

## CONTROLLING LEGAL PRINCIPLES

### *Free Exercise Clause Decision – The “Contemplation of Justice” Olmstead v. United States, 277 U. S. 438, (1928)*



MR. JUSTICE BRANDEIS, *dissenting*.

"We must never forget," said Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 17 U. S. 407, "that it is a constitution we are expounding." Since then, this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed. See *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 96 U. S. 9; *Northern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135; *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163; *Brooks v. United States*, 267 U. S. 432. We have likewise held that general limitations on the powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which, "a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 272 U. S. 387; *Buck v. Bell*, 274 U. S. 200. Clauses guaranteeing to the individual protection against specific abuses of power must have a similar capacity of adaptation to a changing world. It was with reference to such a clause that this Court said, in *Weems v. United States*, 217 U. S. 349, 217 U. S. 373:

"Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions

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and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice

Thoughts, Words and Actions for Plaintiff's Quintessential Rights of the First Amendment:  
*Truths that manifest Life, Liberty & Pursuit of Happiness pursuant to the Free Exercise Clause*

Marshall 'designed to approach immortality as nearly as human institutions can approach it.'

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. *They reach farther than the concrete form of the case there before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employees of the sanctities of a man's home and the privacies of life.* It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security,

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personal liberty and private property, where that right has never been forfeited by his conviction of some public offence -- it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other. [Footnote 3]"

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Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. *Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.* To declare that, in the administration of the criminal law, the end justifies the means -- to declare that the Government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

[Footnote 1]

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. **They knew that only a part of the pain, pleasure**

**and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights, and the right most valued by civilized men.** To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence

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in a criminal proceeding, of facts ascertained **by such intrusion must be deemed a violation of the Fifth.**

Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants' objections to the evidence obtained by wiretapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding. [Footnote 12]

Independently of the constitutional question, I am of opinion that the judgment should be reversed. By the laws of Washington, wiretapping is a crime. [Footnote 13] Pierce's

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Code, 1921, § 8976(18). To prove its case, the Government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue. Compare *Harkin v. Brundage*, 276 U. S. 36, id., 604.

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[Footnote 1]

Otis' Argument against Writs of Assistance. See Tudor, James Otis, p. 66; John Adams, Works, Vol. II, p. 524; Minot, Continuation of the History of Massachusetts Bay, Vol. II, p 95.

[Footnote 3]

In *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 154 U. S. 479, the statement made in the *Boyd* case was repeated, and the Court quoted the statement of Mr. Justice Field in *In re Pacific Railway Commission*, 32 Fed. 241, 250:

"Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books, and papers, from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value."

The *Boyd* case has been recently reaffirmed in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, in *Gouled v. United States*, 255 U. S. 298, and in *Byars v. United States*, 273 U. S. 28.

**MR. JUSTICE BUTLER, dissenting.**

I sincerely regret that I cannot support the opinion and judgments of the Court in these cases.

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In *Boyd v. United States*, 116 U. S. 616, there was no "search or seizure" within the literal or ordinary meaning of the words, nor was *Boyd* -- if these constitutional provisions were read strictly according to the letter -- compelled in a "criminal case" to be a "witness" against himself. The statute, there held unconstitutional because repugnant to the search and seizure clause, merely authorized judgment for sums claimed by the Government on account of revenue if the defendant failed to produce his books, invoices and papers. The principle of that case has been followed, developed and applied in this and many other courts. And it is in harmony with the rule of liberal construction that always has been applied to provisions of the Constitution safeguarding personal rights (*Byars v. United States*, 273 U. S. 28, 273 U. S. 32), as well as to those granting governmental powers. *McCulloch v. Maryland*, 4 Wheat. 316, 17 U. S. 404, 17 U. S. 406, 17 U. S. 407, 17 U. S. 421. *Marbury v. Madison*, 1 Cranch 137, 5 U. S. 153, 5 U. S. 176. *Cohens v. Virginia*, 6 Wheat. 264. *Myers v. United States*, 272 U. S. 52.

**This Court has always construed the Constitution in the light of the principles upon which it was founded.**

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The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words. That construction is consonant with sound reason, and in full accord with the course of decisions since *McCulloch v. Maryland*. That is the principle directly applied in the *Boyd* case.

When the facts in these cases are truly estimated, a fair application of that principle decides the constitutional question in favor of the petitioners. With great deference, I think they should be given a new trial.

\* *Ex parte Jackson*, 96 U. S. 727. *Boyd v. United States*, 116 U. S. 616. *Weeks v. United States*, 232 U. S. 383. *Silverthorne Lumber Co. v. United States*, 251 U. S. 385. *Gouled v. United States*, 255 U. S. 298. *Amos v. United States*, 255 U. S. 313.