

**ACS Constitution in the Classroom
Separation of Powers Lesson
High School**

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Overview and Introduction:

This lesson is designed to provide high-school students with information about, and hand-on experience with, the separation of powers. In particular, this lesson aims to review with students the basic functions of our three branches of government and the basic tools that each branch can use to check the others; and to engage students in real-life exercises related to the core separation-of-powers principles.

This topic is (obviously) quite complicated. Law students typically spend weeks studying and wrangling with it in an introductory Constitutional Law course (and much more in advanced courses). Members of Congress, Executive officials, and attorneys debate it in one form or another every single day. And scholars continue to discover and explore new nooks and crannies in the doctrine, even over 200 years after the ratification of our Constitution. Still, with all this work on the separation of powers, we haven't figured out how to measure its precise metes and bounds. (It sometimes seems like the more we learn about it, the less we know.) And amazingly, even with over 200 years of experience, new, important, unsettled, and hotly contested issues involving the separation of powers arise regularly.

This means that the separation of powers is a challenging topic to present to a high-school class, especially within a mere 45- to 50-minute period. This means that our presentations must be simple, interactive, engaging; and our objectives and goals must be appropriate and modest.

This lesson aims to guide high-school students through the stages of Bloom's Taxonomy — or at least as many stages as we might reasonably achieve in a brief, single session. (If you're not familiar with Bloom's Taxonomy, you can readily find excellent summaries and resources online.) In short, this means that the lesson aims to guide students through *remembering, understanding, applying, analyzing, evaluating, and creating*—in that order—based on the material. While you may not be able to take students through each of these stages in your brief time with them, you should be able to get through the first three stages, and provide them with open-ended challenges and questions to *analyze, evaluate, and create* outside of class.

The activities and exercises below, and the times assigned to them, are a suggestive guide, and not a rigid agenda. You should adjust them to your own classroom, your own students, and your own teaching style. But one word of caution: Given the complexity of the material, there is a strong, built-in incentive to use a lecture format in order to deliver the material quickly and efficiently. But try to avoid over-reliance on lecture. Instead, try to use questions to engage the students and gently guide them to the material you wish to deliver. (A good measure of student engagement is the amount of time *you* talk in comparison to the amount of time *they* talk: they should talk more than you.)

Above all: Have fun! You'll create a more memorable experience for your students if you and your students enjoy it. And the more memorable the experience, the more they'll remember of the experience—and the separation-of-powers principles that you share with them.

Objectives:

This lesson has four principal objectives:

1. To review the basic separation-of-powers and checks-and-balances *structure* in the United States Constitution.
2. To review the principal *reasons* for the separation of powers and checks and balances in our Constitution.
3. To examine how the separation of powers and checks and balances operate in an actual, highly contested policy area.

Take-Aways:

By the end of the lesson, students should be able to do the following:

1. Explain in plain and basic language how the separation of powers works; the ways in which the three branches of government can check each other; and why the separation of powers and checks and balances are important.
2. Explain in plain language Justice Jackson's framework for sorting out the separation of powers as between the legislative and executive branches.
3. Explain in plain language the role of the judiciary in sorting out the separation of powers.
4. Apply separation-of-power and checks-and-balances principles to important matters of public policy.

Materials:

1. Chalkboard, white board, or flip chart—something to write on that all students can see.
2. Chalk or markers, with different colors, if possible.
3. Handouts for each student. (The handouts are attached and labeled as "Handout 1," etc.) Bring one handout for each student, and a few extras, just in case.
4. Pocket constitutions for each student.

Introduction (3 to 5 minutes):

- I. Introduce yourself and provide some (brief) background on your professional experience.
- II. Say briefly why you are teaching today: to share some information about our Constitution and how it works.
- III. Ask students briefly about their own experiences with the law or the Constitution, e.g.:
 - A. Raise your hand if you know a lawyer. Ask one or more of the students: Who? How did you meet her or him? What does she or he do?
 - B. Who can tell me a fact about the Constitution? Who can tell me something that is in the Constitution? Who can tell me where they've seen the Constitution referenced in the news?
- IV. State briefly that the lesson today will review the separation of powers and apply separation-of-powers principles to a hotly contested issue in public policy and at the Supreme Court.

Exercise 1: Review of Separation-of-Powers Principles (10 minutes):

This Exercise is designed to review basic separation-of-powers and checks-and-balances principles. It assumes that your students have had some instruction on the separation of powers. (If this proves wrong, you may have to deliver some of the information by lecture.) This Exercise goes to *remembering* and *understanding* in Bloom's Taxonomy.

