

# POLS 4442: Constitutional Law: Separation of Powers

## Fall 2015

Department of Political Science  
Idaho State University

### 1 Instructor Information

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Office Hours: Tuesdays: 1:00pm to 3:00pm,  
Wednesdays 9:30am to 10:45am  
and by appointment  
Class Location: Rendezvous 123  
Course Time: 11:00 to 12:15 TR

### Teaching Assistant

Michael Sorensen  
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### 2 Course Description and Purpose

At the risk of oversimplifying, politics is a game in which players pursue their interests. Like in any game, the rules matter. In American politics, the rulebook is the U.S. Constitution. However, since the U.S. Constitution is so short and vague, disputes often arise over what the rules mean. To use two recent examples, does Congress' power to regulate interstate commerce extend to mandating everyone purchase health insurance? Can a state legalize recreational drugs?

When the rules are in dispute, players appeal to the umpires or referees. In politics, the referee is the U.S. Supreme Court. Over the past 225 years, the Court has played an active role in defining the powers of each branch of government, outlining where those powers overlap with other branches and, placing limits on the use of those powers. The Court has also been at the forefront in defining the proper operation and functions of a federal system, placing limits on the power of the individual states to encroach on the operation of the federal government, as well as limiting the federal government from taking on functions traditionally performed by states. In this course, we explore these rules, and how they have changed over time.

I expect that when you have completed this course you will have a strong understanding of the basic principles that define the powers of the three branches of government and their relationship with each other. You should also better understand the complex, and evolving relationship between the federal government and the states.

Another primary purpose of this course is to improve your critical reading, writing, and organizational skills. Toward that end, this course will emphasize writing succinctly in the form of legal briefs. You will learn to brief Supreme Court cases, and exams will evaluate your ability to extrapolate from the cases themselves and construct arguments that demonstrate a knowledge of the

concepts behind the cases. In addition, emphasis is placed on classroom participation and critical discussion of the readings.

### 3 Course Format

This course is largely centered on decisions of the U.S. Supreme Court. We will read summaries of issue areas, along with a handful of landmark cases from each issue area. Class will consist of a combination of lecture and discussion of the readings and the legal reasoning of the Court. Toward the end of the semester we will also conduct a “mock” Supreme Court. In order for this format to work, it is imperative that you read the material in advance.

### 4 Requirements

#### Text

There is one required book, which the majority of our readings will come from. Other readings are posted on Moodle and are noted on the course schedule.

The book is available at the campus bookstore, although it is available at a *substantially* lower rate online. To this end, I provide the ISBN for the book below and have placed all of the first week’s readings on Moodle to allow for shipping time. After the first week I expect you to have the book and bring it with you to class. Unfortunately, I will not be able to place the book on course reserve at the library.

1. Epstein, Lee and Thomas Walker. 2013. *Constitutional Law for a Changing America: Institutional Powers and Constraints*. 8<sup>th</sup> edition. Congressional Quarterly Press: Washington.  
**ISBN-10:** 1452226768  
**ISBN-13:** 978-1452226767

#### Assessment<sup>1</sup>

This course is worth 100 points which are broken up over several different items

- Exams: 40 points
- Mock Supreme Court: 20 points
- Case Briefs: 20 points
- Participation & Attendance: 10 points
- Quizzes: 10 points

1. **Participation and Attendance (10 points)**– As a 4000 level class, participation is vital for you to grasp the material. You are expected to come to class, actively participate in the

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<sup>1</sup>This assessment scale only applies to undergraduates. Graduate students, please see the POLS 5442 Supplement for additional information.

discussion, comment on the readings, and engage the comments other students make. However, coming to class is only half the battle. You also have to participate in class. Of course, asking informed questions or joining the classroom discussion is a part of participation, but so too is actively listening (ie: Are you taking notes and paying attention or are you sleeping and texting?).

