Five Supreme Court Cases Everyone Should Know

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Abstract

Operating under the assumption that the average college student knows little to nothing about the Supreme Court and significant cases in the field of American constitutional law, the author hypothesizes that this ignorance is due not to an inability to understand the material, but an unwillingness on the part of the average student to expend the effort necessary to decipher the "legalese" of an average Supreme Court opinion. The author also hypothesizes that it is the high and lofty language of the opinions that generally disenchant the reader, and not the information itself. Therefore, as a means of testing this hypothesis, the author sets out to translate five Supreme Court opinions into the vernacular, in the hopes of making them more accessible to the general public.
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JUDICIAL REVIEW: *Marbury v. Madison (1803)*

An average person on the street, when asked what the number-one most important Supreme Court case in history was, will generally respond with either *Roe v. Wade* or *Brown v. Board*, which are two of the most widely known and widely controversial cases the Supreme Court has ever decided. A political scientist, on the other hand, will almost certainly answer the same question with *Marbury v. Madison*. This is the case from which the Supreme Court derives its primary power—that of judicial review. In the present day, most people take for granted that the Supreme Court has that power; after all, they have had it for more than two hundred years now, and exercised it plenty of times in our history. Even elementary school students learn that according to our system of checks and balances in the government, the power of judicial review is the Supreme Court’s check on the executive and legislative branches of government. If either of those two other branches oversteps its boundaries, and the case comes before the Supreme Court, the justices can declare those laws or actions unconstitutional. Americans accept this wholeheartedly. It is an established, accepted part of political culture.

What many people fail to realize is that things were not always that way. Article III of the Constitution, which deals with the formation, structure, and powers of the judiciary branch, is exactly five paragraphs long, making it one of the shortest articles in the Constitution. Compared to the detail and effort that apparently went into the articles concerning the other two branches of government, the judiciary article seems almost like an afterthought—and in the minds of the Founders, to some extent, it was. As Alexander Hamilton noted in his Federalist #78, the judiciary “has no influence over either the sword or the purse”\(^1\). In other words, whereas the president has the power to implement the law and order troops into battle (the “sword”), and

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Congress has the power to make the law and control the budget (the "purse"), the judiciary has no real way to enforce the decisions it makes. It relies solely on the other branches of government to agree that its rulings are valid, and as John Marshall so neatly and famously put it, the Court's only real power is to "say what the law is"\(^2\).

While *Marbury v. Madison* is perhaps its most significant case, it was not the first case that the Supreme Court ever decided. That distinction belongs to *Chisholm v. Georgia*, an utter disaster of a case that no one really likes to talk about. One of the parties, the state of Georgia, neglected even to *show up* to the court date, arguing that the Supreme Court had no authority over it and therefore had no right to hear or decide a case about it. Afterward, when the Supreme Court decided (mostly by default) in favor of Chisholm, Georgia made such a hullabaloo about emphatically ignoring the ruling that Congress finally passed the Eleventh Amendment to the Constitution, which formally overruled the Supreme Court's decision in the matter, anyway. In other words, the Supreme Court did not just trip coming out of the starting gate, metaphorically speaking; one of the other runners turned around and decked them in the eye, just for good measure. Clearly it was not a particularly strong political situation for anyone concerned.

Fortunately for the Court and its future in the realm of American politics, Chief Justice John Marshall eventually came into office and immediately set about getting the Court's authority and legitimacy back. By asserting the Court's power of judicial review, and maneuvering his political opponents in the other branches of government into legitimizing that power, Chief Justice Marshall took the weakest branch of government at the time and turned it into a truly coequal actor in the political arena.

And the case that made it all possible was *Marbury v. Madison*.

CASE #1: *Marbury v. Madison* (1803)

The case of *Marbury v. Madison* actually begins long before Marbury and Madison ever made it before the Supreme Court, and starts with two well-known political rivals: John Adams and Thomas Jefferson. John Adams belonged to the Federalist Party, which supported a strong national government and relatively weaker state governments. Thomas Jefferson belonged to the Democratic-Republicians, who were basically the exact opposite of the Federalists and wanted to keep power in the hands of the states, not the federal government. This, predictably, led to quite a few differences of opinion among the two men, and a great deal of political conflict, besides.

In the election of 1800, Jefferson managed to defeat then-President Adams, which meant that the Federalists would have to surrender their control of the presidency to the opposing political party when Jefferson was inaugurated. Understandably, the Federalists did not like this one bit, and wanted to ensure that their ideas and influence would last as long as possible, even if they were not in control of the office. But the question was, how to go about it? Jefferson, as president, would get to appoint all of his own people to positions in the executive department, so there was no chance of retaining any sort of power that way. Ditto for the legislature, in which the balance of power could shift unpredictably, depending on how elections happened to go in any given election year. Thus, the judiciary seemed like the Federalists’ best bet at the time, as judicial appointments are made for life, contingent on good behavior. By putting as many Federalists as possible into judicial positions, Adams and his party could make certain that their influence would last a lifetime—quite literally.

Ultimately, stacking the judiciary with Federalists was the route that Adams decided to take. Article III of the Constitution gives Congress the power to establish "inferior courts" to the Supreme Court however it pleases, and at the time, Federalists controlled both Congress and the
presidency. Adams’s plan, therefore, was fairly simple: have the Federalists in Congress create a number of new positions in the judiciary, appoint Federalists to all of those positions, and get them all settled in their non-elected terms for life before Jefferson ever got near the office of the president. And it worked fairly well for him, too. Congress created the new judicial positions, Adams appointed his people to those positions, signed the forms, sealed them up, and handed them off to his Secretary of State to deliver—a neat and tidy end to a masterful political plan.

Or at least it would have been, except for the fact that the Secretary of State failed to deliver all of those commissions on time and actually missed a few along the way. Then, before he could deliver those last remaining few, the countdown clock running in the background of Adams’s plan ran out, and Jefferson took office. Jefferson promptly appointed James Madison as his new Secretary of State, ordered him not to deliver those remaining commissions, and washed his hands of the whole matter.

The problem arose when one of the few men who had failed to receive his commission from the previous Secretary of State decided that yes, actually, he really did want that commission, and if Jefferson refused to do anything about it, then he would just have to take matters into his own hands. That man happened to be named Marbury—the eponymous Marbury, in fact—and he ended up doing what any self-respecting American would do if he felt someone else had wronged him: he filed a lawsuit. Specifically, he ended up asking for something called a writ of mandamus, which is essentially a court order that forces a government official to do something that he or she refuses to. Marbury decided that he would solve his problem by going straight to the Supreme Court and asking them to issue a writ of mandamus, which would compel Madison to deliver his commission and allow him to take his rightful
judgeship. When he did so, the case of *Marbury v. Madison* had officially arrived at the Supreme Court.

On the surface, *Marbury v. Madison* seems like a fairly easy ruling to make. The Chief Justice of the Supreme Court, the much-lauded John Marshall, happened to be a Federalist like Adams, and he therefore was not a particularly big supporter of Thomas Jefferson. Regardless of the conventional wisdom that the Supreme Court is a branch of government entirely removed from politics, and therefore the justices rely solely on law and reason when making their decisions, the fact remains that Supreme Court justices are people, too. Personal opinion, therefore, has a whole lot to do with the way different people interpret the same words. And there were certainly politics at work here: John Marshall was a Federalist, and *Marbury v. Madison* was a fairly clear-cut case of Federalists against Antifederalists. Thus, all he had to do was convince the Court to rule in Marbury’s favor, issue the writ of mandamus, order Madison to deliver the commission, and that would be that. His side would win the case, and the Federalists would prevail over the Antifederalists once more.

Unfortunately, things were not quite that simple for Chief Justice Marshall. As mentioned earlier, the one real downfall of the Supreme Court’s role in government is that, while it can render all the decisions it wants, it still has to count on the other branches of government to legitimize and enforce them. Legitimacy is everything to the Supreme Court, and that is a quality that people in the present day generally take for granted, simply because everyone has grown used to the idea over the course of the nation’s history. Take, for example, the *Bush v. Gore* case that effectively decided the presidential election of 2000: Al Gore, upon hearing that the Court had ruled in favor of Bush, promptly stated that he disagreed with the decision, but that he would still abide by it. Legitimacy means that all parties accept the decision of the court as valid,
regardless of which side the Court supported in the case. And therein lies Marshall’s great
dilemma, back in 1803.

