Big Idea 2: The Courts, Civil Liberties, & Civil Rights

Through the U.S. Constitution, but primarily through the Bill of Rights and the 14th Amendment, citizens and groups have attempted to restrict national and state governments from unduly infringing upon individual rights and from denying equal protection under the law. Sometimes the Court has handed down decisions that protect both public order and individual freedom, and at other times the Court has set precedents protecting one at the expense of the other.

Big Idea 2 Objectives

2.1 - Explain the principle of judicial review and how it checks the power of other institutions and state governments. (5.9)

2.2 - Explain how the exercise of judicial review in conjunction with life tenure can to controversy about the legitimacy of the Court's power. (5.10)

2.3 - Describe ways other branches of government can limit the power of the Supreme Court. (5.11)

2.4 - Explain the extent to which the Supreme Court's interpretation of the 1st and 2nd Amendments reflects a commitment to individual liberty.

2.5 - Explain how the Supreme Court has attempted to balance claims of individual freedom with laws and enforcement procedures that promote public order and safety.

2.6 - Explain the extent to which states are limited by the due process clause from infringing upon individual rights.

2.7 - Explain the implications of the doctrine of selection incorporation.

2.8 - Explain how constitutional provisions have supported and motivated social movements and policy responses.

2.9 - Explain how the Court has at times restricted and protected the civil rights of minority groups.
2.1 Introduction

Madison stated in the Federalist papers that the judicial branch would be the weakest of the 3 branches for it had no power “over the sword or the purse.” Other Enlightenment thinkers agreed like Montesquieu who said, “of the three powers…., the judiciary is next to nothing.” We could argue where the American Judicial Branch ranks among the three branches, but it would be extremely difficult today to say the that branch’s power is “next to nothing.”

2.1A Common Law and Stare Decisis

Our Judicial Branch has significant power. The power resides explicitly in Article III of the Constitution and gives much of the creation and sustaining power to the legislative
branch to determine its size and jurisdiction. Our Judiciary has its basis in the laws of England. In its most basic sense, we fundamentally must understand that there is not specific laws that we can point to cover every situation. To this end, over centuries England developed a system where the decisions of their courts created *precedents* that would be followed for similar future cases. These decisions act like quasi-statutes (laws) in that courts will follow those prior decisions. This is known as *stare decisis* or Latin for “stand by things decided.” Practically, this created fairness in the system. Without a specific law to guide a judge, the punishment given for robbing a bank is 5 years in prison. If the next person caught gets 1 year, this does not promote the fairness of law. The common law decision created a 5 year punishment precedent and stare decisis expects the second person to get 5 years too! It is in this tradition that American legal traditions are based.

Over time England and the United States certainly made laws...that's what the legislative branch’s job IS! But in situations before the court where there is not a specific *statute* (law) to govern the outcome, common law principals are used still today. It is why lawyers and judges spend so much time reading. They are reading about prior decisions and the precedents created to help them understand and figure out the case they are working on in the present.

**2.1A - Judicial Review**

As we have already discussed in Checks and Balances, Judicial Review is the main power of the courts. It must be in Article III right? Strangely it is NOT anywhere in the Constitution. This power was laid down in our history’s first big court case. To keep things as simple as possible, the Supreme Court in its infancy was looking at a law passed by Congress that looked to them to go against provisions in the Constitution. Undoubted, the Court figured, EVERYTHING must follow the Constitution or why have one, right? But the power?! Where did the power come from for the Court to do something, anything when they faced this in *Marbury v. Madison* (1803)? This case laid down an important precedent whereby the Court said THEY undoubtedly had to have the power to interpret ALL laws against the Constitution. It was the most fair they believed from a separation of powers and checks and balances standpoint. Congress should not they argued have the last say in that. Therefore, this power laid down as precedent for the Judiciary to be the defenders of the Constitution that if a statute went again the the Constitution, it was the duty of this branch to nullify its effect for everything must follow the Constitution as the supreme law of the land. The Court also looked toward *Federalist #78* that discussed the role of the courts:

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural
presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. **It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.**

2.1B - Tenure

The Federalist #78 also makes note of what Madison said was crucial for Federal judges: **lifetime tenure.** Madison argued that these position had to be above the fray of political change, factions, and pressure to make decisions that would keep their jobs. It was a new principle. English judges had great autonomy but were subject to the Crown and Parliament. Brutus and others argued this was too great of a power to give. Brutus pointed out these positions were not elected and to give lifetime appointment would give too much power:

> There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.

