Chapter 2

Constitutional Principles

In framing a government, which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place, oblige it to control itself.
James Madison

CHAPTER OBJECTIVES

After studying this chapter you should better understand:

- The basic allocation of power in the U.S. Constitution to Congress, the president, and the judiciary
- The basic nature of constitutionally protected individual rights
- The principle of judicial review as expressed in *Marbury v. Madison*
- The basic interpretative approaches that U.S. Supreme Court justices articulated when considering a "right of privacy" in *Griswold v. Connecticut*
- The nature of the "originalist" and "living constitution" approaches to constitutional interpretation

The constitutional framers' world was very different than ours. They came from 13 colonies with British heritage, all near the Atlantic coast. The colonies had a combined population of less than 4 million, and only five cities of more than 10,000, and few of the inhabitants could hold office, vote, or pursue higher education. The framers could not have envisioned the dimensions of a country of more than 300 million people of diverse races and cultures living across several time zones. They also could not have anticipated a global economy of heavy industries, consumer markets, and instantaneous electronic communications, median human life spans of more than 70 years, or widespread agreement that gender and race should not limit legal rights and political participation.

The framers could not have foreseen how the country would change, but they knew that it would. The also knew they had a precious opportunity. They sought to invent a government based on libertarian principles that would endure in changing economic and social conditions. The framers were not of a single mind about how to go about accomplishing these ambitious goals. They held views that differed in important ways. Amazingly, they succeeded in building a foundational legal framework that survives into its third century, and they did it with only 4,400 words.

This chapter provides an overview of the main features of the U.S. Constitution and the approaches that judges have employed to interpret it. Judges' understanding of their roles can be best understood in their own words. Accordingly this chapter includes the opinions of two of the most illuminating U.S. Supreme Court cases regarding judicial interpretation, *Marbury v. Madison* and *Griswold v. Connecticut*, and a discussion of their significance.

Text of the Constitution

The U.S. Constitution is a statement of fundamental formal law to which all other formal laws are subject. Article VI, the Supremacy Clause, provides, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Ultimately even this supreme formal law is subject to the power of those who can change it. Article V provides that amendments may be proposed by either two thirds of both houses of Congress or through a convention called by two thirds of the state legislatures, and the amendments become effective if three fourths of the states or state conventions approve. The Constitution can be changed, but the task was purposely made difficult.

The text of the Constitution often describes governmental powers or individual rights only in general terms. The Constitution gives the federal government limited powers, and it provides assurances that those powers may not be exercised at the expense of protected individual rights.

Federal Government

The first three articles of the Constitution establish the legislative, executive, and judicial branches. These articles are the source of authority for Congress, the president, and the federal judges.

Congress

Article I established Congress and empowered it to make laws. The article's sequential preeminence reflects the framers' political philosophy that among the three branches the body of representatives elected from all of the states is most closely connected to the people. Through the "Great Compromise" two bodies were established to balance power between large and small states, with House of Representatives membership based on population but each state having two members of the Senate. Initially citizen voters elected representatives, and state legislators elected senators. With the Seventeenth Amendment, ratified in 1913, the people also elected senators.

Congress was given power over the matters most likely to be subject to abuse: taxation, raising an army and navy, and declaring war. An income tax was not authorized until 1913 with the Sixteenth Amendment, which funded a vast expansion of the federal government. As noted in Chapter 1, in the original Constitution, Congress was also given powers later construed to be very broad, including the power to "regulate commerce . . . among the several states" and "[t]o make all laws which shall be necessary and proper for carrying into execution" the enumerated powers.

In the interwoven system of checks and balances the House of Representatives has the sole power to subject another official to impeachment, and the Senate has the sole power to hold a trial to determine whether the official is to be removed. This process for removing a president and federal judges has rarely been invoked, but it reflects the framers' concern about the tendency of those with power to want to expand their influence.

President

Article II provides for a president in whom the "executive power" is vested. No explanation is given about what constitutes the executive power. The Constitution's text does state that the president is the military's commander in chief. A number of other specific presidential powers are listed: to grant pardons for offenses against the United States, to make treaties with the approval of two thirds of the Senate, and to appoint ambassadors and judges "with the advice and consent of the Senate."

