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Introduction:

This material addresses the role of the judiciary in "interpreting" the laws, and discusses some significant contributions the judiciary has made to our form of government.

I. Power of the Judiciary to Interpret the Law

A. Article III of the United States Constitution establishes the federal judiciary. It vests the "judicial Power of the United States" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." It extends "judicial Power" over "cases and controversies" that involve federal law or states and/or citizens of different states. However, the Constitution **does not define "judicial Power."**

B. In the *Federalist Papers*, Alexander Hamilton described the judiciary as the least powerful branch of the federal government. That may have been true until the landmark case, *Marbury v. Madison* (1803), was decided, creating a powerful role for the judiciary in our form of government.

1. Before he left office, President John Adams authorized the appointment of a number of justices of the peace in the District of Columbia and sought to fill the positions with loyal Federalists. The appointments were confirmed by the Senate the day before Thomas Jefferson was to take office, but to be completed, their presidential commissions (the formal appointment document) had to be sealed and delivered by the Secretary of State. Not all of Adams's commissions were properly certified by the time he left office and James Madison,

the incoming Secretary of State and a Democratic-Republican, refused to deliver the completed, but undelivered, commissions to the appointees.

2. William Marbury was one of the appointed justices who had not received his commission by the time Madison took office. He filed suit in the Supreme Court asking for a writ of mandamus—a court order directing a public official to perform the duties of his office—to compel Madison to deliver Marbury's presidential commission. The Constitution did not provide the Supreme Court with the power to issue such writs—rather, Marbury relied on § 13 of the Judiciary Act of 1789, which purported to give the Supreme Court the power to issue the writ.

3. In the opinion for the Court, Chief Justice John Marshall wrote: "It is, emphatically, the province and duty of the Judicial Department **to say what the law is.**" The Supreme Court found that the power granted to it in § 13 of the Judiciary Act conflicted with the scope of the Supreme Court's power in Article III of the Constitution. Because the law was, in the words of Chief Justice Marshall, "repugnant to the Constitution," it had to be struck down.

    a. While the Court held that it lacked the power to issue the writ of mandamus Marbury sought, it, more importantly, established the federal courts' power of **judicial review**—that is, the judiciary's power to review the constitutionality of executive actions or laws passed by Congress, a far greater power and the source of the courts' ability to *interpret* the law.

    b. In this way, the judiciary serves as a check and balance by comparing both laws from the legislature and executive actions against the Constitution and striking down those which are "repugnant to the Constitution."

    c. The power of the judiciary to declare what the law is, however, is also subject to checks and balances. For example, if Congress believes the courts have misinterpreted a statute, even though it was not held

unconstitutional, it can pass legislation to clarify the law or alter the impact of a court's decision. Congress can also start the process of amending the Constitution if it disagrees with the Court's interpretation of the Constitution.

d. But, the judiciary, because it has no power to act independently, must exercise the self-restraint necessary to command respect and ensure support from the executive and legislature for its decisions. This is done through the issuance of reasoned opinions explaining those decisions.

e. An early example of this dynamic can be seen in *Worcester v. Georgia* (1832). Chief Justice Marshall ruled that Georgia state laws seizing Cherokee lands violated federal treaties and laws. Georgia had jailed two missionaries for refusing to obey Georgia's anti-Cherokee laws, and the Supreme Court overturned their convictions. President Andrew Jackson privately sided with Georgia, and this case is the basis for Jackson's apocryphal remark that "John Marshall has made his decision, now let him enforce it." However, when Georgia tried to openly defy Chief Justice Marshall's ruling, Jackson deftly convinced the governor of Georgia to free the missionaries.

f. Georgia's intransigence spurred other states to try to nullify federal laws, however, leaving Jackson with little choice but to ask Congress to authorize the executive to use the military to enforce the Supreme Court's rulings. You can see the historical echo of this when the Supreme Court ordered schools to desegregate in *Brown v. Board of Education* (1954), and the President had to send federal troops to the schools in Little Rock, Arkansas, and elsewhere to ensure compliance.

g. President Jackson eventually hailed his former adversary Chief Justice Marshall as a hero, stating: "I sometimes dissented from the constitutional expositions of John

Marshall, I have always set a high value upon the good he has done for his country. The judicial opinions of John Marshall were expressed with the energy [and clarity,] which were peculiar to his strong mind, and give him a rank among the greatest men of his age."

h. These lessons of history are important to bear in mind as we see the current executive criticizing some of the recent decisions of the judiciary.