2.2A Judicial Restraint v. Judicial Activism

One of the great debates that has endured for the history of our nation is the role judges play in the interpretation of the Constitution and their ability to use this great power of Judicial Review. How do you use it? With a heavy hand actively throwing out laws that in any way shape or form possibly violate the Constitution. This is the definition of **Judicial Activism.** Or it is the role of a jurist to give a large amount of clout to the legislative and executive branches that they would only do things that would be in the spirit of the Constitution. In other words, a role that would give strong deference to the other branches, restraining themselves (**Judicial Restraint**) to only use the power of Judicial Review in places of clear violations of the Constitution. This debate and the debate of Strict and Broad Construction continue today.

2.3A Limited the Judicial Branch’s Power

Truly then with lifetime tenure and judicial review the power of the judicial branch is not “next to nothing.” Despite how we feel about some of their decisions, their decisions
have had a strong impact on our history from civil rights and liberties, to powers of the branches, to many other important decisions that truly impact our lives. Furthermore, numerous presidents have pointed to the fact that nominating a supreme court justice is one of their most important functions as our chief executive. But then, how can the power of this branch be limited?

1. **New judges** - upon the death or resignation a new justice can sway a closely divided court. We will discuss how at times voters will vote with an eye on a president who will appoint a justice who has their belief sets.

2. **New legislation** - At times new laws can be passed to overturn decisions. These new laws can by tricky as we have discussed. Unless the Court is specific as to why the law did not pass Constitutional muster, a new law could share the same fate. Constitutional Amendments guarantee that they will not be overturned, but only 27 have ever been passed and only 17 since 1791.

3. **Not enforcing decisions** - Though a fair point to make, it is controversial. On this point Andrew Jackson once famously said to a Supreme Court decision laid down by Chief Justice John Marshall: “Marshall has made his decision, now let him enforce it.” It famously makes the point that decisions are powerless without the executive to follow up with enforcement. Few times in American history has that judicial v. executive showdown taken place, but it does make the point about following decisions with enforcement.
2.4 -2.9 Corresponds with Chapters 4-5

2.4 - Explain the extent to which the Supreme Court’s interpretation of the 1st and 2nd Amendments reflects a commitment to individual liberty.

2.5 - Explain how the Supreme Court has attempted to balance claims of individual freedom with laws and enforcement procedures that promote public order and safety.

2.6 - Explain the extent to which states are limited by the due process clause from infringing upon individual rights.

2.7 - Explain the implications of the doctrine of selection incorporation.

2.4 - 1st and 2nd Amendment and a commitment to individual liberty.

This section gets very heavy on court cases.

Find the links on the website to each court case for more specifics.

The application of the First Amendment’s establishment and free exercise clauses reflect an ongoing debate over balancing religious practices and free exercise of religion, as represented by such cases as:

**Engel v. Vitale** (1962), which declared school sponsorship of religious activities violates the establishment clause

**Wisconsin v. Yoder** (1972), which held that compelling Amish students to attend school past the eighth grade violates the free exercise clause

The Supreme Court has held that symbolic speech is protected by the First Amendment, demonstrated by

**Tinker v. Des Moines Independent Community School District** (1969), in which the court ruled that public school students could wear black armbands in school to protest the Vietnam War.
In *New York Times Co. v. United States* (1971), the Supreme Court bolstered the freedom of the press, establishing a “heavy presumption against prior restraint” even in cases involving national security.

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The Supreme Court’s decisions on the Second Amendment rest upon its constitutional interpretation of individual liberty:

*McDonald v. Chicago* (2010), ruled the Second Amendment’s right to keep and bear arms for self-defense in one’s home is an individual liberty.