Option 1: Large-Class Discussion

- I. Ask the class if they can name a branch of government. Write the three branches across the top of the chalkboard, white-board, or flip-chart, and draw lines to create three columns.
- II. For each branch—legislative (Congress); executive (the president); judicial (the courts)—ask the students what they do? List one, two, or three core functions of each branch in the column for that branch, and ask a student to explain what each function means.
- III. For each branch, ask the students how they can check the other branches. Draw arrows from column to column to represent these checks. Ask a student to explain what each check means and how it works.

- IV. Ask the class why it's important to have three branches of government, with different jobs, and with different ways to check each other. (You can use a think-pair-share format for this question, if appropriate. This requires each student individually to think about her or his answer; to find a partner; and to share her or his answer with a partner.) Answer: This keeps power from concentrating in the hands of just one person or a few, and thus avoid tyranny.

Option 2: Small Group Work

- I. Ask the whole class to identify the three branches of government. Write these on the chalkboard, white-board, or flip-chart, as above.
- II. Divide the class into three groups. (Use natural divisions in the classroom, or ask students to count off (one, two, three) to set-up the groups.) Assign one branch of government to each group.
- III. Ask each group to identify one, two, or three core functions of their assigned branch of government, and one, two, or three ways that their branch can check one or more of the other branches of government.
- IV. Ask each group to report out to the entire class. Record the responses, as above, on the chalkboard, white-board, or flip-chart.
- V. Ask the entire class why it's important to have three branches of government, with different jobs, and with different ways to check each other. (You can use a think-pair-share format for this question, if appropriate. This requires each student individually to think about her or his answer; to find a partner; and to share her or his answer with a partner.) Answer: This keeps power from concentrating in the hands of just one person or a few, and thus avoid tyranny.

Exercise 2: Justice Jackson's Framework for the Separation of Powers (15-20 minutes)

This Exercise introduces students to Justice Jackson's framework for analyzing the separation of powers between the legislative branch and the executive branch. This framework comes from Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952). It is the commonly accepted framework for sorting out separation-of-powers problems between Congress and the President. This Exercise goes to *understanding* in Bloom's Taxonomy.

- I. Transitioning from Exercise 1 and the diagram you now have on the board, explain that congressional authority and executive authority often work in harmony, but sometimes clash. We need a way to understand and analyze when the President is acting within her or his authority (and when the act is therefore authorized by the

Constitution), and when the President is acting outside her or his authority (and when the act is therefore unconstitutional).

- II. Here's another way to think about it: Draw Figure 1, "The Separation of Powers—in pictures," on the board. As you draw, explain that the executive branch and the legislative branch have their own assigned authorities under Articles II and I of the Constitution, respectively. These are represented by the two circles. Explain that some of these authorities overlap in an area of concurrent authority, represented by the area of overlap in the two circles.

Ask students for examples of executive authority or legislative authority, and any examples of concurrent authority. Write those on your diagram in the appropriate space(s) to illustrate how some powers are separate and some are concurrent. (You may wish to allow students to consult a pocket constitution to help with this.) (If your students fail to identify authorities, I suggest using war powers as an illustration. The President has the commander-in-chief authority (at least part of which belongs *only* to the President, e.g., commanding troops on the battlefield), while Congress has the power to declare war, establish and fund an army and navy, and set rules for the military (at least part of which belong *only* to Congress). Explain that some of these powers belong to the respective branches *exclusively*, but that some of these powers also necessarily *overlap*.)

- III. Explain that the commonly accepted framework for sorting out the separation of powers between Congress and the President is Justice Jackson's three-part framework from *Youngstown*. Distribute Handout 1, "From Justice Jackson's concurrence." Read Handout 1 aloud as your students follow along with you.

Option 1: Think-Pair-Share

Instruct your students to rewrite Justice Jackson's framework in their own words. (Students can use their own pencils and papers for this, or laptops, if they are available.) Give your students no more than 5 minutes to complete their rewrite. Now instruct students to exchange papers (or laptops) with their neighbor, and to read their neighbor's work. Ask for volunteers to read their own rewrite aloud. Comment appropriately.

Option 2: Large-Group Discussion

Ask for volunteers to summarize Justice Jackson's framework orally, in their own words. Comment appropriately.

- IV. Now illustrate Justice Jackson's framework using your overlapping circle diagram already on the board. Refer to Figure 2, "Justice Jackson's framework—in pictures," to help. Explain which areas of the overlapping-circle diagram represent each tier of presidential authority. Use colored chalk or markers—or if unavailable, different

shading—to distinguish between the different tiers. Refer to examples that your students provided, or the war-powers examples, from II., above, to contextualize your presentation.