Marshall could easily have ordered Jefferson and Madison to deliver those commissions a hundred times over, but even if he did, there was no guarantee that Jefferson and Madison would follow the orders at all. At the time, the Supreme Court was a very weak branch of government, and it did not have the legitimacy to back up its orders. The outcome of *Chisholm v. Georgia*, mentioned earlier, had been absolutely disastrous for the Court’s legitimacy, and the last thing that Marshall wanted was to diminish it even further by rendering a verdict that nobody was going to listen to, anyway. On the other hand, Marshall was not particularly enthusiastic about ruling in Madison’s favor, either, as that would mean allowing Adams’s new judicial positions to remain unfilled by Federalists. Leaving those positions open would give Jefferson the opportunity to fill them himself with his own people—a political advantage for the enemy side. No matter what he did, Marshall was in a tricky political position, and a lot was riding on the way he delivered his verdict. It was a moment that demanded nothing short of utter political genius, and John Marshall did not disappoint. In fact, he produced a solution so deft that honestly, if someone were to ask who won the case of *Marbury v. Madison*, the best answer would probably be “the Supreme Court”.

Marshall, writing for a unanimous majority, used a step-by-step process to work through the rationale of the case, just so that everyone was clear about what he was saying and what the thought process was behind it. Part of this means that the opinion in *Marbury v. Madison* gets exceptionally wordy, considering that Chief Justice John Marshall really wanted to make sure that everyone was picking up what he was putting down here, and so he spent a lengthy amount of time going through all the ins and outs and considerations of the issues. However, he
ultimately boiled the issue down to three questions that, once answered, would solve the dilemma between Marbury and Madison. So first, Marshall outlined exactly what he believed those questions were, and then systematically answered them with the court’s stance on each of those issues. Those questions read as follows:

First: Is Marbury entitled to receive his commission?  
Second: If so, is there a legal remedy that will grant him his commission?  
Third: If so, is a writ of mandamus from the Supreme Court the right remedy?³

According to Chief Justice Marshall, the answer to the first question was yes, Marbury was indeed entitled to receive his commission. He then went through a fairly detailed discussion of exactly what goes into issuing a judicial commission, pointed out that Marbury’s commission did indeed meet all those steps, and decided that the commission did not have to be delivered into the hand of the recipient in order to be valid—as that was merely a clerical duty, not an official or constitutional one. The commission became valid once the president made the appointment, got the Senate to confirm it, and then signed and stamped the presidential seal on it. Delivering the envelope to Marbury was not part of the official legal process of appointment, and as its validity was not at all contingent on its delivery, then Marbury’s undelivered commission was still a valid commission. Therefore, he was entitled to receive it.

The answer to the second question was equally straightforward: yes, a legal remedy existed to grant Marbury his commission, and he was correctly in the process of suing for it—a writ of mandamus. Marshall then went on to explain that writs of mandamus basically exist so that people have a way to force government officials into completing their jobs and duties when they neglect to do so. In this case, getting a writ of mandamus was the right thing to do because Madison was a government official, he was neglecting to deliver the perfectly valid commission, and Marbury wanted to compel him to deliver it. Again, nothing particularly complicated here.

³ Marbury v. Madison. 5 U.S. 137 (1803).
Marshall's political genius really shines in his explanation of the final question, and this was where the man threaded the needle of a terrible political situation to actually produce an enduring victory that nobody saw coming, but that people have talked about ever since. Whereas the first two questions were both answered yes—Marbury is indeed entitled to his commission and a writ of mandamus is indeed the way to attempt to get it—Marshall cordially informed everyone assembled that the answer to the third question was a resounding no. No, asking the Supreme Court to issue a writ of mandamus to compel Madison to deliver the commission was not, in fact, the appropriate way of going about getting the commission delivered.

In other words, Chief Justice Marshall just informed everyone that yes, Marbury did everything right, except for the tiny little problem that he asked the completely wrong people to give him what he wanted. To put it even more simply: the Supreme Court, through Marshall's opinion, just said that this case was totally not their problem. But Marshall's genius did not stop there, since he still had to explain why the case was not the Court's problem. And this is where the idea of original and appellate jurisdiction comes in.

Basically, there are two different kinds of cases that the Supreme Court can hear. The first kind, original jurisdiction, means that a case goes directly to the Supreme Court and gets heard for the first time in front of the Supreme Court justices themselves. That kind of jurisdiction is outlined in Article III of the Constitution, which says that the Supreme Court gets original jurisdiction over cases such as when a person from one state sues a person from another state, or a case involving an ambassador, or cases about situations that take place on the high seas instead of in one state or another. In those kinds of cases, the Court is the first to hear it, and the Court gets to decide it just like a trial court does. Appellate jurisdiction, on the other hand, involves the kind of case that people are most used to hearing about—where somebody appeals
the case to the Supreme Court because he or she lost in a lower court and wanted a higher one to hear it. According to the Constitution, Congress has the power to regulate the appellate jurisdiction of the Court, so Congress gets to set the boundaries on what cases the Court can hear, and they can modify it however they choose.

Well, in 1789, Congress passed the Judiciary Act of—unsurprisingly enough—1789, which detailed those boundaries of the Supreme Court, how the judicial system would run, and so on and so forth. One section of that Act, Section 13, gave the Supreme Court the power to issue writs of mandamus. That was the whole reason why Marbury went to the Court to ask for a writ of mandamus in the first place: because Congress had passed a law allowing the Court to issue those writs and compel government officials to do things they did not want to do.

Unfortunately for Congress, as Marshall pointed out in his opinion, giving the Supreme Court the power to issue writs of mandamus changed the original jurisdiction of the Court, and according to the Constitution, Congress is only allowed to change the appellate jurisdiction of the Court. That means there was a direct conflict between a federal law passed by Congress and the wording of the United States Constitution, and in a dilemma like that, the Constitution always wins. So Marshall held that Section 13 of the Judiciary Act of 1789 was unconstitutional, claimed the Court did not actually have the power to issue the writ that Marbury wanted, and informed Marbury that he was essentially out of luck. He had simply asked the wrong people to help him, Marshall explained, and the Supreme Court regrettably did not have as much power as Marbury had assumed.

So by this point, Thomas Jefferson was probably dancing a highland fling in the Oval Office. He had just won his case, Madison would not be required to deliver the judicial appointment, Marbury would not get his commission, he would get the chance to appoint
someone to fill the spot that Marbury had originally intended to, and at that moment, life was just pretty darn awesome for him. So of course, he was more than happy to support the word of the Supreme Court on the case, because he won. Much the way that the victors always get to write history, the winners of court cases always want to agree with the legitimacy of the decision. Which meant that yes, of course Jefferson supported the Supreme Court’s ruling as legitimate in *Marbury v. Madison*. It would have been ridiculous not to, considering the Court had apparently ruled in his favor.

However, that victory came with a catch. Remember that whole discussion about how legitimacy is so important to the Supreme Court and how badly they were doing in terms of legitimacy up until this point in history? Well, that all just turned around, and now the President of the United States was endorsing and agreeing with a decision of the Supreme Court. That was some pretty strong legitimacy right there. After all, the President of the United States agreed that the Supreme Court made the right decision in that *Marbury v. Madison* case, and supported the Court in its ruling.

Of course, by doing so, the President of the United States also handed Chief Justice John Marshall the Supreme Court’s most formidable power on a silver platter.