Article II also provides that the president and other civil officers "shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." This set a standard for Congress's exercise of its power to remove the president.

Judiciary

Article III only generally describes the federal judiciary and its powers. It says, "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Constitution lets Congress set the number of the Court's justices and its procedural rules, as well as the configuration of inferior federal appellate courts and trial courts.

The Constitution provided further guidance about federal court jurisdiction. In addition to specifying a number of types of cases that the federal courts would decide, such as maritime disputes and cases involving treaties and ambassadors, it gave federal courts jurisdiction over cases arising under the Constitution and federal law, cases in which the United States is a party, and disputes between states and between citizens of different states.

Article III also provides that federal judges have life tenure "during good behavior," which tends to insulate judges from the influences that could affect them if they were subject to elections. Life tenure has been criticized for allowing judges to remain on the bench for too long, preventing an infusion of better attuned and more energetic younger judges.

Individual Rights

Framers James Madison, Alexander Hamilton, and others argued that mention of specific individual rights in the Constitution was unnecessary because the federal government has only the limited powers expressly given. Enumeration of certain rights became a political necessity when Thomas Jefferson and others insisted that fundamental rights were at risk of encroachment unless explicitly stated. Madison eventually agreed and introduced the first 10 amendments, known as the Bill of Rights, in the first session of Congress.[1]

Fundamental religious and speech rights are stated in the First Amendment in simple terms: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Some of the difficult interpretive issues that have arisen regarding these prohibitions are discussed in Chapter 4 of this book.

The Second and Third Amendments reflect the framers' experience with oppressive British military occupation and concern about expansion of federal power over the states and individuals. The Second Amendment provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Although this clause refers to the militia, the courts have interpreted it as guarantying a right of personal gun ownership. The Third Amendment prohibits military occupation of homes without the owner's consent "but in a manner to be prescribed by law," addressing one of the abuses that had been cited as inspiring the American Revolution.

Several amendments address rights in connection with police actions and criminal prosecutions, as discussed in more detail in Chapter 10 of this book. The Fourth Amendment prohibits "unreasonable searches and seizures" and requires that warrants for searches be issued only "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fifth Amendment requires a grand jury indictment for certain serious crimes, prohibits compelling criminal defendants to testify against themselves, and prohibits a trial of the same person more than once for the same offense. In addition, the Fifth Amendment contains what is known as the Due Process Clause, broadly providing that no one may "be deprived of life, liberty, or property, without due process of law," which is discussed in Chapter 3. Additional criminal prosecution provisions are in the Sixth Amendment, which assures defendants of "a speedy and public trial" by "an impartial jury," as well as guarantying a right to be informed of the accusation, to confront accusing witnesses and call witnesses, and to have defense counsel. The Eighth Amendment prohibits "excessive bail" and "cruel and unusual punishments."

The Fifth Amendment prohibits private property from being taken for public use "without just compensation." This clause implicitly confirmed the power of government to take private property but only if for "public use" and only if the owner is paid for the value of what is taken. The courts' notion of what constitutes public use has evolved over time to include more than just actual use but also uses providing a "public benefit," an interpretation that recently has received much public attention and is discussed in Chapter 6.

The Seventh Amendment guaranties a jury trial for "suits at common law," which includes cases in which private legal rights are determined, but not "equity cases" in which a court is asked to grant an injunction or to decide a case based on basic fairness.

The final two amendments of the Bill of Rights were included in response to the concern that the list could be considered to be exclusive and that other rights would not be protected. The Ninth Amendment provides that the listed rights "shall not be construed to deny or disparage others retained by the people." The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." This statement made explicit the idea that the federal government is limited only to the powers granted in the Constitution.