Exercise 3: Application of Justice Jackson’s Framework to Policy (25-30 minutes)

This Exercise pushes students to apply Justice Jackson’s framework to a difficult and hotly contested area of public policy, President Trump’s travel ban. It goes to *applying*, *analyzing*, and even *evaluating* in Bloom’s Taxonomy.

- I. Tell students that they will now apply these principles to President Trump’s travel ban, to analyze whether President Trump’s action comports with the separation of powers. Divide students into groups of three or four. (Divide students based on natural class divisions, or have students count off (“One, two, three,” etc.) to a number that equals the number of students in class divided by three or four.)
- II. Distribute Handout 2, “Summary of President Trump’s Travel-Ban Proclamation.” Instruct students to read it silently. Ask if there are any questions.
- III. Instruct students that there are both constitutional and statutory authorities and restrictions on the President that bear on his authority to issue this Proclamation. Ask students what *constitutional* authorities they think are relevant to President Trump’s Proclamation. (You may wish to allow your students to consult a pocket constitution. You may have to prompt your students, or even give them the answers to this question.) (Answers: The President has vast authority (though not necessarily exclusive authority) over foreign affairs and national security, while Congress has vast authority (though not necessarily exclusive authority) over immigration—the power “[t]o establish an uniform Rule of Naturalization.” The Supreme Court is somewhat equivocal on whether one branch or the other has exclusive inherent constitutional power over immigration, and how authority is shared between the two branches.) Write the authorities in the appropriate circles on your diagram.
- IV. Tell students that there are also *statutory* authorities and restrictions that bear on the President’s authority to issue the Proclamation. Distribute Handout 3, “Relevant Statutory Provisions.” Instruct students to read this silently. Tell students that the constable language is italicized in order to draw their attention to it. Ask if there are any questions.
- V. Instruct the students to work in their small groups to analyze President Trump’s Proclamation under Justice Jackson’s framework, using the constitutional and statutory authorities and restrictions in III. and IV., above. Is the President at the height of executive authority, the middle tier, or the lowest ebb? Even if the President is at the lowest ebb, does this necessarily mean that the Proclamation is unconstitutional? (Answer: No, because he may be validly relying on his own

inherent and exclusive Article II authority, like the powers over foreign affairs and national security.) Even if the President is at the apex of executive authority, does that mean that the Proclamation is necessarily constitutional? (Answer: No, because it might violate some other provision in the Constitution, like the Establishment Clause's prohibition against discrimination based on religion. You may wish to give students more information about the Establishment Clause claims against the Proclamation, if time permits, although it is not a part of this separation-of-powers lesson.)

- VI. Ask a representative of each group to report the conclusions to the whole class. Illustrate with reference to the diagram that you already have on the board.

Exercise 4: Supreme Court Vacancy (15-20 minutes)

This exercise is designed to showcase the importance of the separation of powers on a current issue. It will ask the students to think critically and make a well-informed decision while having them participate in a real constitutional process.

- I. Read this section to your students to give them context for the importance of this exercise.
 - a. "The Supreme Court of the United States makes the final decisions on whether laws are constitutional or not. If the Supreme Court decides a law is not constitutional, as it did with segregation in *Brown v. Board*, the law cannot be enforced. Congress can try to change a law to make it constitutional if the Supreme Court rules against it. The Supreme Court only hears about 70 cases per year, but its rulings apply to everyone living in the U.S."
- II. There are two options here: You may assign one student to be the president and have them choose 2-5 other students to be their advisors, thus forming the executive branch. OR You may assign 3-6 students to be the executive and have them choose one student among them to be the President, who will speak for the group.
- III. Have the executive group choose one student in the class to be the Supreme Court justice nominee. They should have three clear reasons why this person should be nominated, write these down on the board. Reasons can range from "they are my best friend" to "they are trustworthy and fair". These reasons will help the judiciary committee and the legislature make their decision.
- IV. The rest of the class will act as the legislative branch. Pull 3-5 students to act as the Senate Judiciary Committee, then divide the rest of the class between pro-nominee and anti-nominee, senators.