It breaks down like this: Congress wrote a bill, passed it through both chambers, and managed to get it passed into law—the Judiciary Act of 1789. John Marshall then ruled that a section of that Judiciary Act of 1789, a law of the United States written by a coequal branch of the federal government and passed democratically by the representatives of the people, was unconstitutional. He ruled it null and void, making it no longer the law because it conflicted with the provisions of the Constitution. In other words, Chief Justice Marshall just said that the Supreme Court has the power to strike down laws that Congress passes if those laws are in
conflict with the wording of the Constitution, and Thomas Jefferson endorsed the decision. He agreed that yes, Marshall and his Supreme Court have this power—remember, Jefferson won the case, and wanted the decision to stand as legitimate—and suddenly, the Supreme Court had the power of judicial review. Thanks to Marbury v. Madison, the Court gained the power to tell Congress that a law they passed is unconstitutional and strike it down, making it no longer law at all.

This is huge. This is bigger than huge. John Marshall took a case that promised to be political suicide no matter which way he decided it, and not only decided it in a way that avoided political suicide, but made it grant the Supreme Court its most effective and formidable power, and maneuvered one of his chief political rivals into endorsing that decision on top of it. Who won in the case of Marbury v. Madison? The Supreme Court did, hands-down. Yes, the Federalists lost the battle for Marbury’s judicial appointment. Yes, Jefferson and Madison technically won their case before the Court. But the Supreme Court just received the power to tell the other two branches of government that their laws and actions are unconstitutional, and if that is not a victory, then nothing is.

Many people consider John Marshall to be the greatest chief justice of all time, and that sentiment is largely due to the way he handled the Marbury v. Madison case. This case also originated one of the most famous quotes in legal history: “It is emphatically the province and duty of the judiciary department to say what the law is”—which, by the way, is actually inscribed on the wall of the Supreme Court building in big gold letters, just so that everybody can take note of the importance of this decision. Marbury v. Madison handed the Supreme Court its formidable power of judicial review, and it is without a doubt the case that everybody should

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4 Marbury v. Madison. 5 U.S. 137 (1803).

Of course, the case is not without its problems, and it would hardly be fair to talk about *Marbury v. Madison* without at least touching on those problems, too. Over the years, there has been a lot of controversy over the way that Marshall handled this case, the way that the ruling came down, the powers that it gave to the judiciary, and other similar criticisms. For one thing, people have argued that this case was not really a constitutional case at all, and that Section 13 of the Judiciary Act of 1789 did not actually change the original jurisdiction of the Supreme Court, so there was no reason to hold it unconstitutional because really, it should not have even been a factor up for consideration. This poses a large problem for the establishment of judicial review; had Section 13 not been ruled unconstitutional, then the Supreme Court would not have held a law passed by a coequal branch of government to be unconstitutional, and that means the whole point of judicial review falls apart. There was also the teensy-weensy criticism that Marshall should have recused himself from this case, rather than taking the opportunity to decide it at all. As it happens, the Secretary of State under John Adams who failed to deliver Marbury’s commission was, in fact, Chief Justice John Marshall. Before he was Chief Justice, of course. And that is generally known as a conflict of interest.

However, regardless of what history believes about Marshall’s actions, and however the debate rages about how this case *should* have been decided, the fact remains that Chief Justice John Marshall pulled some of the biggest political shenanigans of all time with *Marbury v. Madison*, and the future of the judiciary was changed forever because of it.

Which begs the question: what would the world look like today if *Marbury* had been decided differently? For one thing, the Supreme Court would not be nearly as strong a branch of
government as it is today; in fact, without *Marbury*, the Court would almost certainly have little
to no political power at all. The lack of a strong independent judiciary with the authority to make
rulings and overturn laws would allow a dramatic expansion of legislative and executive powers,
which could quickly turn into a tyranny of the majority, an imperial presidency, or both. The
importance of the judiciary lies in its ability to protect the rights of the individual and the
minority against the politically-minded actions of the majority in the other two branches; without
judicial review, the Court would be unable to carry out that duty, and individual rights and
liberties would suffer dramatically for it. Indeed, some scholars have even suggested that if the
*Marbury* decision had gone differently than it did, the nation as a whole would not have survived
past the Civil War. The American system of government relies on the judiciary in many ways,
both directly and indirectly, to be a steadfast anchor amid the ever-changing tides of politics, and
if the judiciary were not a coequal branch of government with the power of judicial review, the
nation as Americans know it today might very well not exist at all.
THE RIGHT TO PRIVACY: *Griswold v. Connecticut* (1965)

Much like judicial review, the right to privacy remains a constitutional right that everyone pretty much takes for granted in the present day. True, people still question and endlessly debate over what the right to privacy means, and what it encompasses, and just how far a person’s privacy should extend, but it is still generally agreed that yes, Americans have a constitutional right to privacy. Interestingly enough, however, the Constitution never explicitly states that there is such a thing as a right to privacy. It currently exists solely because the Supreme Court decided to read between the lines of the freedoms guaranteed by the Bill of Rights, invoking the term “penumbra” to describe where the right to privacy actually falls. Basically, according to the penumbra concept, the right to privacy is analogous to the very middle portion of a complex Venn diagram—it exists where a bunch of other rights overlap, and while no one right explicitly mentions it, they all come together to provide for it.

It also somewhat resembles Captain Planet: by the other amendments’ powers combined, it is the right to privacy. (Which would make the Supreme Court justices the Planeteers in this analogy, but there is such a thing as extending an analogy too far, of course.)

Anyone who has ever heard the term “judicial activism”—which is generally spoken in a tone laced with condescension and disgust, in present times—will recognize that the spontaneous creation of a constitutional right from the penumbras of other rights is going to produce a fairly controversial situation. People who enjoy the use of the slippery slope fallacy would probably argue that the idea of the Supreme Court being able to make up and enforce new constitutional rights out of nowhere will lead to chaos, anarchy, madness, and the eventual downfall of modern society in general. People who enjoy constitutional history might raise the point that this problem perfectly demonstrates why some of the Founding Fathers were opposed to spelling out a list of
guaranteed rights at all—because there was no way they could write down every single right that people should be guaranteed to have, and they were therefore definitely going to miss some along the way, and then people would argue forever over whether or not that right was a valid one, or an important one, or even a relevant one. This would lead to much bickering about how the Founding Fathers made sure to spell out certain specific rights, so clearly the ones they left off must not be nearly so important, and so on and so forth.

The other thing that makes this case a contentious one, aside from the part about judicial activism, is the subject matter in question: the idea of a right to privacy began because a married woman in Connecticut wanted birth control. (As if this case really needed any more hot-button issues to make it a big controversy.) Still, like the affirmation of judicial review in *Marbury v. Madison*, most people generally accept nowadays that the idea of a right to privacy, which *Griswold v. Connecticut* produced, is a valid one. In this day and age, the controversy lies in questions of how far that right extends and what it encompasses, not whether it exists at all. It should also be noted that while *Griswold v. Connecticut* started the idea of a right to privacy, this case also yielded dozens of other cases that further questioned and defined what that right entails. As is often the case with the creation and defense of individual rights in the legal realm, the right to privacy developed over the course of many cases and challenges that came before the Supreme Court. The outcome of *Griswold* only affected married couples attempting to obtain birth control; single men and women only gained that right after one of the many subsequent cases. However, though it was not the last case to define the extents and protections of the right to privacy, *Griswold v. Connecticut* was the case that started the ball rolling, and it opened the door for a whole new guarantee of protection for American citizens.
CASE #2: Griswold v. Connecticut (1965)

The story behind Griswold v. Connecticut begins back in 1879, when the state of Connecticut passed a law that made it illegal to use contraceptives to prevent pregnancies. The law also set up a fairly inconsequential punishment for breaking the statute—a fine of at least fifty dollars, a prison sentence of sixty days to a year, or both. The law was almost never enforced, and the punishment attached was really more of an inconvenience than anything else, but it did provide a deterrent to help keep people from using contraceptives in the state of Connecticut. However, elsewhere in the book of Connecticut laws, there existed a statute that said that anyone who "assists, abets, counsels, causes, hires or commands" someone else to break the law can be prosecuted as though he were the person who committed the offense himself. In other words, helping or encouraging someone to commit a crime in any way, shape, or form meant that a person could be prosecuted as though he or she were the one who committed the crime in the first place. Thus, when combined with the statute prohibiting the use of birth control, the two laws created a system in which anyone who sold birth control, or even simply provided information about it, could be prosecuted under the 1879 statute, as they were assisting, abetting, or counseling the person who used the birth control to do it.

