P Sc 104D, FALL 2012, P Sc 104D
MIDTERM, Pt. I, Questions A & B // Name:
For each Question, you have been graded on four dimensions, earning between 0 and 3 points on each (0=Not attempted/Poor; 1=Unacceptable; 2=Acceptable; 3=Good)

<u>QUESTION A:</u> TWO EXAMPLES TO SHOW THE THINKING BEHIND

,,,, STATEMENT 1 (Are Diff Ways to Define "Judicial Activism"; "Depending on which Conception used, Different Types of Decisions will End up Being Labeled "Activist"
,,,, STATEMENT 2 (Beyond Establishing the Broad Framework, U.S. Constitution plays "only a minor role" in selection of fed'l judges; Much more a function of "Non-Constitutional Traditions, as well as Practical Political Realities"
____ STATEMENT 3 (Crim. Proc. Before Trial: At some points – "judges have significant discretion and influence"; At many other points – "little or no discretion" and therefore "do not have significant opportunities for influence")

EX 1: Clarity/Specificity of Explanation	0	.5	1	1.5	2	2.5	3
EX 1: Accuracy/ Relevance in Exemplifying	0	.5	1	1.5	2	2.5	3
EX 2: Clarity/Specificity of Explanation	0	.5	1	1.5	2	2.5	3
EX 2: Accuracy/ Relevance in Exemplifying	0	.5	1	1.5	2	2.5	3

TOTAL POINTS, QUESTION A:_____

<u>QUESTION B:</u> TWO MOST IMPORTANT DIFFERENCES B/tw TWO CONCEPTS:
,,,, PAIR 1 (Role/Import. of partisan elections in choosing/retaining state trial-level judges /// Role/Import….in choosing/retaining state Supreme Court-justices
,,,, PAIR 2 (Explaining Supreme Court decision-making in terms of justice following their policy preferences /// Explaining…justices responding to legal-system factors
,,,, PAIR 3 (Role of Interests Groups in influencing cases taken and decisions made by the U.S. Supreme Court /// Role of the U.S. Solicitor General…

DIFFERENCE 1: Clarity/Specificity of Explanation	0	.5	1	1.5	2	2.5	3
DIFF 1: Accuracy/ Relevance in Exemplifying	0	.5	1	1.5	2	2.5	3
DIFF 2: Clarity/Specificity of Explanation	0	.5	1	1.5	2	2.5	3
DIFF 2: Accuracy/ Relevance in Exemplifying	0	.5	1	1.5	2	2.5	3

TOTAL POINTS, QUESTION B:_____

= TOTAL POINTS, *PART I* = [[_____]]

SUGGESTED ANSWER OPTIONS,
P SC 104D MIDTERM, PART I, QUESTION A:

[Note: As noted on the Spring 2011 scoresheet, where a statement had two opposing "facets," the best answers generally gave one example for "one facet" and one example for the "other facet"]

Statement 1: Beyond simple minded view…could define judicial activism as…
**Carp, et. al. (p. 90) characterize the Court being free to overrule precedent as belonging "in the restraint column" (Their reasoning is that precedential flexibility frees the Court "to back off when discretion advised a cautious to a problem", thus "withdraw[ing] from a confrontation.") This definition would view as "activist" the Court sticking with a precedent *if* that means a confrontation with the Congress. (For example, sticking with a free speech precedent that required invalidation of a congressional statute – e.g. a law regulating internet indecency – would be "activism.")
**A directly contrasting view would view as "judicial activism" departing from past precedents without extraordinary reasons for doing so; this view regards loyalty to precedent as a major "restraining" influence on judicial discretion. Under this view, a departure from precedent would be activist whether "liberal" or "conservative" in effect. (For example, if the current Court abandons the 9 year old affirmative-action precedents in the UT case without adequate basis, it would be "activist.")
**Baum (p. 162) defines judicial activism as making "significant changes in public policy." This definition would view as "activist" any major change from the status quo whether the change is in a "liberal" or "conservative" direction (if the current approach is liberal, then moving the law back in a conservative direction would be "activist"; if the current approach is conservative, then moving the law in a liberal direction would be "activist.")
**Another definition (which Baum's qualifier on p. 162 -- "especially in policies that the other branches have established" – defines as "activist" a willingness to interpose judicial power between, or second guess, the policy decisions of elected officials at the federal and sub-federal level. Under this view, whether the Court invalidates a "liberal" law (e.g., Obamacare) or a "conservative" law (the Patriot Act), it would be being activist.