- V. At this time the Senate Judiciary Committee can begin to question the candidate about what would make them a great Supreme Court justice. Remember this position is a part of the branch of government responsible for interpreting our laws. The Supreme Court is particularly important because the 9 justices of the Supreme Court of the United States make the legal decisions when the US government is involved in the the legal case.
- VI. Prompt the legislators to give questions to the Judiciary Committee that they can ask the nominee during the 'hearing'. "Remember that Justices for the Supreme Court of the United States must be fair and impartial. If you want the nominee to become a justice, think about what questions you can ask that would show how fair the nominee is. If you are against this nomination, think about what questions you can ask that would show how unfair or biased this nominee is. Remember the 3 reasons that the executive originally stated as to why this nominee was chosen. Are those good reasons?" Remind your class to be kind in their questioning.
- VII. Have the legislators vote. There must be a simple majority for the nominee to be confirmed.

Closing (5 minutes)

Ask your students to write down a public policy or public debate recently or currently in the news that the Justice-Jackson framework would apply to. Ask for volunteers to share their responses, and, if there's time, how they think the policy or debate would come out. Remind the students that the best way to keep our constitutional values strong is to participate in our democracy through voting. Encourage the students to register or if they are in a [state that offers pre-registration](#), to pre-register to vote. You can pass out state specific documents on voter pre-registration and youth poll workers found at <https://acslaw.org/Pre-RegisterToVoteNow>. Thank your students and the teacher.

Handout 1

From Justice Jackson's concurrence in
Youngstown Sheet & Tube Co. v. Sawyer,

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government, as an undivided whole, lacks power. A[n action] by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least, as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables, rather than on abstract theories of law.
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Handout 2

Summary of President Trump's Travel-Ban Proclamation

1. On September 15, 2017, the Secretary of Homeland Security submitted a report to the President recommending entry restrictions for nationals from seven countries that the Secretary determined to be “inadequate” in providing information on their citizens to the United States. The report was based on a worldwide investigation of other countries’ practices and cooperation with the United States in vetting their citizens for connections to terrorists.
2. On September 24, 2017, President Trump issued the Proclamation at issue here. The Proclamation declares that the entry of certain foreign nationals from eight countries “would be detrimental to the interests of the United States” and imposes tailored restrictions on entry by nationals of those countries. For countries that refuse to cooperate regularly with the United States (Iran, North Korea, and Syria), the Proclamation largely suspends entry of all nationals, except for Iranians seeking nonimmigrant student and exchange-visitor visas. For countries that are “valuable counter-terrorism partners but have deficiencies” (Chad, Libya, and Yemen), the Proclamation suspends entry only for nationals seeking immigrant visas and nonimmigrant business, tourist, and business/tourist visas. For Somalia, the Proclamation suspends entry of nationals seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas, in light of the “special concerns that distinguish it from other countries.” Finally, for Venezuela, which “refuses to cooperate in information sharing but for which alternative means are available to identify its nationals,” the Proclamation suspends entry only for government officials “involved in the screening and vetting procedures” and “their immediate family members” on nonimmigrant business or tourist visas.
3. The Proclamation provides for exceptions and waivers when a foreign national can demonstrate undue hardship and that his or her entry would not pose a threat to national security or public safety and would be in the public interest.
4. The Proclamation requires relevant executive agencies to continually assess whether entry restrictions should be continued, modified, terminated, or supplemented, and to report to the President every 180 days.
5. The Proclamation is the third version of President Trump’s travel ban. The two earlier versions were halted in the courts, because they were illegal or unconstitutional or both. Some of the countries in the Proclamation are different than some of the countries in the earlier versions; the earlier versions were not based on a worldwide investigation; and the earlier versions provided for a temporary ban, not a permanent ban.

Handout 3
Relevant Statutory Provisions
Immigration and Naturalization Act

Whenever the President *finds* that the entry of any aliens or of any class of aliens into the United States would be *detrimental to the interests of the United States*, he may by proclamation, and *for such period as he shall deem necessary*, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f).

Unless otherwise ordered by the President, it shall be unlawful for any alien to depart from or enter or attempt to depart from or enter the United States except under such *reasonable rules, regulations, and orders*, and subject to such limitations and exceptions as the President may prescribe.

8 U.S.C. § 1185(a)(1).

[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigration visa because of the person's race, sex, *nationality*, place of birth, or place of residence.

8 U.S.C. § 1152(a)(1)(A).

Youth Voter Pre-Registration:

Young people can register as future voters in states with pre-registration laws, even if they won't turn 18 before Election Day. Pre-registering to vote, as early as 16 in some states, is an important first step in making your voice heard.

ACS encourages everyone to learn more about voter registration in their state. ACS is not a voter registration entity. This is simply an informational tool and is not intended, nor should it serve, as legal advice.