This combination of laws set the stage for the defendants in the case to make their move. Enter Griswold, the Executive Director of the Planned Parenthood League of Connecticut, with her co-appellant Buxton, who was serving as the Medical Director of the League’s New Haven center. Griswold and Buxton decided that they wanted to deliberately challenge the 1879 law against birth control, in the hopes that they would be able to get it ruled unconstitutional.

As a side note, while the idea of deliberately breaking the law for the sake of getting the courts to rule on it may seem a little odd at first, it turns out that a lot of famous cases came about that way. These are called “test cases”, and are basically lawsuits intentionally created and chosen for the sake of testing laws under judicial scrutiny. For example, the notorious Roe v. Wade case was one such “test case”, as was Plessy v. Ferguson, which is famously known as the case that set up the “separate but equal” doctrine. Griswold v. Connecticut was also a test case, and so Griswold and Buxton deliberately opened a Planned Parenthood center in New Haven to provide “information, instruction, and medical advice” to married couples about contraception, including the best methods of contraception for their individual needs. In other words, they flagrantly broke the law, which is one of the few but fun perks of being the subject of test cases like this.

Predictably, they were arrested, found guilty on accessory charges for helping married couples break the law, and were each fined one hundred dollars. Of course, this was exactly what Griswold and Buxton wanted, because they were now in a position to bring a lawsuit to court and appeal their case. According to American law, a case cannot be brought before a court unless it meets certain criteria and requirements, which are known as threshold requirements. One such threshold requirement is that of standing, which means that the person bringing the case before the court has a direct, personal stake in its outcome. Griswold and Buxton could not spontaneously take a case to court to challenge the law because they felt like it; to meet standing requirements, they had to actually break the law, be injured or wronged by its enforcement, and then appeal the ruling to a higher court. They first appealed the case to the circuit courts, but the circuit courts merely affirmed the judgment that yes, they were guilty, and no, the law was not

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unconstitutional. Undeterred by these setbacks, Griswold and Buxton relentlessly continued to appeal the case until it finally made it to the Supreme Court.

As it turns out, that relentlessness paid off. After hearing the case, the Supreme Court ruled in favor of Griswold and Buxton, reversing the convictions and outlining the idea of a right to privacy in the process. Justice Douglas, writing for the majority, set things out in a fairly methodical way, going back through at least a dozen court cases and pointing out all the rights that the Court upheld with each passing case. For example, he mentioned things like the right to “educate a child in a school of the parents’ choice”, or the right to “study any particular subject or any foreign language”\(^7\), neither of which are expressly mentioned in the Constitution, but both of which had been previously covered by the protections guaranteed in the First Amendment. Douglas then continued to list off cases upon cases, always explaining what rights came out of each of them, and how while none of those rights are outright listed in the Constitution, that “[w]ithout those peripheral rights, the specific rights [that are listed] would be less secure”\(^8\).

Essentially, Douglas explained that everyone possesses a set of rights that are listed off and guaranteed by the Constitution, which was the whole point of passing the Bill of Rights back when the Constitution was first ratified. However, those expressly listed rights are absolutely not the only rights guaranteed to people. In other words, the Bill of Rights should not be taken solely to the letter of the law, but should instead be viewed more as broad guidelines that spell out the basic ideas of rights that people should have. These basic ideas can then encompass a lot of smaller, more specific, more individualized rights within the boundaries of those guidelines. It is a sort of umbrella metaphor—the First Amendment is something like an open umbrella that shelters many other rights as well, all of which bear some relation to the right of free speech, free

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\(^7\) Griswold v. Connecticut. 381 U.S. 479 (1965).
press, free assembly, or the other explicit provisions of the First Amendment. Alternatively, consider the analogy of a magnet picking up iron filings: the specific rights guaranteed by the First Amendment are like the magnet itself, and all the other tangential rights are the filings that get picked up and stick to it along the way. Or, to use the metaphor that Justice Douglas did, there are “penumbras”\(^9\) around the specific guarantees in the Bill of Rights—shadowy sorts of vague areas from which other rights that are not specifically named can emerge.

With regards to the right to privacy, though, the First Amendment was not the only amendment that Justice Douglas cited in his opinion. He also pointed to the Third Amendment, which protects people from having to quarter troops in their own homes; the Fourth Amendment, which protects people against unreasonable searches and seizures; the Fifth Amendment, which guarantees protection against self-incrimination; and the Ninth Amendment, which provides the catch-all guarantee that while the Framers only listed off a certain number of specific rights, that in no way means that the rights expressly listed are the only rights that people are entitled to, and that there are therefore plenty of other rights reserved to the people, as well. Put them all together, Justice Douglas explained, and they paint a pretty clear picture that people are intended to have what he calls a “zone of privacy”\(^{10}\). The right to think what one wants, to keep one’s house free of soldiers, to keep the police from unreasonably searching one’s home and possessions, and to stay silent rather than having to incriminate oneself all imply that a person is entitled to a certain amount of privacy in his or her own affairs, and that the government generally should not encroach upon that individual’s right to privacy.

With that in mind, Justice Douglas discusses the case in question, and how the right to privacy also encompasses privacy in the union of marriage. According to Douglas, married

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\(^{10}\) \textit{Griswold v. Connecticut.} 381 U.S. 479 (1965).
couples ought to have the right to make their own decisions about choices regarding their own marriage, and one of those choices is whether or not to have children. If the government can pass laws banning contraceptives, then that opens the door to have the police start searching, as Justice Douglas puts it, the “sacred precincts of marital bedrooms for telltale signs of the use of contraceptives”\(^\text{11}\), which was something that nobody wanted. To do so would be a flagrant violation of marital privacy, one of the oldest and most accepted aspects of privacy in existence. For these reasons, the Supreme Court reversed the convictions against Griswold and Buxton and held the Connecticut statute prohibiting the use of contraceptives to be unconstitutional.

There were a few dissents on this case, where other justices on the court did not agree with the majority’s decision, and also a few concurrences, where justices who sided with the majority decided to write their own opinions to make sure that their own rationale was heard, as well. But the opinion that Justice Douglas wrote was a majority opinion handed down from the Supreme Court, which means it carried the force of law. Thus, with this case, the right to privacy suddenly became part of judicial precedent for the Supreme Court. Future cases could now cite *Griswold v. Connecticut* as justification for their own “right to privacy” concerns, and there would be a basis for those claims because of the decision in this case. And indeed, *Griswold* spawned many other subsequent cases, such as *Eisenstadt v. Baird*, which extended the holding in *Griswold* to unmarried couples, and the famous *Roe v. Wade*, which protected a woman’s right to choose to have an abortion, with a given set of criteria and restrictions regarding fetus viability and maternal health. The right to privacy also yielded cases in other areas, such as the “right to die” case of *Cruzan v. Director, Missouri Department of Health*, or the case of *Lawrence v. Texas*, which challenged a Texas law prohibiting certain varieties of intimate sexual contact between same-sex couples.

In short, the case of *Griswold v. Connecticut* created the right to privacy that the American public enjoys today, and it is all thanks to two crafty people who decided to challenge an old Connecticut law and a married couple who just wanted some birth control. And the importance of the right to privacy, the rationale of Justice Douglas’s opinion, and the doors opened for other privacy cases to come forth are all what make *Griswold v. Connecticut* one of the Supreme Court cases that everyone should know.