II. Important Manifestations of the Judicial Power

A. Commerce Clause Jurisprudence – What Laws Congress Can Pass

1. Congress is a body of **enumerated powers**, meaning that it can only act when doing so under a specific grant of authority in the Constitution. One of the enumerated powers Congress often relies upon when enacting legislation is **the Commerce Clause**, which gives Congress the power to enact laws "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. Art. I, § 8.

2. In *Gibbons v. Ogden* (1824), Chief Justice Marshall rejected a narrow definition of the term "commerce." In that case, the Court held that "commerce" included not only "buying and selling, or the interchange of commodities," but extended to navigation. The Court therefore struck down New York's legislatively-granted monopoly on the operation of steam-propelled vessels because it conflicted with congressional regulation of interstate navigation. Chief Justice Marshall retained the commercial, or monetary, element of "commerce" in the definition of "interstate commerce"—and, accordingly, Congress's power to regulate interstate commerce—has expanded even further over the years.

3. After *Gibbons* and into the 1930s, the Commerce Clause was interpreted not as a source of congressional power, but primarily as a limit on legislation that discriminated against interstate commerce. The Court took a formalistic approach, holding that local activities with only an indirect effect on interstate commerce (such as manufacturing) were within the

province of state governments and beyond the power of Congress to regulate. Meanwhile, activities that were national with a direct effect on interstate commerce could be regulated by Congress.

a. A key example of this formalistic approach is seen in *Hammer v. Dagenhart* (1918). There, the Supreme Court invalidated an early federal child labor law that prohibited the interstate shipment of any goods manufactured or mined by an establishment employing children. The Court found that Congress had exceeded its Commerce Clause power because the law regulated the conditions of production. It held that the power to oversee production was reserved to the states under the Tenth Amendment to the Constitution and could not be regulated by the federal government.

b. The Supreme Court further defined Congress's power in *A.L.A. Schechter Poultry Corp. v. United States* (1935). That case involved a federal minimum wage for workers on poultry farms. Schechter bought and sold chickens in New York only. When he was convicted for violating the minimum wage law, he challenged his conviction claiming that Congress did not have the power under the Commerce Clause to regulate his purely intrastate activity. The government defended the law, arguing that for the minimum wage law to be effective it had to apply to all operators, even if their products did not move in interstate commerce. The Supreme Court found that any effect on interstate commerce resulting from Schechter's business would necessarily be indirect because the company did not buy or sell chickens outside of New York. Accordingly, the Court held, his business was beyond federal reach. By taking such a narrow view of the Commerce Clause, the Supreme Court limited the scope of Congress's power.

4. The Court continued to strike down laws aimed at regulating industry into the 1930s, thwarting Congress's effort to enact

legislation to bring the country out of the Great Depression. After President Franklin Roosevelt proposed increasing the number of Justices on the Supreme Court (which would have enabled him to appoint Justices who would be more sympathetic to the New Deal legislation), two of the Justices "switched" sides and began to uphold the Commerce Clause legislation. After the "switch in time that saved nine," the Court began to defer to Congress's determination of whether activity affected interstate commerce. Congress typically makes a legislative finding discussing the impact on interstate commerce in the opening part of legislation enacted under the Commerce Clause.

a. Another famous example of the Court's doctrinal turn-around came in *Wickard v. Filburn* (1942). The Agricultural Adjustment Act limited the amount of wheat a farmer could grow in an effort to stabilize the price of wheat in the national market. Roscoe Filburn was a farmer who exceeded his wheat quota. He argued that because the excess wheat he grew was for *private consumption*, it did not enter commerce (much less interstate commerce) and could not be regulated by Congress. The Supreme Court upheld the Act stating that if Filburn had not used home-grown wheat, he would have had to buy wheat on the open market. This effect on interstate commerce, the Court reasoned, may not be substantial from the actions of Filburn alone but through the cumulative actions of thousands of other farmers just like Filburn, its effect would certainly become substantial. Therefore Congress could regulate **wholly intrastate, non-commercial activity if such activity, viewed in the aggregate, would have a substantial effect on interstate commerce.**