2. **Case Briefs (20 points)**— This course does not have a research paper; instead you will brief, which is to say write a legal summary, of select cases throughout the semester. Additionally, briefing will help you better understand the cases, and make studying for the exams easier. Early in the semester I will go over the proper format for briefs as well as provide examples. All briefs must be typed and turned in as a hard copy *and* be uploaded to Turnitin.com. **I do not accept briefs via e-mail.** All briefs must be stapled, with your name on each page. **Late briefs will not be accepted.** On most weeks, there is a brief specified for completion on Thursday. I will not collect every brief, but I will randomly choose six briefs over the course of the semester which I will grade. Each brief is worth 4% of your final grade, meaning you can safely skip one brief- or do all six briefs for extra credit. Please see the separate “Brief How-to” guide for more information.
  
3. **Quizzes (10 points)**— Periodically throughout the semester I will administer unannounced quizzes. These quizzes will be given at the start of class and will consist of multiple choice, true or false, fill in the blank, and/or short answer items. They can cover anything previously discussed in class or anything from that day’s readings. If you do the readings and pay attention in class, it should be easy to obtain full credit on all the quizzes. Quizzes will be passed out at the start of class and no quizzes will be passed out after that time, so it is important to arrive to class on time. I will administer seven quizzes and take your top five quizzes over the course of the semester to compile your total quiz score (with each worth 2% of your final grade). Quizzes cannot be made up, therefore it is imperative you attend class regularly, read for class, and are on time for class.
  
4. **Exams (40 points)**—There are two exams, none of which are cumulative, though some concepts will stay with us the entire semester. The two exams will only cover material from the last exam until the current exam. Each exam is worth 20 points, which is to say two letter grades. All exams will be blue book based and can consist of short identification terms, hypothetical cases which you will be asked to decide based on the case law we have discussed in class, or essays. **You must bring a bluebook to the exam.** I suggest you go to the bookstore and buy a few bluebooks at the start of the semester so you are not in any danger of not having one on exam day (They cost about 50 cents each). You should note that if you are unable to take the exam at the scheduled time, the make-up exam will be a separate research paper.
  
5. **Mock Supreme Court (20 points)**—Toward the end of the semester, we will conduct a moot court. Each person will be assigned a different role, ranging from attorney to member of the Court. What precisely you do will vary. For instance, if you are one of the attorneys, you and your team must prepare a brief for the Court and present oral arguments. If you are a justice, you must ask questions of the attorneys during oral arguments and help your

fellow justices write the opinion or dissent. If you are a reporter, you must report on the legal proceedings in a way accessible to the lay person, while still retaining all of the legal nuance. Please see the separate “Mock Supreme Court” handout.

### Assessment Scale

A: 93-100	A-: 90-92	B+: 87-89	B: 83-86	B-: 80-82	C+: 77-79
C: 73-76	C-: 70-72	D+: 67-69	D: 63-66	D-: 60-62	F: <60

## 5 Course Policies

### Contacting the Instructor

I am happy to help you via e-mail, telephone, and in person. I have several office hours posted, if my office hours do not fit your schedule let me know and we can schedule a meeting at a time that is more convenient. If you come to office hours you should come prepared; bring your book and notes and read the material in advance. You can call me on my office phone if you like, but e-mail may be faster if I am away from my desk. If you contact me via e-mail, I will respond within 48 hours, though in most cases it will be less than six hours. However, in any e-mail you must identify yourself and use proper format which consists of an opening (As simple as the recipient’s name), a closing (as simple as your name), and a descriptive message subject. If you do not follow that convention or if you use Internet shorthand (ie: “u” instead of “you,”) I will not reply to the message.

### Make-up Exams and Assignments

To qualify for a make-up test a student must notify me of the absence in advance via e-mail and provide documentation. Make-up exams will be a written research paper.

Papers are due in hard copy at the beginning of the class on the date indicated in the schedule. I will not accept e-mail copies or papers placed under my door. Please do not be afraid to print multiple rough drafts and revise them before turning them in. I am happy to look at drafts and help you with crafting your final paper. I do not accept excuses about dogs, computers, or traffic. Be responsible.

### Technology in the Classroom

I understand that laptops and tablets have become the primary means of note taking for many of you. To this end, you are welcome to bring those devices to class. *However*, I ask that you only use them for class purposes. So, you can take notes and pull up cases. Please do not browse the Internet or update Facebook in class. The screens are distracting to those around you and takes away from learning. I ask that those who wish to use digital devices sit further toward the back of the room, so that those who are not using digital devices are not distracted by the screens. No cell phones are permitted to be out in class without first notifying me of a valid reason (i.e.: You’re waiting on a phone call/ your kids are home alone).