How would life be different without the *Griswold* decision? Primarily, the lack of a right to privacy would open the door for vast government expansion into the private life of an individual. The “zone of privacy” would cease to exist, and the potential for abuse of government regulation and power would increase significantly. Furthermore, if the Supreme Court had ruled against Griswold and Buxton, they would have rejected both the idea of an individual right to privacy and the right of a married woman to access means of birth control. While the loss of privacy rights would have impacted all individuals, this decision would disadvantage women twofold, stripping them both of the right to privacy in matters of their own body and the right to control marital decisions and matters of procreation through the use of contraceptives. Had married women never gained this right, single women would be equally disadvantaged, as the right of single women to access birth control only came into effect from one of the cases that followed *Griswold*. The women’s rights movement would almost certainly suffer dramatically, and women in the present day would enjoy considerably fewer rights than they do now. Without *Griswold* to open the door for all the subsequent privacy cases, many significant rulings concerning personal rights would never have existed, and the nation in the present day would be less equal, less free, and generally worse off for it.
THE RIGHT TO DUE PROCESS: *Miranda v. Arizona (1966)*

Thanks to popular culture and the present-day fascination with crime dramas, most everyone knows of the “Miranda rights”. In fact, the first sentence has become almost a catchphrase in situations where people have found themselves into trouble: “You have the right to remain silent”. Granted, several other sentences are generally intended to follow that one, but everything about presence of attorneys and being appointed before questioning usually goes by the wayside next to something as catchy and snappy as “You have the right to remain silent”. Much like the phrase “shave and a haircut”, saying the words “Miranda rights” aloud will almost guarantee that someone within earshot will respond with “You have the right to remain silent”; it has become an unconscious, ingrained response.

The trouble is, popular culture has a funny way of turning into a grand-scale game of Telephone; facts go in on one end, and by the time they come out on the other, they sound very little like what they were when they first started. Sometimes, they have been distorted beyond all recognition of their original meaning, and those distortions can be both intentional and unintentional. Perhaps one of the players thought the phrase would sound better a different way and intentionally changed it, or perhaps that person just misheard and repeated it incorrectly to the next person down the line. Society has seen much the same effect with *Miranda*, whether it be from shows like Law and Order that alter details to make for good scriptwriting, or just from people hearing something once and misremembering it to others later.

*Miranda* is an important case not because of the story behind it, nor because it involves any sort of genius political maneuvering on the part of the Supreme Court, but because it is one of those cases that might someday be relevant to the average person’s everyday life. One never knows when one will need to employ his or her constitutional rights of due process, after all.
Readers interested in furthering their exploration of what the Fifth Amendment means to the average citizen are advised to look into to Professor James Duane’s “Don’t Talk To The Police” lecture\textsuperscript{12}, and the follow-up response by Officer George Bruch of the Virginia Beach Police Department\textsuperscript{13}, both of which deal with many of the issues covered in the following segment, and several that are not.


CASE #3: **Miranda v. Arizona (1966)**

Interestingly enough, the majority opinion in *Miranda v. Arizona* does not specifically deal with the *Miranda* case, for the most part. This decision was written to encompass four similar cases that were all decided together, all relating to the Fifth Amendment and the rights of the accused during questioning. Though each of the four stories is slightly different, they all share a similar trend: in each case, the accused was apprehended, taken into an interrogation room, and questioned without ever being given the opportunity to willingly and knowingly exercise—or waive—his Fifth Amendment right to protection against self-incrimination and his right to have counsel present during any questioning. Miranda’s case began when the police picked up Miranda on charges of kidnapping and rape and took him down to the station, where the complaining witness identified him. At that point, officers hustled him into an interrogation room, questioned him for two hours, and eventually emerged with a written confession of guilt that Miranda had signed. Despite the officers wholeheartedly admitting during the trial that they had not advised Miranda of his right to remain silent and his right to counsel, Miranda was found guilty on all the charges and sentenced to twenty to thirty years for each sentence. When he appealed to the Supreme Court of Arizona, the court upheld the conviction and said that his rights had not been violated. Miranda then continued to appeal the case, which is what brought it up to the Supreme Court.

Chief Justice Earl Warren, writing for the majority, started off his opinion with a discussion of the interrogation procedure that the police used on suspects at the time, and what exactly went into a typical interrogation for any given suspect. Apparently, the Supreme Court got a hold of some of the instruction manuals that the police followed for such matters—the “guidebook to conducting an interrogation”, in a sense—and went through to see exactly what
procedures the police were following and if their actions took a suspect’s constitutional rights into consideration. Basically, at this point in time, police interrogations were nicknamed the “third degree”\textsuperscript{14}, and the police would use every psychological trick in the book when it came to interviewing a suspect, just to better their chances of getting a confession. Some of those tricks were reasonably harmless, such as interviewing a suspect down at the station rather than in the suspect’s own home in order to give the interrogating officer the figurative “home court advantage” by getting the suspect out of his comfort zone. Others were a little more questionable, such as advising the suspect of his right to remain silent but then immediately “point[ing] out the incriminating significance of the suspect’s refusal to talk”\textsuperscript{15}. This, in the context of the provisions of the Fifth Amendment, is extremely problematic.

The Fifth Amendment, contrary to popular belief, was not put into effect because the Framers wanted to protect guilty people from having to incriminate themselves. The point of the Fifth Amendment is to protect \textit{innocent} people from accidentally incriminating themselves for something they did not do. Under the American system of laws, everyone is innocent \textit{until proven guilty}. That means up until the point when a judge or a jury delivers a conviction, the person sitting in the defendant’s chair is presumed to be innocent. It is clear that the police were not operating by that rule at the time, and to some extent, that failure is a reasonable one. It is the duty of the police to apprehend people that they believe are guilty of a crime, assuming they have probable cause to believe that the person in question really did commit the crime in question. Therefore, under most circumstances, the police already have good reason to believe that a person committed a crime by the time they go to apprehend him.

However, the police are people, too, and people make mistakes. No one is perfect; eventually, the incriminating evidence will seem to point to a person that is actually innocent, and the police will mistakenly pick up and interrogate the wrong suspect. The Framers knew this would happen sooner or later, which is one of the reasons why they came up with the Fifth Amendment—to help to protect those innocent people so they do not get flustered or intimidated in the face of the police, accidentally say something stupid that incriminates them for a crime they did not commit, and then get hit with a guilty verdict and shipped off to jail for something they never did. The rights of the accused are an extremely big deal in the American system of government because everyone realizes that no matter how good the police are at apprehending criminals, sooner or later they will mistakenly apprehend one of the innocent ones, too. It is at that moment when ensuring a defendant’s constitutional rights is going to count the most.

In other words, the idea of a police officer telling a suspect that he has a right to remain silent, and then immediately following it up with “but of course, you’ll look totally guilty if you do, just saying” is a flagrant attempt to coerce the suspect out of exercising his Fifth Amendment rights. It suggests that the phrase is no longer “innocent until proven guilty”, but “guilty until proven innocent”, which is highly problematic. Taking the Fifth is not, will not, and should not ever be taken as a sign of guilt in a criminal investigation, as though a person would only decline to speak if he clearly had something to hide. The Fifth Amendment exists to protect the innocent people as a part of their due process rights, and the right to remain silent without having that silence reflect negatively in the eyes of the law is one of the most important rights a person could possibly retain.

In short, police interrogations were employing rather questionable tactics back then, and Chief Justice Warren and his court decided they had better lay down some rules and
requirements about exactly which rights a person in custody possesses, and exactly how the police need to operate if their interrogation is to be constitutional and admissible in court.

According to Chief Justice Warren, the current interrogation tactic could be summed up basically like this:

[Being] alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.16

Chief Justice Warren went on to note quite a few cases involving people who tried to exercise their constitutional rights but were denied them, or people who were effectively bullied into "confessing" to what the police wanted them to say, thanks to the heavy psychological warfare employed by the interrogators. In short, Chief Justice Warren concluded that the interrogation process was heavily stacked in favor of the interrogators, putting individual liberties at risk in the process. Therefore, the courts needed to step in and do something about it.

After devoting an entire section of the opinion to summing up all of the case law that went into establishing and defining the privilege against self-incrimination, Chief Justice Warren detailed how the problem ought to be solved—and thus, what rights the suspect in question must be informed of, and knowingly acknowledge, before any questioning can take place. Since these are now known as the Miranda rights, and they have since entered the realm of popular culture knowledge, most everyone can recite them by heart. But according to Chief Justice Warren, the

proper steps to informing a suspect of his or her constitutional due process rights should proceed as follows:

**FIRST:** A person must be told in clear and unequivocal terms that he has the right to remain silent. Period. No ifs, ands, or buts. This is both to make him aware of his privilege to remain silent, and that the police have to honor that privilege if he decides to use it.