Statement 2:
--Minor Constitutional Role: The Constitution merely…
**Gives the president the power to nominate federal judges (like many other federal officials), without stating qualifications or procedures to consult
**Says the Senate shall "advise and consent" to the nomination (doesn't even specify a majority vote as being required, but that is inferred from the fact that the constitutional language doesn't specify 2/3 or 3/4 vote margins, as does at times); again no standards for voting are stated
--*Process by which presidents nominate and interact with Senators "are much more a function*
Legal Factors: A judge may be limited in his/her ability to simply reflect ideological preferences by a number of legal system factors, including:
--precedents which have presumptive validity (under *stare decisis*) and which run counter to the judge's ideology or values
--limitations on court jurisdiction or other doctrines preventing the judge from reaching the merits and ruling as his/her values indicate…
--concerns about the proper judicial role (e.g., judicial restraint) may prevent the judge from second-guessing elected officials, ruling unnecessarily broadly, etc. (thus constraining the judge's ability to reflect ideology or values
--when the relevant legal doctrines are well established, such that a particular case mainly calls on the judge to apply well established principles to a slightly different fact pattern (i.e., "norm enforcement"), rather than break new legal ground ("policymaking")
--*Group Dynamics:* B/c multi-member courts must put together majorities for any position to be binding, individual judges may experience difficulty persuading their colleagues to vote their way and on the legal theories they champion; for one thing, various judges have differences in their personal persuasive powers, willingness to compromise, etc; other examples of how group dynamics could constrain a particular judge include:
--the desire of judges to preserve good interpersonal collegiality

--the tendency of judges in multi-member courts to vote in group patterns (for example, this could prevent a particular judge from being able to counteract the "predictable patterns"
--the "rational choice" theory that judges think about how the ideology and values of other actors (e.g., executive officials responsible for enforcing judicial decisions) will react to different options for ruling
--"cue theory" suggests that other judges on a collegial body, or on lower courts, may provide "cues" influencing particular judges, out of the control of a particular judge seeking to produce a majority in his/her desired ideological direction

--*External Influences:* Any or all of the following may constrain a judge seeking to produce a result favoring his/her ideology or values:

--a desire not to get too far out in front of public opinion
--a desire to continue being supported by the legislative or executive branch, to avoid sanctions such as withholding of resources, reduction of court jurisdiction, etc.
--the ability of the legislative and executive branches to narrow the range of judicial policy-making choices available in legislation under review
--the desire of judges to structure their decisions in a way to enhance the likelihood that they will be followed or enforced (for example, to pull for enforceability, a judge might make a narrower, more "brightline" ruling which nevertheless prevents the ruling from being read expansively in the future…)

[Implicit in the question, also, could be the validity of using one example to show that, although ideology and values are not the *sole* or *primary* factor explaining decisionmaking, it is *an important* or *relevant* factor…]

Statement 3:

Trial and Post-Trial Phases Giving "Significant Opportunities" for Judicial Discretion and Influence

--Ensuring that constitutional rights are observed at the outset of the trial (e.g., a schedule for speedy trial; procedures in place for a fair jury; a valid indictment giving adequate notice of charges, consistent with due process; appointed counsel for indigents)
--Initial removal of jurors "for cause" (e.g., know the parties or lawyers; would resent jury service for needed length; have family member clearly identified with one side or other, etc.)
--Could also say that judges have substantial discretion over some phases of each sides' case, including allowable questions to witnesses (e.g., the judge rules on many objections), and which experts will be allowed to testify and about what subjects
--Instructing the jury about the governing law and directing various verdict options under different assumptions
--Determining guilt or innocence in rare cases when the jury trial right is waived
--Depending upon how much sentencing discretion the applicable statute allows (see below), Sentencing a convicted defendant often has much discretion available, (especially after *Booker,* which made sentencing guidelines largely *voluntary*)
--Appellate courts have substantial discretion and influence on a relatively narrow range of alleged legal/procedural errors

Trial and Post-Trial Phases without "Significant Opportunities"

--Conducting "voir dire" peremptory challenges of jurors, once jurors have been removed "for cause": the examination of individual jurors and the making of decisions about which jurors to use each sides challenges on is largely up to the lawyers for each side [barring real suspicions of racially- or gender-biased patterns of challenges)
--Opening Statements outlining each sides case and intended proof: largely up to the lawyers, within broad parameters
--Developing Each Sides Case, Calling Witnesses, Introducing Evidence, etc.: again largely up to the lawyers, with judges expected to maintain neutrality…but see above
--Influencing the jury's verdict of guilt or innocence (other than minor supervision of the jury – e.g., what if they're deadlocked – judges merely await the result like everyone else)
--Deciding to Prosecute an Individual Arrestee; Deciding where to put prosecutorial focus: prosecutors and other public officials influenced by voters do that
--Grand jury review of "probable cause": happens largely outside of judicial supervision, is a matter between prosecutor and citizen jurors
--Plea bargaining, the means by which the vast majority of criminal cases are resolved, is almost entirely in the hands of prosecutors and defense attorneys; very little judicial supervision
--Some sentencing decisions are constrained significantly, though, by minimum mandatory sentences, tight sentencing ranges, etc.

--But appellate judges have no discretion to change the verdict of guilt or innocence as right or wrong…they can only reverse the verdict (on legal/procedural "reversible error" grounds) and order a new trial.
--Also, recent federal and state legislation has limited the number and scope of appeals, especially in death-penalty cases.

