

Student Handout: Supreme Court Nominations and Political Ideology Activity 2, Part A

Name _____

Date _____

Background: In 1787, the framers of the Constitution divided the authority of the federal government into three branches: the executive, legislative and judiciary. Each branch was granted distinct powers and within these powers, checks and balances were established so none of the three branches could become too powerful. In a stroke of genius, the framers also established an institution designed to interpret the constitution's provisions. This institution was the Supreme Court, a concept quite unique at the time. Though this power is not specifically stated in the Constitution, it was intended by the framers as explained in the Federalist Papers in Federalist 78: "Limitations [on government's power] can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."

This inferred power became a reality with the case of *Marbury v. Madison* in 1803. In this case, Chief Justice John Marshall struck down a 1789 law passed by Congress that gave authority to the Court which wasn't granted in the Constitution. Marshall's decision asserted the power of judicial review to the Supreme Court – the power to declare acts of Congress unconstitutional. This power provides the judicial branch with an important check on the powers of the two other branches and keeps in balance the powers of government. In recent years, some conservative organizations and politicians have expressed concern that some judges have over extended this power with rulings that go against the will of the people. When this happens, the judges are accused of being "activists" and "legislating (or making laws) from the bench." Examples of this are court rulings striking down anti-abortion laws, anti-gay marriage laws, and laws allowing the display of the Ten Commandments. Historically, the courts have often decided cases that were not always in the mainstream of society's thinking – *Brown v. Board of Education* that desegregated the schools and providing legal counsel at government expense for those accused of capital offenses. But these too were controversial at the time and the court was questioned by some on its decisions.

Another example of striking a balance of power among the three branches is the power of appointment and "advice and consent." The Executive Branch has the power to appoint members to the Supreme Court (and lower courts) and the Senate has the power to advise and agree to the appointments...or not... thus preserving the balance of power among the three branches of government. At least in theory. The political philosophies or ideologies of either the president or the Senate can influence their decision making. Both branches will assert their decisions of appointment and confirmation are based solely on constitutional principles and the quality and experience of the candidates. However, in reality, political ideology plays a strong role in the decisions surrounding judicial appointments. If the political will of either branch is leaning toward change, then that branch will be looking for judges that are more inclined to look at the law as flexible to a degree. Conversely, if the political will is more inclined to keep the status quo or refer back to the "original intent" of the Constitution's framers, then the choice will be for a judge who is more inclined to rule in that way.

The terminology used to describe a judicial nominee's ideology can be confusing. In nearly all cases, judges rule based on the principles of the Constitution. However, the Constitution is subject to interpretation by these judges. They know the framers of the Constitution wrote the document with the intention that the application of some of its principles would change over time as would the society it was to govern. These methods of interpretations

have been categorized by political analysts and members of the press to help people understand the thinking of a judge in their rulings. It is fair to say, however, that most judges feel their rulings are in accordance with the principles of the Constitution... at least as they interpret them. You can see the difficulty in trying to “label” a judge’s political philosophy. However, since these terms are used frequently, here is a brief description of some of the main judicial philosophies identified:

Strict constructionist or an originalist: This ideology states the text of the Constitution should be strictly interpreted as it was originally understood by the framers. Proponents of this ideology insist that respect for the original understanding of the Constitution is the only way of separating law from politics.

Liberal or sometimes called a progressive: This ideology believes the duty of government is to improve social conditions and make a more equitable society. Liberals see the conditions of the poor, minorities, and disadvantaged as a product of social injustices rather than individual failings. Liberals place an emphasis on environmental protection and the defense of civil liberties.

Conservative: Opposite of liberals, conservatives feel government is not the answer to social problems and that overall, government should get out of the way of its citizens’ lives. In judicial matters, conservatives tend to be traditionalists who believe that judges shouldn’t radically move away from Constitutional principles or case law (previously decided court decisions) except in exceptional cases like *Brown v. Board of Education*. In addition, many conservatives hold strict views on social issues, such as pro-family, anti-abortion, and traditional moral values. At times, some conservatives tend to look practically at issues and focus more on the outcome of a decision than only on the principle.

Libertarian: Libertarians are usually like conservatives in their approach as to what government should or should not do. Most are against the government getting involved in people’s affairs, especially economic liberties. For this reason, judicial libertarians are more likely to over turn judicial precedents in cases protecting economic liberties, but not always individual liberties.

Moderate: Like the story of the Three Bears, moderates fall somewhere in the middle of two extremes. Because of this, it is hard to accurately generalize how moderates think on any specific issue. But it is safe to say they believe that logical approaches and the circumstances involved are a better way to address problems than only relying on principles and the original intent of the Constitution.

Directions: In your small group go to the “One the Issues” website at <http://www.issues2000.org/Court/Court.htm> and review your justice’s position on key issues such as abortion, gun control, crime, homeland security, and their “principles and values” listed at the top of the webpage. You won’t need to review all topics, but look at 2-3 in each of the four categories listed. From this research, determine which of the five ideological categories (or possible combinations of categories) the justice falls into. Then after your group has discussed the justice and come to a consensus on his/her ideology, report your findings to the class by placing the justice on a continuum line at the front of the class.

Strict Constructionist	Conservative	Libertarian	Moderate	Liberal