**SECOND:** A person must be warned that anything he says can and will be used against him in court. This is to remind him that there are consequences to not exercising his privilege.

**THIRD:** A person must be informed that he has a right to talk to an attorney before questioning, that he is entitled to have an attorney present during questioning, and that he can ask for one at any time during that questioning.

**FOURTH:** A person must be informed that if he can’t afford an attorney, that doesn’t mean he doesn’t get to have one at all. He is entitled to an attorney, period, and if he wants one and can’t afford it, then the police have to appoint one for him. Period.¹⁷

The phrase “knowingly and willingly” comes up a lot in this section, due to the fact that it is not enough for the police to simply read a person his rights. The suspect must actually understand what they mean, so that he can make an informed decision as to whether or not he wishes to exercise them. And, as Chief Justice Warren noted, if an interrogation occurs and the suspect in question has not chosen to exercise any of the rights that he is guaranteed to have, then “a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel”¹⁸.

In short, the Supreme Court made certain to emphasize just how important these rights are, and that in the future, a close watch would be kept on the police to make sure they were following these proper procedures.

The opinion also has a section addressing a complaint that Chief Justice Warren anticipated might arise from these guarantees of individual liberties: that the need to catch criminals and throw them in jail outweighed the need to give people accused of a crime their full complement of rights. This potential complaint prompted Chief Justice Warren to point out that the FBI had already been using a similar system of advising people of their rights prior to interrogation for years, and that the Bureau currently boasted what the Chief Justice called an "exemplary record of effective law enforcement"\(^{19}\), even so. Thus, advising suspects of their constitutional rights clearly did not hinder interrogation and conviction in any significant way, and therefore there could be no argument against it in that respect.

Finally, at the very end of the opinion, Chief Justice Warren briefly addressed the *Miranda* case itself. In exactly three paragraphs, the Chief Justice pointed out that Miranda signing his name to a typewritten paragraph that effectively read, "why yes, I know my rights" did not automatically mean that Miranda had full knowledge of his rights, nor did it mean that he knowingly and willingly waived them. As a result, Miranda's conviction was reversed, and the rights of the accused during police interrogation were upheld once more.

A world without *Miranda* to help protect the rights of the accused from the police would be a fearsome world indeed, and highly susceptible to abuses of governmental power for the sake of getting a conviction. As William Blackstone remarked in his *Commentaries on the Laws of England*, it is "better that ten guilty persons escape, than that one innocent person suffer"\(^{20}\); the *Miranda* decision agrees with that line of thinking, and requires the police to ensure that all due process procedures are followed to protect the individual's rights and help reduce the chance of convicting an innocent person for a crime he or she did not commit. Contrary to some popular


beliefs, ensuring the rights of the accused is not an act of being 'soft on crime'; quite the opposite, it actually helps the police enforce justice more easily and efficiently. Protecting the rights of the accused means less chance that the police will make mistakes and apprehend innocent individuals in place of guilty ones, which means they will expend less effort pursuing leads that ultimately do not pan out. It will also lead to more solid convictions, as there will be less chance of a guilty defendant 'getting off on a technicality' because the police made a procedural mistake along the way. And, as Chief Justice Warren noted himself, advising a suspect of his or her *Miranda* rights shows no significant effect on the success or failure of the interview procedure that follows, so there is really no excuse not to do it. *Miranda* is one case where the government is once again reminded of its duty to serve its citizens, not to lord over them, and the world would be a considerably more dangerous place without it.
THE COMMERCE CLAUSE: Gibbons v. Ogden (1824)

Article 1, Section 8 of the United States Constitution is probably one of the most important sections of the entire document, and it is almost certainly one of the most referenced in constitutional law. The primary function of Congress is to make laws, and Article 1, Section 8 is the section that lists off the enumerated powers of Congress—what Congress expressly has the power to do, as spelled out by the Framers. Of that list of powers, there are two clauses that are arguably the most important clauses in the entire section, as they are the lines from which Congress draws the vast majority of its implied power. Much like the Ninth Amendment’s protection of rights not expressly mentioned in the Constitution, Section 8 includes certain clauses that guarantee Congress implied powers not explicitly written down in the Constitution.

The first of these two clauses, the Necessary and Proper Clause, gives Congress the power to “make all Laws which shall be necessary and proper”\(^{21}\) to carrying out its expressly given powers. The Framers understood that the point of Congress was to pass laws, and that they could not possibly spend the whole Constitution writing out what laws Congress could and could not pass. So in the end, they made things simple and attempted to address the source of the problem, instead: the Framers listed off certain matters in which Congress has the power to act, and then gave it the power to pass appropriate legislation for the purposes of actually carrying those actions out. This is fundamental to the idea of implied powers because if Congress wants to pass a law, they have the power to do so as long as they claim that passing it is “necessary and proper” for the purposes of achieving some end—provided that end is within their expressly given powers to achieve, which is a subjective decision and therefore widely open to interpretation. This came up in the McCulloch v. Maryland case, which involved a question of

whether or not Congress had the power to create a national bank as a way of carrying out its power of the purse. As it turned out, Congress did indeed have that power, which affirmed the power of the Necessary and Proper Clause.

The second relevant clause, and the focus of the next case, is the Commerce Clause. This single-line clause, that Congress shall have the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”\(^{22}\), has become perhaps the most formidable power for carrying out actions that Congress has in its arsenal. The “with foreign Nations” part is generally considered to be a given, and the “with the Indian Tribes” part has become relatively moot. But the “among the several States” part has become a keystone of congressional power, because according to the Commerce Clause, if something involves interstate commerce, then Congress can regulate it.

On the surface, this power may seem relatively inconsequential, but consider this: the Civil Rights Act of 1964 was passed thanks to the Commerce Clause. Segregation in the private sector was largely brought to its knees by the Commerce Clause. Businesses cannot fire workers for being part of a labor union because of the Commerce Clause. And despite the fact that in recent years, the Supreme Court has cut back on the extent of the powers granted to Congress by the Commerce Clause, there was once a point in time where Congress could regulate effectively anything it wanted, provided it could tie that issue to interstate commerce in some way, shape, or form. And as if that were not enough power already, the Supreme Court generally held that the party responsible for defining what exactly interstate commerce consisted of was none other than Congress itself. In other words, for a long period in American history, the Commerce Clause was basically a blank check given to Congress by the Supreme Court, and the case that created that blank check was \textit{Gibbons v. Ogden}.\(^{22}\)

\(^{22}\) U. S. Constitution, Art. I, § 8, cl. 3.
CASE #4: Gibbons v. Ogden (1824)

The story behind *Gibbons v. Ogden* begins with two men named Robert: Robert R. Livingston and Robert Fulton, the inventors of the steamboat. It was the early 1820’s, and shipping by water was the fastest way to get things moved from one place to another. As a direct result, people in the shipping industry were highly interested in finding better, faster ways of moving things from one place to another, and states with big, high-traffic ports—like the state of New York—were no exception. So New York held the equivalent of an inventor’s contest to see if anyone could come up with a new innovation for the shipping industry, and the two Roberts ended up taking the prize by inventing the steamboat. In return, the state of New York gave the two Roberts a grant entitling them to “exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years”23. In other words, the two Roberts gained a monopoly on steamboat shipping on the waterways of New York State for some given period of years. And they in turn were allowed to authorize other people to use steamboats on New York waterways, which they eventually did. However, the monopoly license that New York offered to the two Roberts was not the only boating license in existence at the time. The federal government had created a mandatory federal license, too, under the Federal Coastal Act of 1793. Thus, there were two possible licenses concerning shipping on New York waters: a federal-issued one and a state-issued one. And these multiple licenses led directly to the matter of Gibbons and Ogden.

At one point in time, Gibbons and Ogden were partners in a shipping business that involved shipping cargo from New Jersey to New York and then back again. However, the partnership eventually went sour, and the two of them parted ways. Both also continued their

shipping businesses, which in part included ferrying commuters from the New Jersey side over to the New York side and back again.