The Constitution was amended only twice after the Bill of Rights was ratified and before the Civil War. In 1795 the Eleventh Amendment made clear that a state could not be sued in the federal courts by a citizen of another state or country. In 1804 the Twelfth Amendment required voters to choose a president and vice president rather than having the presidential runner up become the vice president. The next three amendments are known as the Civil War Amendments. The Thirteenth Amendment and Fifteenth Amendment, respectively, simply abolished slavery and prohibited the states from denying the vote on the basis of race. The intervening Fourteenth Amendment was more complex and proved to be laden with the potential for considerable interpretive disagreement. In addition to assuring individuals in previously rebellious states of the same rights as individuals in the loyal states, the Fourteenth Amendment provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This language includes what are known as the Due Process Clause and the Equal Protection Clause, both of which were to be later employed by the U.S. Supreme Court in invalidating state legislation. These clauses are discussed in the next chapter.

In the 1900s several amendments addressed specific fundamental rights. The vote was at last extended to women in 1920 with the Nineteenth Amendment, almost a century and a half after the Constitution was ratified. Previously the U.S. Supreme Court had held that the Constitution did not extend the right of suffrage to anyone. The Twenty-Fourth Amendment, ratified in 1964, prohibited a poll tax in a federal election. In 1971 the Twenty-Sixth Amendment mandated an 18-year-old voting age.

History also has proved that amending the Constitution may not be an effective way to alter behaviors despite apparent popular agreement about the desirability of change. In 1920 the Eighteenth Amendment prohibited the manufacture, sale, or transportation of liquor. Prohibition was ineffective in eradicating liquor consumption. Instead it resulted in a lucrative illegal liquor market that heavily burdened law enforcement resources and, in 1933, during the Great Depression, the Twenty-First Amendment was ratified to repeal the Eighteenth Amendment.

There have been a total of 27 amendments—only 17 since the Bill of Rights was ratified in 1791. As the discussion above shows, few of the amendments were instruments for change.

Law has shifted fundamentally over time through another process—judicial interpretation—which is not reflected in the constitutional text.

Who Decides What the Law Means?

Within a very short time after ratification of the Constitution national leaders disagreed about key provisions governing the powers of the branches of government. What does it mean for Congress to have the power "[t]o regulate commerce . . . among the several states" and "[t]o make all laws which shall be necessary and proper for carrying into execution the" enumerated powers, for the president to have "[t]he executive power," and for the U.S. Supreme Court to have "[t]he judicial power of the United States"? The framers also left much room for disagreement about individual rights, such as what it means to prohibit any person from being "deprived of life, liberty, or property, without due process of law." There is nothing in the Constitution that says that the legislature and executive must look to the courts as the sole interpreter of the Constitution.

Judicial Review: *Marbury v. Madison*

As the United States underwent its first serious shift in the political orientation of its national leadership, a case came before the U.S. Supreme Court to test how a challenge to a law's constitutionality would be addressed. As Federalist John Adams was relinquishing power to Republican Thomas Jefferson in 1801, Adams made last-minute appointments of loyal Federalists to government posts, including William Marbury as a justice of the peace in the District of Columbia. Adams' secretary of state, John Marshall, signed a commission for Marbury before leaving office. Jefferson, looking to keep Federalists from office during his term, directed his secretary of state not to complete delivery of commissions. Marbury and other appointees looked to the Court, of which the same John Marshall was now chief justice, for a writ of mandamus to order the president to deliver the commissions.

Marshall took up several issues that were central to the newly established government. One basic question was this: Who decides whether an act of Congress exceeds the powers entrusted to that body in the Constitution?

Marbury v. Madison
5 U.S. (1 Cranch) 137 (1803)

Chief Justice Marshall, writing for the Court.

At the last term, on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the Secretary of State to show cause why a mandamus should not issue directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the District of Columbia.

No cause has been shown, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it require a complete exposition of the principles on which the opinion to be given by the Court is founded.

The first object of inquiry is,

1st. Has the applicant a right to the commission he demands?

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The appointment, being the sole act of the President, must be completely evidenced when it is shown that he has done everything to be performed by him.

Some point of time must be taken when the power of the Executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act required from the person possessing the power has been performed. This last act is the signature of the commission.

The commission being signed, the subsequent duty of the Secretary of State is prescribed by law, and not to be guided by the will of the President. He is to affix the seal of the United States to the commission, and is to record it.

It is therefore decidedly the opinion of the Court that, when a commission has been signed by the President, the appointment is made, and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State.