Particularly with new technology, some students opt to record lectures to compliment their notes. If you wish to do so, please let me know before you record me. You are more than welcome to record, I just want to know when/if I am being recorded.

### **Extra Credit**

The only extra credit I offer is the “extra” brief. It is a good idea to get in the habit of briefing every case (even those you don’t have to turn in). If you do so, you can potentially get a 4% bump in your final grade.

### **Academic Honor Code**

Academic integrity is the expected norm for all academic activity at ISU, and all members of the ISU community are expected to act in accordance with this principle. Academic integrity is the pursuit of scholarly activity in an open, honest, and responsible manner. Consistent with this expectation is an ISU code of conduct that all students should act with personal integrity, respect other students dignity, rights and property, and help create and maintain an environment in which all can succeed through the fruits of their efforts. Academic integrity includes a commitment not to engage in or tolerate acts of deception, falsification, or misrepresentation. Such acts of dishonesty violate the fundamental ethical principles of the University community and compromise the worth of the work completed by others.

Plagiarism is an act of academic dishonesty and shall be dealt with according to ISU policy. Plagiarism is any misrepresentation of another's work as your own. For example, copying portions of articles, papers, web pages, etc, or using portions of another person's work (either word for word or paraphrasing) without proper citations. If you have questions about plagiarism, please come talk to me, or refer to Plagiarism Statement written by the ISU Department of English and Philosophy: (<http://www.isu.edu/english/DeptDocs/PlagiarismStatement.pdf>).

I adhere to the University policy regarding academic misconduct and expect academic integrity. Academic misconduct will result in an “F” for the assignment, a possible “F” for the course, and the filing of charges with the University against the student involved. Academic misconduct includes, but is not limited to, taking credit for work done by others, cheating, and helping others to cheat. I encourage students to study together and exchange ideas and information, but you must do your own work when taking exams and completing writing assignments. If you are unclear on this topic, please let me know. I am happy to discuss it further.

### **Students with Disabilities**

ISU is committed to providing equal opportunity in education for all students. If you have a diagnosed disability or if you believe you have a disability (physical, learning, hearing, vision, psychiatric etc.) that might require reasonable accommodation in this course, please contact the Disability Services Center, Rendezvous Building, Room 125 (282-3599) or on the web at <http://www.isu.edu/ada4isu>. It is the responsibility of students to contact instructors during the first week of each semester to discuss appropriate accommodations. Of course any communication with me about disabilities remains strictly confidential.

## Classroom Courtesy

Classroom courtesy is an essential component of creating an effective learning environment. All students have the right to learn without unnecessary distractions. These distractions include: cell phones, talking during lectures (unless recognized by the instructor), reading newspapers, falling asleep, etc. If you need a cell phone for emergency purposes, leave it on vibrate. Entering and leaving are also significant sources of distraction. It is your responsibility to be on time and to stay for the entire period. In circumstances where you need to leave early, tell the instructor beforehand. Repeated disruptions of class will lead to a reduction in your final grade.

Most importantly, class discussions of law will include several sensitive topics which can lead to strong feelings and heated debate. Because this is a college classroom, all discussion must be respectful and scholarly. This is to say you must be respectful, in both content and tone, of diverse opinions and not make personal or partisan attacks.

## Acceptable Comments

- are respectful of diverse opinions and open to follow up questions and/or disagreement
- are related to class and/or the course material
- focus on advancing the discussion about issues related to the course and/or course material rather than personal beliefs, and
- are delivered in normal tones and a non-aggressive manner.

## Unacceptable Comments

- are personal in nature. This includes attacks on a person's appearance, demeanor, or political beliefs.
- include interrupting the instructor or other students. Raise your hand and wait to be recognized.
- often use the discussion to argue for political positions and/or beliefs. If political discussions arise, they must be discussed in a scholarly way (see above).
- may include using raised tones, yelling, engaging in arguments with other students and being threatening in any manner.
- include ignoring the instructor's authority to maintain the integrity of the classroom environment.