Eventually, Ogden came to the decision that he did not want his good old ex-partner Gibbons to engage in the ferrying business anymore, and so he decided to sue Gibbons for illegally operating a boat on New York waters without a proper license. Here, the matter of the two licenses becomes relevant: Gibbons only possessed the federal license mentioned earlier, issued under the Federal Coastal Act of 1793. Ogden, on the other hand, had been licensed by the two Roberts to operate his steamboat, so he had the state permit that granted certain holders a monopoly on navigation on New York waters. In short, it came down to a question of whose regulatory law would win out: the law of New York State, or the law of the federal government. When the case went to a lower court, the justices ruled in favor of Ogden, and therefore in favor of the state law. Gibbons, not to be outdone, appealed the case up to the Supreme Court—and therefore, right up to review by Chief Justice John Marshall.

As noted in the discussion of the *Marbury v. Madison* case, Chief Justice John Marshall was a pretty staunch Federalist, and he was therefore very much in favor of giving the federal government power over the states. With that in mind, it should come as no surprise that Chief Justice Marshall and his court overturned the lower court’s decision, deciding in favor of Gibbons and the federal law instead of Ogden and the state law. Like *Marbury v. Madison*, this decision could have been resolved simply and neatly in little time at all. However, Chief Justice Marshall instead decided to go one step further and give Congress one of its most versatile and extensive powers while he was at it.

The key to this case deals with the definition of “interstate commerce”, and what that means in terms of the regulatory powers of Congress. In this case, Ogden was advocating for a
"strict constructionist" interpretation of the Commerce Clause, which basically means that Congress can only regulate a set, certain, very narrow number of aspects of commerce between the states, and everything else needs to be left to the states to decide for themselves. Chief Justice Marshall promptly rejected that argument, pointing out that the Constitution never states that the Commerce Clause has to be taken that literally. Quite the contrary, Marshall claimed, the Necessary and Proper Clause exists to expand the powers expressly written down in the Constitution. By Chief Justice Marshall’s interpretation, the Necessary and Proper Clause is effectively a blank check; so long as Congress can tie its actions back to one of its enumerated powers in some way, shape, or form, the Necessary and Proper Clause gives them the right to enact that legislation. In and of itself, the Necessary and Proper Clause is therefore extremely powerful. However, it only gets better for Congress when used in combination with the Commerce Clause.

Chief Justice Marshall then discussed the question of commerce itself: what it is, what it entails, and whether there was interstate commerce occurring in the matter of Gibbons and Ogden. One of the big questions that came up in this case was whether or not navigation was considered to be commerce, which does not seem like it would be that important of a distinction. But at the time, the question of navigation as commerce held vast ramifications for the nation as a whole, as it was tangentially related to the highly controversial issue of slavery.

At this point in history, the southern states were still fairly heavily involved in the slave trade. And trading slaves meant moving slaves, which in turn meant moving people, despite the fact that the Constitution ordered slaves to be counted as only three-fifths of a person for basically everything that mattered. For a time, a distinction was made between moving people and moving goods: moving people was “navigation”, moving goods was “commerce”. As long
as "navigation" and "commerce" were two different things, then Congress could only regulate the latter of the two, and the former was still up for debate. But if navigation were considered to be commerce, then that means Congress had the power to regulate both. Therefore, if Congress could regulate the movement of people between the states and with foreign nations, then Congress would also have the power to regulate the slave trade, and that raised a whole slew of controversial issues for the nation as a whole.

However, despite the potential controversy, Chief Justice Marshall decided that yes, navigation is indeed included in the definition of commerce, as commerce means "commercial intercourse"\(^24\), and the people being moved from one state to another were involved in commercial activities in those states—such as going to work, spending money, et cetera. He also pointed out that yes, this was considered to be commerce among the states, since commerce extends beyond state borders, and there was more than one state involved in the commerce in question. As the people were moving from New Jersey to New York and then back again, there were therefore two states involved in the transit, which meant the activity was indeed interstate commerce. Marshall also made it a point to note that the Commerce Clause only concerns interstate commerce, which means that in order for the Commerce Clause to apply, at least two states have to be involved. In issues dealing with commerce solely within one state, the Commerce Clause does not apply, and Congress does not have the power to regulate that issue. But as navigation was a part of commerce, and it was taking place between two states, it became interstate commerce. And that gave Congress the power under the Commerce Clause to regulate it.

However, Chief Justice Marshall did make sure to draw a distinction between commerce within a state and commerce between states. The states retain some power to regulate commerce

\(^{24}\) Gibbons v. Ogden. 22 U.S. 1 (1824).
according to their "police powers", which concern issues of health, safety, and welfare. But even if the activity takes place solely in one state, the state's laws still cannot violate federal laws. By Marshall's distinction, so long as there is no infringement on federal law and the states are regulating based on their valid police powers, then they have the ability to regulate commerce within their borders. In contrast, anything that goes on between two or more states is considered interstate commerce, and that means Congress retains the power to regulate.

Ultimately, Chief Justice Marshall and his court unanimously ruled that the New York licensing law was decidedly in conflict with the federal licensing law, and because federal laws always trump state laws due to the Supremacy Clause, the New York law had to be unconstitutional. Gibbons won his case, Ogden lost, and Chief Justice Marshall handed Congress what would eventually become its most powerful tool for getting stuff done: an expansive interpretation of the power granted by the Commerce Clause.

Now, all things considered, this really does not seem like such a landmark case, especially not when held in comparison to cases like Marbury v. Madison or Griswold v. Connecticut. But Gibbons v. Ogden is important simply because it was the case that got the ball rolling for many other cases concerning the Commerce Clause, many of which led to a huge expansion of the power of Congress. As mentioned in the introduction to this case, the expansion of power grew so great that eventually, Congress was regulating issues of civil rights based on the Commerce Clause. More significantly, using the Commerce Clause to regulate those issues was considered more constitutional than using the Equal Protection Clause of the Fourteenth Amendment to do the same exact thing. And Congress was able to use this power for essentially anything it wanted, because as far as the Supreme Court was concerned, it was up to Congress to decide whether or not an issue had a close and substantial relation to interstate commerce, and if
Congress believed that it did, then Congress's word on the issue was good enough for the Court. That makes for *effectively limitless* power on the part of Congress. And while it should be noted that the commerce power has been somewhat reined in by the Supreme Court in recent years, that is still a fairly recent development, and even *with* those limitations, the commerce power is still quite possibly the most formidable power that Congress currently has. *Gibbons v. Ogden* was the case that opened the door on that whole new arena of power for Congress, and that is why it is worthy of being called a case everyone should know.
FREEDOM OF SPEECH: *Cohen v. California (1971)*

If there is one freedom and privilege that every person in America loves to claim, it is the freedom of speech. Much the way that “taking the Fifth” and the *Miranda* rights have become permanently intertwined in the mindset of popular culture, so too has the First Amendment become permanently associated with the right of free speech, despite the fact that the First Amendment also makes four other guarantees of freedoms as well: the freedom of religion, freedom of the press, freedom of assembly, and the right to petition the government for a redress of grievances. Interestingly enough, however, the freedom of speech is not even the first freedom guaranteed by the First Amendment; it is actually the second guarantee made, with the freedom of religion being the first. And yet, if there is one thing that most people instantly think of when someone says “the First Amendment”, it is the freedom of speech.

However, as with any right, there is still the lingering problem of figuring out what exactly free speech actually means, how far it extends, and what it does and does not protect. As with many other rights, there have been dozens of Supreme Court cases that have attempted to provide an objective, concrete standard for which speech is protected and which speech is not. For example, whether they are conscious of it or not, most people are aware of the phrase “clear and present danger” and of the fact that a person yelling “fire” in a crowded theater is not protected speech under the First Amendment—both famous quotes arose from the majority opinion in *Schenck v. United States*, an early case that dealt with free speech and First Amendment protections. However, it is generally accepted in this day and age that there is more to the idea of “free speech” than simply the spoken word. To some extent, conduct can also be factored into free speech, which then creates a distinction between “pure speech” and “symbolic
speech”. Can actions be considered speech, and therefore protected by the First Amendment? And if so, what actions, in which contexts, on what terms?