The discretion of the Executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

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

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

This brings us to the second inquiry: which is,

2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

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

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

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

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and, being entrusted to the Executive, the decision of the Executive is conclusive.

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

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

The question whether a right has vested or not is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate and proceeded to act as one, in consequence of which a suit had been instituted against him in which his defence had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.

So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him or to a copy of that commission, it is equally a question examinable in a court, and the decision of the Court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is that the latest point of time which can be taken as that at which the appointment was complete and evidenced was when, after the signature of the President, the seal of the United States was affixed to the commission.

It is then the opinion of the Court: That, having this legal title to the office, he has a consequent right to the commission, a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3d. He is entitled to the remedy for which he applies.

Blackstone, in the 3d volume of his Commentaries, page 110, defines a mandamus to be "a command issuing in the King's name from the Court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the King's dominions requiring them to do some particular thing therein specified which appertains to their office and duty, and which

the Court of King's Bench has previously determined, or at least supposes, to be consonant to right and justice."

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, "to do a particular thing therein specified, which appertains to his office and duty and which the Court has previously determined or at least supposes to be consonant to right and justice."

These circumstances certainly concur in this case.

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

This, then, is a plain case of a mandamus, either to deliver the commission or a copy of it from the record, and it only remains to be inquired . . . whether it can issue from this Court.

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

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

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

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

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

When an instrument organizing fundamentally a judicial system, divides it into one Supreme and so many inferior courts as the Legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the Supreme Court by declaring the cases in which it shall take original jurisdiction, and that in others it

shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases, its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to the obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that, if it be the will of the Legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true; yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that case. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper is, in effect, the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this to enable the Court to exercise its appellate jurisdiction.

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

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

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

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

The Government of the United States is of the latter description. The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act.

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

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

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

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

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

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

This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

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

Marshall expressed a notion that has become synonymous with the rule of law: that everyone, including the highest executive, is subject to the enacted laws. As Marshall famously said in *Marbury v. Madison*, "The Government of the United States has been emphatically termed a government of laws, and not of men." He explained that in some matters a president has political discretion but in others is as much bound by the law as anyone else. This was not in dispute. The more difficult question was this: Who decides when an act exceeds constitutional authority?

Even those who think they understand the legal system may be surprised to know that the Constitution does not say that the judiciary interprets it, as Marshall concluded. Nor did the

leaders at the time agree that this was so. Revolutionary intellectual Jefferson did not believe that the federal courts had the power to declare an act of Congress to be unconstitutional. He believed that giving judges the power to override legislative acts would be "very dangerous" and tend to "place us under the despotism of an oligarchy."[2] His view was that each branch must decide for itself about the validity of its actions, with the ultimate check on excess resting with change through the election process.[3] Jefferson, Madison, and others also believed that state autonomy within the federalist arrangement would constrain Congress from assuming powers not granted in the Constitution. According to this view, the states were not bound by acts of the national government that exceeded the limited powers granted to it. Jefferson invoked this power of state nullification in his Kentucky Resolution of 1799, which declared void the federal alien sedition laws that among other things allowed for the arrest of those who published "malicious" statements about the government. Jefferson argued that the states that ratified the Constitution had the "the unquestionable right to judge of its infraction" and to nullify an unauthorized act.

Jefferson could have challenged Marshall's position that the Court had the authority to refuse to enforce an act of Congress. The executive, not the judiciary, had force at its disposal. But Marshall brilliantly crafted the decision in a way that did not call for any action by any of the other branches. He said that although the president must honor the judicial appointments, the Court had no power to issue a writ of mandamus, so it could do nothing about it. Jefferson did not publicly contest the Court's interpretation of its powers, and over time the principle of judicial review became a foundation of the constitutional system. The courts do not often declare a statute to be unconstitutional, but the assumption that they have the power to do so stems from the analysis in *Marbury*.

How Is the Constitution Interpreted?