b. The broader reading of Congress's Commerce Clause power facilitated civil rights legislation in the 1960s. In *Katzenbach v. McClung* (1964) and *Heart of Atlanta Motel v. United States* (1964), a restaurant owner and motel owner, respectively, challenged congressional

authority to enact Title II of the Civil Rights Act of 1964, which made it illegal to discriminate against African Americans in public facilities. The Court upheld the Act as a valid exercise of Congress's Commerce Clause power. With respect to the restaurant, the Court noted that at least half of the restaurant's food was purchased from out-of-state suppliers so there was a sufficient connection to interstate commerce. Likewise for the hotel, the Court noted that 75% of the guests were from outside the state, and the hotel was near two major interstate highways. These facts were sufficient to justify, under the Commerce Clause, Congress's regulation of otherwise local, privately-owned businesses.

5. In the last ten to twenty years, the Supreme Court has begun to cut back on Congress' Commerce Clause power.

   a. In *United States v. Lopez* (1993), the Court found a gun control law to exceed Congress's Commerce Clause power. That case involved the Gun Free School Zones Act, which prohibited the possession of firearms on school property. Alfonso Lopez, Jr. was charged in federal court under the Act after bringing a gun to his school. He argued that Congress lacked the authority to regulate firearms in school zones. The government argued in support of the law, claiming that (1) the possession of a firearm in an educational setting was likely to lead to a situation involving violent crime, which would affect the general economic condition in the area; and (2) the presence of firearms in schools would be seen as dangerous, disturbing people from learning, and leading to a weaker economy. The Court sided with Lopez and struck down the law. Chief Justice Rehnquist wrote: "To uphold the Government's contentions here, we have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior

cases have taken long steps down that road, giving great deference to congressional action. . . . [W]e decline here to proceed any further."

b. In this way, the Court has sought to keep Congress's legislation tied to interstate commerce. Otherwise, Congress would cease to be the body limited to the enumerated powers described in the Constitution.

B. Criminal Procedure – Saying What the Executive Can Do

1. Part of the judiciary's power to say what the law is includes the power to rein in executive conduct that infringes on constitutional protections. In the 1960s, the Supreme Court handed down a number of decisions regarding the manner in which the executive branch investigates and prosecutes criminal cases.

2. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This establishes the constitutional requirement that police must usually obtain a warrant prior to a search or an arrest.

a. In *Mapp v. Ohio* (1961), the Court held that the **exclusionary rule** applied in state and federal proceedings, prohibiting the government from using evidence obtained in violation of the Fourth Amendment's warrant requirement. The goal of this rule is to provide a meaningful method for preventing the police from going beyond their power; if they could violate the Fourth Amendment, but the violation would be forgiven and the evidence obtained via the violation would still be admissible, then the Fourth Amendment's protections would be meaningless. The exclusionary rule acts to deter police misconduct by denying the prosecution the fruits of illegal police conduct.

b. During this time, the Court also defined the scope of the Fourth Amendment protection.

(1) In the case of *Katz v. United States* (1967), the FBI had wiretapped a phone booth that Charles Katz used to place illegal bets. The government used the recordings to obtain a gambling conviction. When Katz moved to suppress the recordings (under the exclusionary rule), the government argued that the warrantless wiretap did not violate Katz's Fourth Amendment rights because it did not physically intrude into the phone booth. The Court disagreed, holding that the Fourth Amendment protection applies to people, not places, whenever a **reasonable expectation of privacy** exists. Because a reasonable person would expect calls made in a phone booth to be private, the government had to comply with the Fourth Amendment's warrant requirement.

(2) Federal courts have created a number of well-recognized exceptions to the warrant requirement. In *Terry v. Ohio* (1968), the Supreme Court held that a police officer with "reasonable suspicion" that criminal activity is afoot, and with an articulable basis to believe that a criminal suspect is armed, has the right to perform a limited "stop and frisk" search. The officer may not only briefly detain a person, but may also pat down the exterior of that person's clothing to remove anything the officer believes to be a weapon.

(a) The scope of the *Terry* exception itself has been the subject of multiple Supreme Court cases. For example, in *Minnesota v. Dickerson* (1993), the Court held that police officers cannot reach into a suspect's pocket during a pat-down unless they believe they feel a weapon. In that case, the Court held

that the police were justified in stopping and frisking Timothy Dickerson under *Terry*, but suppressed cocaine the officers discovered during the pat-down because when the officers took the bag from Dickerson's pocket, they did not believe it was a weapon. Searching a suspect for contraband other than a weapon exceeded the officer-safety rationale for the warrant exception articulated in *Terry*.