The following case joined many others in helping to define the meaning of free speech, but this case in particular stands out because the subject matter it concerns will likely be relevant and interesting to the target demographic of this work—which is to say, it involves the use of the ‘F-bomb’. Of course, no right is absolute, and it is generally understood that even free speech is going to come with some limitations on it. But thanks to Cohen v. California, the average American’s right to drop the ‘F-bomb’ in public is secure.
CASE #5: Cohen v. California (1971)

Cohen v. California is a relatively short and straightforward First Amendment case that began with a California law prohibiting people from “disturbing the peace”. In particular, the law prohibited “maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person...by...offensive conduct”\(^{25}\). One day, while a man named Paul Robert Cohen was standing in the corridors of the Los Angeles Courthouse with a jacket proclaiming “Fuck the Draft” on it, he was promptly arrested for disturbing the peace by his offensive conduct, convicted, and sentenced to thirty days in jail. He appealed the case, but the Court of Appeal of California upheld the conviction, stating that “‘offensive conduct’ means ‘behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace’”, and that by wearing his expletive-adorned jacket in a public place, Cohen “might cause others to rise up to commit a violent act against [him] or attempt to forcefully (sic) remove his jacket”\(^{26}\). According to the Court of Appeal, this meant that Cohen had engaged in offensive conduct because wearing the jacket might have made other people angry enough to incite them to beat him up, and that Cohen was effectively acting as a potential instigator in that respect.

Upon receiving this verdict, Cohen promptly attempted to appeal the case again, this time to the California Supreme Court. Unfortunately, that court decided not to receive his appeal, which in laymen’s terms means that the higher court refused to hear the case, and so the lower court’s ruling remained final. Ordinarily, that would have been the end of the case—except for the fact that the United States Supreme Court decided that they actually wanted to make a ruling on it themselves, so they had the case brought up to their court. To dissuade any claims of


improper procedure, given that the Supreme Court skipped over a step or two in the procedural
chain of appeals by having the case brought up so directly, the justices decided to address that in
the majority opinion. They pointed out that as Cohen had been arguing his case based on his First
and Fourteenth Amendment rights, the case was clearly asking a constitutional question, and that
gave the Supreme Court jurisdiction to hear it. And as soon as they did, they reversed the lower
court’s ruling, overturning Cohen’s conviction and allowing themselves an opportunity to create
some precedent for what does and does not constitute free speech in situations such as Cohen’s.

Justice Harlan, writing for the majority, laid out the issue in a step-by-step process. First,
he discussed whether or not Cohen’s conviction was considered a matter of speech or a matter of
conduct. Next, he systematically pointed out all the various kinds of speech that can be
prohibited and regulated by the government. Then, at last, he showed why Cohen’s actions in the
case did not fall into each of those categories.

First, Justice Harlan noted that Cohen’s arrest was based on the fact that the words on the
back of his jacket were considered to be disruptive and offensive, not because he took disruptive
or offensive actions while wearing it. At the time of his arrest, Cohen had been standing in the
corridor of the Los Angeles Courthouse; no one was beating him up because of the words on his
jacket, nor was he going around hassling people in threatening or violent ways, nor was there any
evidence that he was actually making any noise at all, up until the moment when they arrested
him. He was merely a man standing around wearing a jacket with the F-bomb on it. Furthermore,
Justice Harlan used a footnote to point out that when Cohen walked into one of the courtrooms in
the building, he actually took the coat off and wore it “folded over his arm”27; when a policeman
in the vicinity suggested to the presiding judge that Cohen be held in contempt of court, the
judge refused, and Cohen was only arrested after he left the courtroom. Thus, it was the phrase

itself that got him convicted of disturbing the peace, and the extent of his “disruptive” actions was limited to wearing a jacket with an expletive on it in a public place. According to Justice Harlan and the majority, that meant that this case revolved around speech instead of around conduct.

Next, Justice Harlan pointed out that wearing a jacket with the F-bomb on it around in a public place does not meet any of the criteria for other forms of prohibited or regulated speech. It did not qualify as “obscene expression” because the phrase itself was not erotic in nature—which Justice Harlan humorously justified by pointing out that it was highly implausible for anyone to find such stimulation in a “vulgar allusion to the Selective Service System”, anyway—nor is it considered to be an example of “fighting words” because it is not expressly directed or addressed to the people viewing it. Again, Justice Harlan remarked that it was fairly unlikely for anyone to take the phrase “Fuck the Draft” as a direct personal insult, and that in the scenario in question, no one in the vicinity seemed personally agitated or incited toward violence because of the phrase, either. And finally, while the word “fuck” is indeed a generally accepted Bad Word that some people might be sensitive to, that does not mean that the state can automatically prohibit “all speech capable of giving offense” just to protect the public’s delicate sensibilities—and particularly so when the state is only presuming the presence of “unwitting listeners or viewers”. By entering the public sphere, Justice Harlan explained, people put themselves at risk of seeing and hearing things they find offensive; it is simply one of the hazards of leaving the privacy of one’s home.

Thus, as Justice Harlan concluded in his opinion, states cannot make laws that turn certain words into criminal offenses, no matter how offensive those words may be. After all, who

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has the right to decide whether or not one word is more offensive than another? In a particularly famous quote from this opinion, Justice Harlan pointed out that “one man’s vulgarity is another’s lyric”, and that words are “often chosen as much for their emotive as their cognitive force”\(^{30}\).

Prohibiting certain words runs the risk of prohibiting ideas as well, and in Justice Harlan’s opinion, that could very easily lead to governmental censorship to prevent unpopular views. Having the freedom to think and express one’s ideas means having the freedom to engage in potentially offensive language, and as the saying goes, it is the kinds of speech liked least that must be protected most.

Thus, Cohen ultimately won his case, and the right of free speech gained one more aspect of definition. *Cohen v. California* established that even some forms of actions, such as wearing a jacket with an offensive phrase on it, can fall into the realm of free speech, and that the protections on speech extend to more than just the spoken word. That aspect of the freedom of speech is a powerful one, and that makes *Cohen v. California* a case that everyone should know.

Would the world ultimately be different without *Cohen*? To some extent, the answer is yes, since the ruling in *Cohen* did help to further define the protections of the First Amendment with regards to speech and conduct. However, *Cohen* is only one of a vast number of cases regarding the protection of free speech, and there is no single definitive free speech case to point to as particularly groundbreaking or momentous over all the others. The impact *Cohen* made was a minute but important one, and the case itself should be taken and appreciated as a small part of a greater whole—that speech is expression in more forms than simply the spoken word, and that the protections guaranteed by the First Amendment are vast enough to cover those many forms of expression.

CONCLUSION

Hundreds upon hundreds of Supreme Court cases exist on the books, and the task of picking just five to cover was a decidedly daunting one. Obviously, many important and relevant cases did not make the cut, for various reasons, and some people may disagree about whether or not the five cases contained herein are truly the five most important cases of which everyone should be aware. Importance is a subjective concept, and thus entirely susceptible to the biases of its author. Therefore, these are by no means the only cases that the general public should know. However, it is the opinion of the author that each of the cases is noteworthy in its own way, and that the cases provided were selected to span a wide range of concepts that the public should be aware of—judicial review, the right to privacy, the rights of the accused, the vast power of the Commerce Clause, and the limitations and extents of freedom of speech.

The purpose and hypothesis behind this thesis was to take five important Supreme Court cases and make them more accessible to the general public in a way that was both informative and entertaining. The test audience, comprised of a sampling of college students of varying ages, years, and disciplines, gave feedback strongly favoring this hypothesis. One student in particular strongly endorsed this method of conveying information about the Supreme Court, responding that he had always found the history and politics of the Supreme Court to be incredibly boring, save for when the author explained them in the style and fashion of this thesis. Furthermore, he professed his belief that this method would be equally applicable to other areas of study, and that if all studies of history and politics were conducted in this fashion, students would likely retain and understand information much more easily.

Thus, the author concludes that this thesis has achieved its purpose, and therefore is a resounding success.
REFERENCES


U. S. Constitution, Art. I, § 8, cl. 3.

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