The U.S. Constitution often describes governmental powers or individual rights only in general terms. How do judges decide what the generalities mean? For most of the U.S. Supreme Court's history justices did not address this question directly. They began to do so in the second half of the 1900s, when they disagreed about their authority to invalidate statutes affecting evolving notions of individual rights. The 1960s in particular were a turbulent period during which judges staked out opposing points of view. *Griswold v. Connecticut* is an excellent example.

Molding the Constitution: *Griswold v. Connecticut*

In *Griswold v. Connecticut* the defendants were medical professionals who were fined for violating a Connecticut statute by giving advice about contraception. The U.S. Supreme Court justices agreed that such a prohibition was a bad law, but they disagreed about whether the Court had the constitutional authority to strike down the Connecticut legislation. The justices' opinions illustrate the main differing views about constitutional interpretation.

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

Justice Douglas, writing for the Court.

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

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

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

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

The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment.

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

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

The [Court's] cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth

Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630 (1886), as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred in *Mapp v. Ohio*, 367 U.S. 643, 656 (1961), to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people."

We have had many controversies over these penumbral rights of "privacy and repose." These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307 (1964). Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

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

Justice Goldberg, concurring.

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that "due process" as used in the Fourteenth Amendment incorporates all of the first eight Amendments . . . I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment. I add these words to emphasize the relevance of that Amendment to the Court's holding.

This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights. The language and history of the Ninth Amendment reveal that the Framers of

the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.

The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct. As my Brother Harlan so well stated in his dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 553 (1961):

> *Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.*

In sum, I believe that the right of privacy in the marital relation is fundamental and basic—a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the

Fourteenth Amendment from infringement by the States. I agree with the Court that petitioners' convictions must therefore be reversed.

Justice Harlan, concurring.

I fully agree with the judgment of reversal, but find myself unable to join the Court's opinion. The reason is that it seems to me to evince an approach to this case very much like that taken by my Brothers Black and Stewart in dissent, namely: the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights.

In other words, what I find implicit in the Court's opinion is that the "incorporation" doctrine may be used to restrict the reach of Fourteenth Amendment Due Process. For me this is just as unacceptable constitutional doctrine as is the use of the "incorporation" approach to impose upon the States all the requirements of the Bill of Rights as found in the provisions of the first eight amendments and in the decisions of this Court interpreting them.

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). For reasons stated at length in my dissenting opinion in *Poe v. Ullman*, 367 U.S. 497 (1961), I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

Justice White, concurring.

In my view this Connecticut law as applied to married couples deprives them of "liberty" without due process of law, as that concept is used in the Fourteenth Amendment. I therefore concur in the judgment of the Court reversing these convictions under Connecticut's aiding and abetting statute. These decisions affirm that there is a "realm of family life which the state cannot enter" without substantial justification. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

The Connecticut anti-contraceptive statute deals rather substantially with this relationship. For it forbids all married persons the right to use birth-control devices, regardless of whether their use is dictated by considerations of family planning, health, or indeed even of life itself. The anti-use statute, together with the general aiding and abetting statute, prohibits doctors from affording advice to married persons on proper and effective methods of birth control. And the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment.

In these circumstances one is rather hard pressed to explain how the ban on use by married persons in any way prevents use of such devices by persons engaging in illicit sexual relations and thereby contributes to the State's policy against such relationships. Neither the state courts nor the State before the bar of this Court has tendered such an explanation. It is purely fanci-

ful to believe that the broad proscription on use facilitates discovery of use by persons engaging in a prohibited relationship or for some other reason makes such use more unlikely and thus can be supported by any sort of administrative consideration.

I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law.

Justice Black, dissenting.

I agree with my Brother Stewart's dissenting opinion. And like him I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is to my Brethren of the majority and my Brothers Harlan, White and Goldberg who, reciting reasons why it is offensive to them, hold it unconstitutional.

My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law.

So far as I am concerned, Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm.

Justice Stewart, dissenting.

Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I

believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

We are told that the Due Process Clause of the Fourteenth Amendment is not, as such, the "guide" in this case. With that much I agree. There is no claim that this law, duly enacted by the Connecticut Legislature is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid.

