitlow* case marks the beginning of contemporary definition. A State prohibition against criminal advocacy (here, advocating the violent overthrow of the government) was challenged in court on First Amendment grounds. The Court proceeded to include the First Amendment within the meaning of the Fourteenth Amendment's due process clause, imposing a new Constitutional restriction on the States. The Holmes - Brandeis dissent is a classical defense of freedom of expression.

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MR. JUSTICE SANFORD delivered the opinion of the Court.

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. He was separately tried, convicted, and sentenced to imprisonment. The judgment was affirmed by the Appellate Division and by the Court of Appeals. The case is here on writ of error to the Supreme Court.

The contention here is that the statute, by its terms and as applied in this case, is repugnant to the due process clause of the Fourteenth Amendment.

\* \* \*

The following facts were established on the trial by undisputed evidence and admissions: The defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of "moderate Socialism." Membership in both is open to aliens as well as citizens. The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different States. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a "Manifesto." This was published in *The Revolutionary Age*, the official organ of the Left Wing. The defendant was on the board of managers of the

paper and was its business manager. He arranged for the printing of the paper and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Sixteen thousand copies were printed, which were delivered at the premises in New York City used as the office of the Revolutionary Age and the headquarters of the Left Wing, and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped and mailed out copies of the paper under the defendant's direction; and copies were sold from this office. It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption; and that he was responsible for the Manifesto as it appeared, that "he knew of the publication, in a general way and he knew of its publication afterwards, and is responsible for its circulation."

There was no evidence of any effect resulting from the publication and circulation of the Manifesto.

\* \* \*

The precise question presented, and the only question which we can consider under this writ of error, then is, whether the statute, as construed and applied in this case by the state courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.

The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action. Advocacy is defined in the Century Dictionary as: "1. The act of pleading for, supporting, or recommending; active espousal." It is not the abstract "doctrine" of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose. It was so construed and applied by the trial judge, who specifically charged the jury that: "A mere grouping of historical events and a prophetic deduction from them would neither constitute advocacy, advice or teaching of a doctrine for the overthrow of government by force, violence or unlawful means. [And] if it were a mere essay on the subject, as suggested by counsel, based upon deductions from alleged historical events, with no teaching, advice or advocacy of action, it would not constitute a violation of the statute...."

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words: "The proletariat revolution and the Communist reconstruction of society -- *the struggle for these* -- is now indispensable.... The Communist International calls the proletariat of the world to the final struggle!" This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement.

\* \* \*

For present purposes we may and do assume that freedom of speech and of the press -- which are protected by the First Amendment from abridgment by Congress -- are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States....

By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight.

\* \* \*

The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency.

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And finding, for the reasons stated, that the statute is not in itself unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right, the judgment of the Court of Appeals is *Affirmed.*

Mr. JUSTICE HOLMES, dissenting.

MR. JUSTICE BRANDEIS and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right, then I think that the criterion sanctioned by the full Court in Schenck v. United States, 249 U.S. 47, 52, applies. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent." It is true that in my opinion this criterion was departed from in Abrams v. United States, 250 U.S. 616, but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and Schaefer v. United States, 251 U.S. 466, have settled the law. If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.