## Syllabus Change Policy

This syllabus is a guide for the course and is subject to change with advanced notice. These changes may come via e-mail. Make sure to check your university supplied email regularly. You are accountable for all such communications.

## 6 Tentative Course Schedule

A few notes about reading the course schedule:

- “*Epstein*” refers to the required Epstein & Walker book
- “(M)” means that reading can be found on Moodle

### Course Introduction

Tuesday, August 25– Introduction to the Course & Supreme Court Basics

- *No readings*

### Supreme Court Basics

Thursday, August 27– The Supreme Court’s Procedures and Institutions

- Epstein 3-46

Tuesday, September 1– Schools of Interpretation

- Tushnet: “The Politics of Constitutional Law” (M)
- Murphy et al. “Textualism” (M)
- Carter and Burke: “Literalism: Sticking to the Words” (M)
- Scalia: “Originalism: The Lesser Evil” (M)
- T. Marshall: “The Constitution: A Living Document” (M)

### The Power to Decide: Judicial Review

Thursday September 3– Judicial Review

- Epstein: 57-82. **Cases:** *Marbury v. Madison* (1803), *Martin v. Hunter’s Lessee* (1816)
- *How to brief a case*

Tuesday September 8– Judicial Review’s Limits

- Epstein: 82-98. **Cases:** *Eakin v. Raub* (1825), *Ex Parte McCordle* (1869)
- Epstein: 98-111, 116-119 *Baker v. Carr* (1962), *Nixon v. United States* (1993)

### Congress

Thursday September 10– Membership of Congress & Enumerated and Implied Powers

- Epstein 120-140 **Cases:** *U.S. Term Limits v. Thornton* (1995)
- Epstein 144-170 **Cases:** *McCulloch v. Maryland* (1819) *Barenblatt v. United States* (1959)

## The Executive Branch

Tuesday September 15– Inherent Powers and Amendments & Presidential Background

- Epstein 171-182 **Cases:** *United States v. Curtiss-Wright* (1936), *South Carolina v. Katzenbach* (1966)
- Epstein 183-186, 193-205 **Cases:** *In re Neagle*

Thursday September 17– The President's Domestic Powers

- Epstein 205-217, 224-227 **Cases:** *Clinton v. City of New York* (1998), *Morrison v. Olson* (1988), *Humphrey's Executor v. United States* (1935)

Tuesday September 22– Inherent Powers and Amendments

- Epstein 227-246 **Cases:** *United States v. Nixon* (1974), *Mississippi v. Johnson* (1867), *Nixon v. Fitzgerald* (1982), *Clinton v. Jones* (1997)

Thursday September 24– The Delegation of Legislative Powers & Executive Power in Wartime

- Epstein 257-289 **Cases:** *Mistretta v. United States* (1989), *IMS v. Chadha* (1983), *The Prize Cases* (1863), *Ex Parte Milligan* (1866)

Wednesday October 8– Executive Power and the Evolving Definition of War

- Epstein 290-322 **Cases:** *Korematsu v. United States* (1944), *Ex Parte Quirin* (1942), *Youngstown Sheet and Tube Co. v. Sawyer* (1952), *Dames & Moore v. Regan* (1981), *Hamdi v. Rumsfeld* (2004)

## Nation-State Relations

Tuesday September 29– Federalism

- Epstein 325-57 **Cases:** *McCulloch v. Maryland* (1819), *Scott v. Sandford* (1857)

Thursday October 1– New Judicial Federalism

- Epstein 357-376 **Cases:** *Printz v. United States* (1997), *Alden v. Maine* (1999), *Michigan v. Long* (1983)

Tuesday October 6– National Preemption of State Laws

- Epstein: 376-391 **Cases:** *Missouri v. Holland* (1920), *Crosby v. National Foreign Trade Council* (2000), *Arizona v. U. S.* (2012)

Thursday October 8– The Role of the Judiciary in the Federal System

- *Guest Lecture: Judge N. Randy Smith, United States Court of Appeals for the Ninth Circuit*

Tuesday October 13– **MIDTERM EXAM**

- *Be sure to bring a blue book to class.*



## The Commerce Power

Thursday October 15– Commerce Clause General Background

- Epstein 392-405, 407-415 **Cases:** *Gibbons v. Ogden* (1824), *U.S. v. E.C. Knight Co.* (1895), *Champion v. Ames* (1903), *Hammer v. Dagenhart* (1918).