As to the First, Third, Fourth, and Fifth Amendments, I can find nothing in any of them to invalidate this Connecticut law, even assuming that all those Amendments are fully applicable against the States. It has not even been argued that this is a law "respecting an establishment of religion, or prohibiting the free exercise thereof." And surely, unless the solemn process of constitutional adjudication is to descend to the level of a play on words, there is not involved here any abridgment of "the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." No soldier has been quartered in any house. There has been no search, and no seizure. Nobody has been compelled to be a witness against himself.

The Court also quotes the Ninth Amendment, and my Brother Goldberg's concurring opinion relies heavily upon it. But to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history. The Ninth Amendment, like its companion the Tenth, which this Court held "states but a truism that all is retained which has not been surrendered," *United States v. Darby*, 312 U.S. 100, 124 (1941), was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.

At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. If, as I should surely hope, the law before us does not reflect the

standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.

In *Griswold* the majority concluded that the marital relationship was a private matter constitutionally protected against government control. A few years later in *Eisenstadt v. Baird*,[4] the Court built on the right of privacy and held that the Equal Protection Clause entitled unmarried couples to the same kind of privacy. Soon afterwards the right of privacy was invoked in one of the most controversial opinions that the Court ever issued. In the 1973 case of *Roe v. Wade*,[5] a majority of the Court held that a woman's decision about abortion was private during her first few months of pregnancy, with government having power to regulate or prohibit abortions in later stages. *Griswold* was a launching point for later judicial involvement in matters previously left to the legislature, following a course of expansive constitutional interpretation to which some judges and scholars continue to object.

The opinions in *Griswold* encapsulate the two prevailing opposing approaches to constitutional interpretation. A majority of the justices saw their proper role as including protection of rights not expressly stated in the constitutional text. The dissenting justices disagreed, restricting themselves to the constitutional text for protected rights and finding no authority for the judicial discretion assumed by the majority.

Writing for the majority, Justice Douglas did not tie his conclusion to any particular phrase in the Constitution. In his view the expressly protected rights "have penumbras, formed by emanations from those guarantees that help give them life and substance," including a "zone of privacy" into which the government may not interfere. Within that zone, he said, is the marriage relationship. Justice Goldberg cited the Ninth Amendment as a source of judges' authority to find rights not expressly enumerated. The Ninth Amendment, which provides that the enumerated rights "shall not be construed to deny or disparage others retained by the people," had previously been considered to be merely a truism reflecting that the federal government had no powers except as delegated by the Constitution. Justices Harlan and White pointed to the Due Process Clause of the Fourteenth Amendment. Harlan said that the Due Process Clause protects "basic values 'implicit in the concept of ordered liberty'" including contraceptive advice. Justice White said that the Connecticut law violated the Due Process Clause because it affected the behavior of those who are not appropriate targets of it. The common theme in all of these approaches is an assumption of authority by the justices to define what rights are protected by the Constitution.

The dissenters agreed that the prohibition against giving contraceptive advice even to married couples was a bad law, but they did not see the Court as having the authority to invalidate legislation except when it conflicted with something specific in the Constitution.

Approaches to Constitutional Interpretation

The disagreement in *Griswold* illustrates the contrast between two basic notions about the judges' proper role in interpreting the Constitution: on the one hand originalism, variants of

which are called strict interpretation and textualism, and on the other hand living constitution, sometimes called nonoriginalism.

Originalism

Originalism is reflected in the *Griswold* dissenting opinions. As Justice Black explained this view, judges are not charged with updating the Constitution. As he said, "The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification." Originalists reject the notion that judges are better suited than legislators to plumb or respect fundamental law. U.S. Supreme Court Justice Antonin Scalia, described by many as a leading modern originalist but who prefers to be called a textualist, argues that judges are not empowered to "update" the Constitution by applying their notion of current societal values. He says, "Quite to the contrary, the legislature would seem a much more appropriate expositor of social values, and its determination that a statute is compatible with the Constitution should, as in England, prevail."[6]