SUGGESTED ANSWER OPTIONS, P SC 104D MIDTERM, PART I, QUESTION B:

Pair 1: Partisan Elections in State Trial-Court Judge Selection vs. State Supreme-Court Justice Selection
--(As Carp, Tables 5-1 & 5-2, pp. 104 & 105, show) Fewer states use partisan elections to select state supreme-court-justice positions than for filling state trial-court judge positions
**11 states use partisan elections for filling state trial-court positions; only 8 use them for state supreme-court positions
**This reflects the significantly greater use of merit selection for state supreme-court positions; both partisan and non-partisan elections are used less
--Given the low level of visibility for state trial-court judge elections (see Carp. p. 104), party labels are likely to be the major source of voter cues. (That is, the voter is less likely to have access to specific information about the candidates individually). On the other hand, given the higher visibility of state supreme-court justice elections (because the highest court's activities are more likely to come to attention of state voters & be made the subject of extensive special-interest campaigns about "hot button" issues – see, e.g., the West Virginia example on Carp p. 106 and the Tennessee example on Carp. P. 108), it is more likely that partisan labels will be viewed in the context of other more specific information. Bottom Line: The partisan label itself is more likely to be influential at the state trial-court level than at the state supreme-court level.
--Other?

Pair 2: Explaining Supreme-Court Decision Making in terms of Policy Preferences vs. Legal System Factors
--OVERALL: Justice policy preferences are more personal to particular justices, whereas legal system factors are more commonly felt by all the justices; among other things, this means that legal-system factors affect the Court collectively and consistently and over time, whereas policy preferences have a more variable effect in any particular era, depending upon the individual preferences of individual justices.
--SPECIFIC DIFFERENCES AND APPLICATIONS OF THIS OVERALL POINT…
**Individual Supreme Court Justices differ as to the strength of their adherence to precedent (EX: Thomas has the least commitment to precedent following, see Baum p. 120, and Scalia also argues to overrules), but ALL JUSTICES are significantly bound by this important legal-system norm
**Individual ideologies (i.e., liberalism vs. conservatism) clearly vary (see Baum, Table 4-2 p. 124, showing the most liberal justice at 70% liberal and the least liberal justice at 28%) – but legal-system factors (including respect for precedent) likely explain why the most liberal justice was still "conservative" 30% of the time, and the least liberal justice was still liberal 28% of the time!
**Another legal-system dynamic that significantly constrains all justices regardless of their policy preferences is judicial self-restraint (including the norm that courts can only exercise judgment if they have jurisdiction discussed at length in Carp. Chapter 4; again, this dynamic helps to explain why even the most "liberal" or "activist" justice declines to intervene in challenges to governmental legislation and policy making, even when it is contrary to their policy preferences
**Policy preferences are highly individual to the justices; they reflect their background, their career experiences before ascending the Court bench (e.g., Stevens describing impact of military experience and father's trumped up criminal charge on his views about policy). By contrast, their legal training and the pressures of legal-system elites are felt fairly uniformly (e.g., in a shared commitment to judicial self-restraint)

Pair 3: Role of Interests Groups in influencing cases taken and decisions made by the U.S. Supreme Court vs. Role of the U.S. Solicitor General…)
--Although both the US SG and interest groups file amicus briefs urging the Supreme Court to take or not take particular cases, the U.S. SG's long-standing "special relationship" with the Court (b/c it represents the federal gov't, which is an ongoing, longstanding litigator in the Court, b/c the SG office has special expertise re: the Court's preferences and decision patterns in cert., etc.) makes them the most influential

determinant of the Court's taking or not taking a case. (Per Baum, p. 94, SG office has "enormously high" success rate in having cases it recommends taken; 2/3 in one 5-year study)
--The SG's office speaks for the federal government officially, whereas interest groups have no official, legitimized role in speaking for a particular industry or social sector. This affects both the SG's
--Because the federal government is such a dominant source of cases in the Court, the SG office develops a "considerable expertise in dealing with the Court" (Baum, p. 94) that leads to great success and is unrivaled by any interest group (although interest groups actively involved in litigation before the Court can "develop some of the solicitor general's advantages")
--A related dynamic of the government's overwhelming caseload in the Court is that the SG's screening function (i.e., deciding whether lower-court decisions should be appealed to the Supreme Court) is more important in influencing the Court's agenda; no interest group has either the breadth or shot-calling power over a comparable category of cases. RESULT: The SG has a more pervasive impact over the Court's agenda setting.
--Another related dynamic of the government's overwhelming caseload in the Court is that the SG's office argues substantially more cases (both as advocate for a federal-government party and as advocate invited by the Court to argue the federal government's position in litigation in which the government is not formally a party) than any individual interest group or even category of groups; so the SG's ability to influence the way the Court decides cases is greater.
--Interest groups can actually "sponsor" cases, in the sense of developing a strategy of how to bring test cases, recruiting plaintiffs, etc.; the SG can't really perform a similar function; the SG largely reacts to lawsuits filed by non-governmental parties and to enforcement and litigation strategies initially taken by other government agencies. RESULT: Interest groups have more of an ability to be policy entrepreneurs, causing issues to be introduced into the judicial pipeline and become salient at the Court.