3. The Fifth Amendment instructs that "No person . . . shall be compelled in any criminal case to be a witness against himself." The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense."

   a. The basis for the warning we all know from movies and television shows such as "Law & Order" comes from a famous case, *Miranda v. Arizona* (1966). The Court held: "The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him." If a suspect makes a statement during an interrogation, while in police custody, and does not first receive these warnings, the statement cannot be used against him.

   b. This decision has spawned a number of cases examining when a person is considered to be "in custody," whether he is being "interrogated," when the warnings must be given again if the suspect begins to speak after having invoked his right to remain silent, etc. Each of these cases illustrates the courts' power to state what is the law and also to interpret the law under various scenarios.

c. If an indigent defendant cannot afford an attorney, one will be provided for him at public expense. This requirement was first announced by a unanimous Court in *Gideon v. Wainwright* (1963). There, the Court held that the Sixth Amendment's guarantee of assistance of counsel was compulsory both on the federal government and on the states. In order to prosecute a criminal defendant too poor to afford his own counsel, the government is required to provide the accused with an attorney, free of charge.

d. This has led to a substantial increase in government financial support for the Public Defender system. In the federal court system alone the judiciary oversees the expenditure of more than one billion dollars annually for indigent legal defense services.

C. School Context – Applying the law to students and schools

1. First Amendment. A number of cases deal with students' rights to free speech in schools, and what limitations may be placed upon a student's speech.

a. First, in *Tinker v. Des Moines Independent Community School Dist.* (1969), the Supreme Court expanded First Amendment protections to students. To protest the Vietnam War, Mary Beth Tinker and her brother wore black armbands to school. Fearing a disruption, the administration prohibited wearing such armbands. The Tinkers were removed from school when they refused to comply, but the Supreme Court ruled that their actions were shielded by the First Amendment, noting: "Students do not leave their rights at the schoolhouse door."

b. However, the Court has placed limits on students' freedom of speech. In *Hazelwood v. Kuhlmeier* (1988), the principal of Hazelwood East High School edited two articles in the school paper that he deemed inappropriate. The student authors argued that this editing violated their First Amendment right to freedom

of speech. The Supreme Court disagreed, stating that "educators are entitled to exercise greater control over . . . [school- sponsored] student expression," allowing administrators to edit materials to reflect school values.

c. More recently, a Juneau, Alaska, high school student was suspended after he displayed a banner reading "Bong HiTs 4 Jesus" across the street from his school during the Winter Olympics torch relay. In *Morse v. Frederick* (2007), the Supreme Court upheld the administrator's action in the face of the student's First Amendment challenge, finding that the school can restrict student speech at a school-supervised event when that speech is reasonably viewed as promoting illegal drug use.

d. In recent years, the Supreme Court has declined to hear multiple cases involving a student's rights under the First Amendment. This means that circuit interpretation applies in cases dealing with:

   (1) whether teachers have a free speech right to express viewpoints not specifically adopted by the school district (*Mayer v. Monroe County Community School Corp.* (7th Cir. 2007));

   (2) whether depictions on students' t-shirts are protected speech (*Brandt v. Board of Education of Chicago* (7th Cir. 2007));

   (3) whether students and parents have a right to complain about a superintendent in the local newspaper (*Evans v. Jenkins* (6th Cir. 2008));

   (4) whether a school's punishment of a student for displaying violent depictions of a teacher to other students violated that student's right to free speech (*Wisniewski v. Board of Education of Weedsport* (2d Cir. 2007)); and

(5) whether a student has a First Amendment right to select a musical piece to perform at her graduation ceremony (*Nurre v. Whitehead* (9th Cir. 2009)).