Originalists look to the constitutional text and context to determine what its general terms mean. As Thomas Jefferson instructed, when interpreting the Constitution "[o]n every question of construction, [we] carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed."[7] With an originalist approach judges consider the evident meaning of words, the way words were used at the time of adoption, the context within the rest of the Constitution, and records of the circumstances and debates surrounding adoption. Scalia acknowledges that interpreting original intent is "a task sometimes better suited to the historian than the lawyer." But originalists see this as a lesser evil than having judges apply their own notions of what the Constitution should be.[8]

Living Constitution

Judges who are characterized as nonoriginalists argue that the framers intended to create a broad and flexible document that would have meaning in unforeseen circumstances. Chief Justice Oliver Wendell Holmes, Jr., expressed this view in 1920, when he said:

> *[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago.*[9]

The term "living constitution" can be traced to Howard Lee McBain's 1927 eponymously entitled book in which he described a constitution that is "elastic, expansile, and is constantly

being renewed."[10] On what do the justices rely to determine just how elastic the Constitution can be? Justices in *Griswold* mentioned "the light of our whole experience," "basic values," "traditions," and the "conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." But as the dissenters asked, by what means are those sensibilities to be determined? Connecticut's elected assembly enacted the restrictive law in question and rejected efforts at its repeal, and the law was upheld by a state trial court and two state courts of appeals.[11] The judges in the majority in *Griswold* implicitly concluded that the Connecticut legislative process did not reflect the "conscience of our people," and said that in such a case it was their duty to invalidate the legislation.

Interpretive Balance

A judge's approach to constitutional interpretation rarely can simply be characterized as either entirely strict textualism or elastic interpretation. There are many variations of interpretative approaches, some of which offer guideposts for determining the extent to which judges should feel constrained by the text. For instance, some scholars argue that judges must be more protective when the issue affects a minority that cannot seek redress through the democratic process. Some judges seem to invoke various approaches depending on the issue. For example, some judges seem to employ an elastic interpretation to carve out social rights but seem more restrictive when considering property rights. Few cases require judges to choose an interpretive approach, and judges have no obligation to announce when they are doing so.

As with so many things involving the law, constitutional interpretation involves a tension between formally expressed rules and contemporary notions of basic right and wrong. The framers left room for much later disagreement about the meaning of the Constitution. We should not be surprised that a willingness to stray from textual support has increased as time has passed and conditions have continued to change. The room left for disagreement can be seen not as a shortcoming but as further evidence of the framers' genius. Their composition has allowed a gradual evolution of the law to accommodate shifts in norms and conditions while constraining lawmakers and judges sufficiently to prevent radical upheaval.

Review Questions

1. What are the main powers given to the U.S. Congress in the U.S. Constitution?
2. What is the nature of the president's powers as described in the U.S. Constitution?
3. What is the nature of the federal judiciary's powers as described in the U.S. Constitution?
4. What is the nature of judicial review as defined in *Marbury v. Madison*?
5. What alternative did Thomas Jefferson propose to judicial determination of the constitutionality of a federal law or action?

6. Based on what analysis did Justice Marshall develop the principle of judicial review in *Marbury v. Madison*?
7. What were the basic interpretative approaches that the U.S. Supreme Court justices articulated when considering a right of privacy in *Griswold v. Connecticut* and which approach prevailed in that case?
8. How do the opinions in *Griswold v. Connecticut* reflect justices' views about the roles of the judiciary and the legislature?
9. Describe the nature of the originalist approach to constitutional interpretation and why its proponents support it and its opponents object to it.
10. Describe the nature of the living constitution approach to constitutional interpretation and why its proponents support it and its opponents object to it.

Notes

1. David N. Mayer, The Constitutional Thought of Thomas Jefferson 146–58 (1994).
2. *Id*. at 271 [quoting Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820)].
3. *Id*. at 270.
4. 405 U.S. 438 (1972).
5. 410 U.S. 113 (1973).
6. Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cinn. L. Rev. 849, 854 (1988–89).
7. Letter from Thomas Jefferson to Supreme Court Justice William Johnson (June 12, 1823).
8. Scalia, *supra* note 6, at 857.
9. Missouri v. Holland, 252 U.S. 416, 433 (1920).
10. Howard Lee McBain, The Living Constitution 3 (1927).
11. Buxton v. Ullman, 156 A.2d 508, 513 (Conn. 1959).