Tuesday October 17– The Expanding Commerce Power

- Epstein 415-419, 424-448 **Cases:** , *NLRB v. Jones & Laughlin Steel Corp.* (1937), *United States v. Darby*, *Wickard v. Filburn* (1942), *Heart of Atlanta Motel v. U.S.* (1964)

Thursday October 22– The Commerce Clause in the Late 20<sup>th</sup> Century

- Epstein 448-466 **Cases:** *Garcia v. San Antonio Metropolitan Transit Authority* (1985), *U.S. v. Lopez* (1995), *U.S. v. Morrison* (2000)

Tuesday October 27– Marijuana, Health Care, and the Commerce Clause

- Epstein 467-482 **Cases:** *Gonzales v. Raich* (2005), *National Federation of Independent Businesses v. Sebelius* (2012), *King v. Burwell* (2015) (M).

Thursday October 29– State Commerce Power

- Epstein 482-492, 495-502 **Cases:** *Cooley v. Board of Wardens* (1852), *Southern Pacific Co. v. Arizona* (1945), *Maine v. Taylor* (1986), *Granholm v. Heald* (2005)

## The Power to Tax and Spend

Tuesday November 3– Income and Export Taxes & Tax Immunity

- Epstein 503-522 **Cases:** *Pollock v. Farmers' Loan and Trust* (1895), *U.S. v. United States Shoe Corp.* (1998), *South Carolina v. Baker* (1988), *Davis v. Michigan Dept. of Treasury* (1989)

Thursday November 5– Inherent Powers and Amendments– Tax Immunity and the Power to Regulate & the General Welfare

- Epstein 522-542 **Cases:** *McCray v. U.S.* (1904), *Bailey v. Drexel Furniture Co.* (1922), *U.S. v. Butler* (1936), *Steward Machine Co. v. Davis* (1937), *South Dakota v. Dole* (1987)

Tuesday November 10– The State Revenue Power

- Epstein 551-564 **Cases:** *Michelin Tire Corp. v. Wages* (1976), *Complete Auto Transit v. Brady* (1977), *Quill v. North Dakota* (1992), *Oregon Waste Systems v. Oregon* (1994)

## Economic Liberties

Thursday November 12– The Contract Clause

- Epstein 569-585 **Cases:** *Fletcher v. Peck* (1810), *Trustees of Dartmouth College v. Woodward* (1819), *Charles River Bridge v. Warren Bridge* (1837)

Tuesday November 17– The Contract Clause in the 20<sup>th</sup> Century

- Epstein 593-605 **Cases:** *Home Building and Loan Assn. v. Blaisdell* (1934), *United States Trust Co. v. New Jersey* (1977), *Allied Structural Steel Co. v. Spannaus* (1978)

Thursday November 19– **MOCK SUPREME COURT ORAL ARGUMENTS**

Tuesday November 24– **FALL BREAK: NO CLASS**

Thursday November 26– **FALL BREAK: NO CLASS**

Tuesday December 1– Economic Substantive Due Process

- Epstein 606-648, **Cases:** *Munn v. Illinois* (1877), *Alleyer v. Louisiana* (1897), *Lochner v. New York* (1905), *Muller v. Oregon* (1908), *West Coast Hotel v. Parrish* (1937)

Thursday December 3– Takings

- Epstein 663-681 **Cases:** *U.S. v. Causby* (1946), *Penn Central Transportation Co. v. City of New York* (1978), *Lucas v. South Carolina Coastal Council* (1992)

Tuesday December 8– **MOCK SUPREME COURT OPINION ANNOUNCEMENTS**

Thursday December 10– Graduate Student Research Presentations

**Final Exam: Tuesday December 15, 10:00am to 12:00pm in our normal classroom**