### 2.5 - Balancing individual freedoms with laws that promote order and safety

*This section gets very heavy on court cases.*

*Find the links on the website to each court case for more specifics.*

The *Miranda rule* involves the interpretation and application of accused persons’ due process rights as protected by the Fifth and Sixth Amendments, yet the Court has sanctioned a “public safety” exception that allows unwarned interrogation to stand as direct evidence in court.

Pretrial rights of the accused and the prohibition of unreasonable searches and seizures are intended to ensure that citizen liberties are not eclipsed by the need for social order and security, including:

▸ The right to legal counsel, speedy and public trial, and an impartial jury

▸ Protection against warrantless searches of cell phone data

▸ Limitations placed on bulk collection of telecommunication metadata (Patriot and USA Freedom Acts)
Court decisions defining cruel and unusual punishment involve interpretation of the Eighth Amendment and its application to state death penalty statutes.

Efforts to balance social order and individual freedom are reflected in interpretations of the First Amendment that limit speech, including:

▶ Time, place, and manner regulations
▶ Defamatory, offensive, and obscene statements and gestures
▶ That which creates a “clear and present danger” based on the ruling in *Schenck v. United States* (1919).

**2.6 - Due process limiting states in individual rights issues**

*This section gets very heavy on court cases. Find the links on the website to each court case for more specifics.*

The due process clause has been applied to guarantee the right to an attorney and protection from unreasonable searches and seizures, as represented by:

▶ *Gideon v. Wainwright* (1963), which guaranteed the right to an attorney for the poor or indigent

▶ The exclusionary rule that stipulates evidence illegally seized by law enforcement officers in violation of the suspect’s Fourth Amendment right to be free from unreasonable searches and seizures cannot be used against that suspect in criminal prosecution
The court has interpreted the due process clause to protect the right of privacy from state infringement as represented by:

▶ **Roe v. Wade** (1973), which extended the right of privacy to a woman’s decision to have an abortion while recognizing compelling state interests in potential life and maternal health

2.7 - Selective Incorporation

*This section gets very heavy on court cases. Find the links on the website to each court case for more specifics.*

The Court has on occasion ruled on enhancing states’ power over individual liberty in spite of **selective incorporation**, as represented by:

▶ **Gitlow v. New York** (1925), which held that while the First Amendment applies to the states via the 14th Amendment, the states may prohibit speech having a tendency to cause a danger to public safety

The doctrine of selective incorporation has imposed limitations on state regulation of civil rights and liberties as represented by:

▶ **McDonald v. Chicago** (2010), which ruled the Second Amendment’s right to keep and bear arms for self-defense in one’s home is applicable to the states through the 14th Amendment
2.8 - The Constitution has supported specific social movements over time:
This section gets very heavy on court cases.
Find the links on the website to each court case for more specifics.

The application and interpretation of the following Supreme Court rulings and legislative policies illustrate how constitutional provisions can motivate policy responses:

► The Civil Rights Act of 1964

► Title IX of the Civil Rights Act Amendments (1972)

► The Voting Rights Act of 1965

► Brown v. Board of Education
(I) (1954), which declared that race-based school segregation violates the 14th Amendment’s equal protection clause

► Brown v. Board of Education (II) (1955), which held that school districts and federal district courts must implement the court’s decision in Brown v. Board of Education (I) (1954) “with all deliberate speed”
The leadership and events associated with civil, women’s, and LGBT rights are evidence of how the equal protection clause can motivate social movements, as represented by:

▶ Dr. Martin Luther King’s “Letter from a Birmingham Jail” and the civil rights movement of the 1960s. This letter is on the website.

▶ The National Organization for Women and the women’s rights movement

▶ The pro-life movement

2.9 - SCOTUS has at times restricted and protected civil rights of minorities:

Decisions affecting the rights of minority groups demonstrating that minority rights have been restricted at times and protected at other times include:

▶ Plessy v. Ferguson (1896), which upheld “separate but equal” racial segregation by the states

▶ Brown v. Board of Education (I) & (II)

The Supreme Court has upheld the rights of the majority in cases that limit inter-district school busing and those that prohibit majority–minority districting.

The debate on affirmative action includes justices who insist that the Constitution is colorblind and those who maintain that it forbids only racial classifications designed to harm minorities, not help them.