2. Equal Protection and Affirmative Action

a. A constantly evolving issue is how the Equal Protection Clause and affirmative action impact children in the public schools. As is well known, the groundbreaking case in school desegregation was *Brown v. Board of Education* (1954). In a unanimous decision, the Supreme Court declared that "separate educational facilities are inherently unequal," ending racial segregation in schools and prompting numerous cases regarding the proper means of integrating schools (e.g., school busing cases).

b. The Court still hears race-based school programming cases today. The most recent example is *Parents Involved in Community Schools v. Seattle School Dist. No. 1* (2007). In the K-12 context, the Supreme Court held that the school district's policy of using race simply to achieve racial integration, and not as a remedy for past discrimination, was unconstitutional. The district's use of a racial tiebreaker in making school assignments was not "narrowly tailored" to a "compelling interest," and was thus a violation of the Equal Protection Clause.

c. Additionally, affirmative action has been a hot-button issue in higher education admissions. In the landmark case, *Grutter v. Bollinger* (2003), Barbara Grutter alleged that her Equal Protection rights were violated when the University of Michigan Law School's attempt to obtain a diverse student body resulted in the denial of her admission application. The law school did not have a quota program, but did take race and ethnicity into consideration when making admission decisions. The Supreme Court upheld the law school's program, finding that institutions of higher education have a legitimate interest in promoting diversity and found that

the law school's program was "narrowly tailored"—designed to harm as few people as possible—in achieving its interest.

d. The undergraduate program at the University of Michigan used a different system to achieve a diverse student body; applicants from "underrepresented" ethnic groups received an automatic 20-point bonus on the 150-point scale used to rank applicants for admission. In *Gratz v. Bollinger* (2003), the Supreme Court struck down this program, affirming the principle that universities have a legitimate interest in promoting diversity, but finding that the automatic 20-point bonus was not "narrowly tailored."

e. Note: In her opinion in *Grutter*, Justice Sandra Day O'Connor stated, "Race-conscious admissions policies must be limited in time. The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable. The Court **expects that 25 years from now, the use of racial preferences will no longer be necessary** to further the interest approved today."

f. But it seems that we're not quite there yet. Recently, (July 25, 2016) the Supreme Court upheld the University of Texas' undergraduate admissions system in *Fisher v. University of Texas* (*Fisher II*). The admissions system is comprised of two components: first, as required by the state's Top Ten Percent Law, the University offers admission to any students who graduate from a Texas high school in the top 10% of their class; second, it fills the remainder of its incoming freshman class (approximately 25% of the class) by combining an applicant's "Academic Index" (test scores and grades) and the applicant's "Personal Achievement Index" (a holistic review containing numerous factors, including race). Abigail Fisher, a Caucasian student, was not in

the top ten percent of her high school class and was not admitted through the combination of her Academic and Personal Achievement indices. She argued that the University's consideration of race in its holistic review process disadvantaged her and other Caucasian students in violation of the Equal Protection Clause. Her case actually made two trips up to the Supreme Court. In a 4-3 opinion this July (Justice Kagan was recused and Justice Scalia passed away in February 2016), the Court upheld the University's race-conscious admissions program as narrowly-tailored to achieve a diverse student body in service of the University's educational goals.

3. Another prevalent issue is the extent to which the Fourth Amendment protects students while in the school setting.

   a. In *New Jersey v. T.L.O.* (1985), a teacher accused a student, T.L.O., of smoking in the bathroom. When T.L.O. denied the allegation, the principal searched her purse and found cigarettes and marijuana paraphernalia. A family court then declared T.L.O. a delinquent. The Supreme Court ruled that no search warrant was needed and her rights were not violated because *students have reduced expectations of privacy in school*.

   b. More recently, the Supreme Court decided *Safford Unified School Dist. v. Redding* (2009), a case concerning a 13-year-old middle school student who was strip searched after it was alleged that she carried prescription-strength Ibuprofen with the intent to distribute it to other students. The Court held that even though the assistant principal had reasonable suspicion that the student was distributing contraband drugs, that suspicion did not justify a strip search of the girl by the school nurse. However, the administrators were entitled to qualified immunity because the rule was not clearly established at the time.

III. Judicial Independence, Accountability and Activism

A. The fact that federal judges must first be nominated by the President and then confirmed by a majority vote in the Senate is a means of holding judges accountable. However, there is concern that this process has become over-politicized. Some express concern that selection includes only those nominees who have passed a "litmus test" on how they might decide cases once appointed. This potentially undermines judicial independence.

B. States balance the competing interest of judicial independence and accountability in different ways. Some states elect judges for set terms. In other states, an executive body appoints judges, but the judges are subject to "approval" elections after a set term.

   a. There are pros and cons to judicial elections. In 2006, over $2.4 million was spent in the primary contest between Chief Justice Gerry Alexander and attorney John Groen for a seat on the Washington State Supreme Court. $1.8 million of that was spent by outside groups supporting one candidate, or opposing the other. On the flip side, elections provide a means for the public to remove judges whose conduct is unconscionable.

C. Recently, judicial activism has been a "hot topic." However, the term is not well-defined and is often used pejoratively. The debate over judicial activism may be better appreciated as a debate over how judges view and interpret the Constitution.

   1. Some people believe the Constitution should be interpreted literally as written and argue that there is no legitimate basis for overturning policy choices of elected officials unless the policy is in direct conflict with a particular provision in the Constitution. Others see the Constitution as a "living" document that the Framers intended to see grow and evolve over time, and they see the judge's role as upholding the law as interpreted to reflect modern experience notwithstanding the political sentiments of the day.

      a. An early case evidencing this debate was *Lochner v. New York* (1905), where the Court invalidated state

legislation aimed at protecting bakers by limiting the number of hours a baker could work each week. Though the New York state government argued the law was necessary to protect the health of the bakers, the Court disagreed, calling the law an "unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract," and thereby violated the Fourteenth Amendment right to Due Process. Justice Oliver Wendell Holmes dissented and exposed the majority's willingness to adopt new applications of the Constitution, stating, "Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular . . . theory."

b. Throughout our country's history, the Supreme Court has continued to expand the umbrella of the Due Process Clause, finding more substantive rights within the clause. For example, in *Meyer v. Nebraska* (1923), Nebraska had passed a law making it illegal "to teach any subject to any person in any language other than the English language." A teacher was charged for violating the law by teaching a student to read German. The Court found that the law conflicted with the Due Process Clause, which, the Court stated, "[w]ithout a doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." Again in dissent, Justice Holmes pointed out that there were arguments in favor of and in opposition to the law. He noted that prohibiting teachers from teaching certain subjects only violated the teacher's, or the student's, constitutional rights if the restriction "passes the bounds of reason and

assumes the character of a merely arbitrary fiat." He concluded that the law at issue "appears to me to present a question upon which men reasonably might differ, and therefore I am unable to say that the Constitution of the United States prevents the experiment's being tried."

c. In *District of Columbia v. Heller* (2008), the Supreme Court issued a landmark decision regarding the individual right to possess a firearm. The Court held that such a right exists under the Second Amendment and that a person may use that firearm for traditionally lawful purposes such as "for self-defense in the home." The Court noted that "the right secured by the Second Amendment is not unlimited," explaining that "nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

d. In 2010, in *McDonald v. Chicago*, the Supreme Court issued an important decision finding that the Second Amendment right to bear arms applies to the states. That means that state laws regulating gun ownership and sales may violate a person's constitutional right to keep and bear arms. Unfortunately, the Supreme Court did not identify any test for determining whether a state's law violates the Second Amendment. Until the Supreme Court addresses the issue again and states an appropriate standard, it is the responsibility of the lower federal courts to develop and apply tests that determine what laws are constitutional and what laws are not.

e. In 2015, the Supreme Court held in *Obergefell v. Hodges*, that the Fourteenth Amendment Due Process Clause requires a state to license a marriage between two people of the same sex and to recognize a marriage

between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

2. The Constitution gives the legislative and executive branches the power to make law and policy because those branches are democratically elected and directly accountable to the people; judges are not politically accountable and therefore are not in a position to "make law" or "legislate from the bench." However, the judiciary must be careful not to allow the legislature or executive to override constitutional protections, simply because the legislature seeks to enact a law which is popular or the power the president attempts to invoke is useful to address a problem.

3. For example, there was substantial popular support for laws establishing "separate but equal" schools. However, these laws were undoubtedly repugnant to the Equal Protection Clause of the Fourteenth Amendment and were rightfully struck down by the Court in *Brown v. Board of Education* (1954).

Conclusion:

The judiciary has made substantial contributions to our form of government through its power to say what the law is, including defining the scope of Congress's power to pass legislation regulating interstate commerce, the ability of the executive to investigate and prosecute criminals, and preserving basic constitutional protections to be free from oppressive actions by the government or even by the majority who oppose minority views. The power of the courts is aided by judicial independence and checked by the number of ways the other two branches hold the courts accountable in the political system.